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2018 CITY OF NEW ORLEANS DISPARITY STUDY

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CITY OF NEW ORLEANS DISPARITY STUDY SUMMARY REPORT

(draft, not for public distribution, 1/10/2018)

The 2018 City of New Orleans Disparity Study examines whether there is a level playing field for minority- and women-owned businesses in City contracts, and how the City can increase opportunities for small businesses, including minority- and women-owned companies. Keen Independent Research LLC (Keen Independent) completed the study for the City. This Summary Report and twelve appendices provide results. The ten key conclusions from the study are:

1. There was a strong need to conduct the 2018 City of New Orleans Disparity Study.

2. Because there is substantial availability of minority- and women-owned businesses in the New Orleans metropolitan area, one would expect high utilization of minority- and women-owned businesses (MBE/WBEs) in the marketplace and in City procurement.

   - 44 percent of local businesses available for City work are MBE/WBEs.
   - MBE/WBEs might be expected to receive 41 percent of City contract dollars if there were a level playing field for minority- and women-owned firms.

3. Analysis of the New Orleans marketplace suggests that there is not a level playing field for minority- and women-owned businesses.

   - There is evidence of disparities for people of color and women in entry and advancement, business ownership, access to capital and business success.
   - There are substantial disparities in the utilization of MBE/WBEs.
   - There is qualitative evidence of discrimination against minority and female business owners.
   - Without City action, there would be disparities in MBE/WBE utilization in City contracts.

4. To avoid being a passive participant in marketplace discrimination, there is a need for City efforts to assist minority- and women-owned companies in its procurement.

   However, race-conscious programs are subject to legal challenge based on the equal protection clause in U.S. and state constitutions. Gender-conscious programs can be challenged as well.

5. The City currently operates a program that determines eligibility based on factors other than race or gender.

   - To achieve its overall goals for MBE/WBE participation, the City operates the Small and Local Disadvantaged Business Enterprise (SLDBE) Program.
   - To be certified as an SLDBE, a firm must show that it is socially and economically disadvantaged. Determination of social disadvantage is not based solely on race, ethnicity or gender.
   - The City's current operation of the SLDBE Program is relatively new.

6. In recent years, overall MBE/WBE utilization on City contracts roughly matched what would be expected based on the availability analysis. There was no overall disparity between MBE/WBE utilization and availability.

7. There were disparities in utilization in City contracts for some MBE/WBE groups for some types of work.

8. On types of City contracts where the program was not applied, there were substantial disparities between utilization and availability of for each minority group and for white women-owned firms.

9. The City might consider adding stronger measures to its SLDBE Program, including programs focused on vendors, prime contractors and consultants.
    - The City should change the name of the program to the Socially Disadvantaged Business Enterprise Program (SDBE), or similar name.
    - As much as possible, there should be centralized, unified certification of firms eligible for other local programs using these same criteria.
    - The City should consider additional measures that specifically assist vendors, consultants, prime contractors and others directly bidding on City procurements.
    - The City should further expand its outreach to groups that showed disparities, especially Asian American- and Hispanic American-owned companies.

10. To maintain defensibility of the SLDBE Program, the City will need to closely monitor its operation and results in the future, and make additional changes if needed.

These conclusions are further discussed below and in the twelve supporting appendices of the report.

1. There was a strong need to conduct the 2018 City of New Orleans Disparity Study.

For a number of years, community members have urged the City of New Orleans to commission an independent review of minority- and women-owned business participation in City contracts and in the broader New Orleans marketplace. The City funded such a study and requested competitive proposals to conduct that work. Keen Independent performed the disparity study with local subconsultants The Villavaso Group, Spears Group, Dr. Silas Lee and Lucas Diaz, and national subconsultants Holland & Knight and Abaci Research & Consulting.

Keen Independent went beyond City reports to compile raw data about MBE/WBE utilization and availability in City contracts. The study team also interviewed a cross-section of business owners, trade associations and other community members. Study results provide a tool for the City to:

- Further improve existing efforts that have a positive effect on utilization of minority- and women-owned firms in City procurement;
- Introduce new measures where there are gaps in City assistance or where existing programs are insufficient; and
- Retain a sound legal foundation for its programs.

Leveling the playing field for minority- and women-owned companies in the New Orleans marketplace is also a concern for other local public, private and not-for-profit organizations. Some initiatives will require coordination and support from these organizations as well.

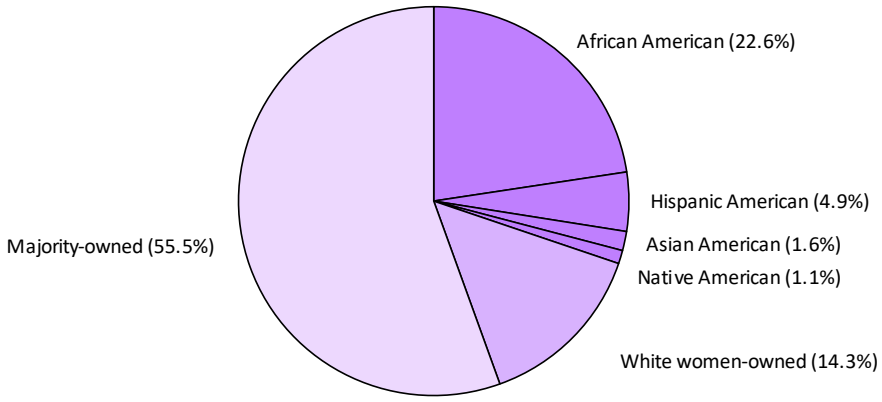
2. Because there is substantial availability of minority- and women-owned businesses in the New Orleans metropolitan area, one would expect high utilization of MBE/WBEs in the marketplace and in City procurement.

2-a. About 44 percent of local businesses available for City work are MBE/WBEs. Of the companies in the New Orleans metropolitan area available for City contracts, 44 percent are minority- or women-owned businesses. This indicates a very large MBE/WBE business community, which is consistent with other research.[1] The share of firms that are MBE/WBEs is similar to the Atlanta metropolitan area.[2]

Availability results come from Keen Independent's 2017 survey of firms in the New Orleans metropolitan area. The survey contacted firms that (a) had previously expressed interest in City procurement, or (b) were identified by Dun & Bradstreet as performing types of work that were relevant to City contracts.[3] (See Appendix A for definitions of terms used in this report.) Figure 1 shows that 30 percent of those companies are minority-owned and that 14 percent are white women-owned. Appendix D explains these results.

Figure 1.
Number of businesses in the New Orleans metropolitan area available for City procurement

Source:
Keen Independent 2017 availability survey.



[1] The federally-defined New Orleans-Metairie Metropolitan Statistical Area includes Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany parishes. U.S. Census data for the metropolitan area indicate that 30 percent of business owners in study industries were people of color and 16 were non-minority women.

[2] About 43 percent MBE/WBE based on Keen Independent's 2015 disparity study for the City of Atlanta (Keen Independent Research, 2015 City of Atlanta Disparity Study, October 2015). Availability results include certified and non-certified firms.

[3] The study team attempted to reach each firm on the combined list. Because there was no sampling of firms when preparing the list of firms to be contacted in the availability survey, this approach is sometimes called a "custom census." The study team contacted companies via email and through telephone calls. Companies could also complete the survey through a link on the disparity study website (which allowed any firm to be surveyed). Through these methods, the study team successfully contacted more than 5,000 establishments in the metropolitan area. After screening firms for qualifications and interest in City procurement and other factors, there were 1,378 firms included in the availability analysis.

2-b. MBE/WBEs might be expected to receive 41 percent of City contract dollars if there were a level playing field for minority- and women-owned firms. The high benchmark for MBE/WBE utilization in City contract dollars is further evidence of the size of the local MBE/WBE business community in fields pertaining to City procurement.

The study team calculated this availability benchmark based on the relative availability of MBEs and WBEs for specific City contracts and subcontracts.[4] If MBE/WBEs that were available for a contract or subcontract had the same chance of successfully receiving it as majority-owned firms available for that contract or subcontract, MBE/WBEs would have received about 41 percent of City contract dollars over those three years.

Figure 2 provides an example of an availability calculation for a representative City procurement. Appendix D explains these calculations in more detail.

Figure 3 shows the percentage of City contract dollars that might be expected to go to each MBE group and to WBEs for 2014 through 2016 based on this analysis. The results of the availability analysis in Figure 3 differ from Figure 1 because of differences in relative MBE/WBE availability for specific types of work and sizes of contracts.

Figure 2.
Example of an availability calculation

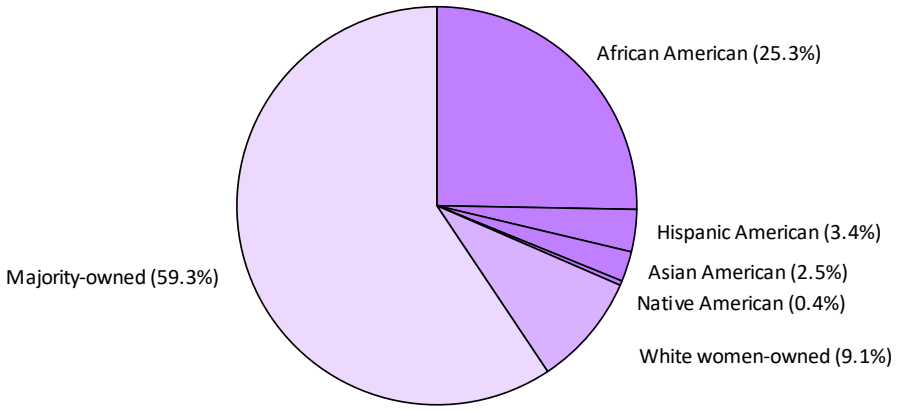
One of the City contracts examined was for landscape maintenance ($85,423). To determine the number of MBE/WBEs and majority-owned firms available for that contract, the study team identified businesses in the availability database that:

a. Reported qualifications and interest in working on City contracts;
b. Indicated that they performed landscape maintenance; and
c. Reported bidding on work of similar or greater size in the past five years.

There were 30 businesses in the availability database that met those criteria. Of those businesses, 16 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 53 percent (i.e., 16/30 = 53%).

Figure 3.
Percentage of City contract dollars that might be expected to go to MBE/WBEs based on availability analysis, 2014-2016

Source:
Keen Independent availability analysis using City contracts and subcontracts for 2014-2016 and 2017 availability survey data.



[4] 1,260 City procurements, including subcontracts, from 2014 through 2016 that were included in the disparity study, as described in Appendix C.

3. Analysis of the New Orleans marketplace suggests that there is not a level playing field for minority- and women-owned businesses.

More than 92 percent of City of New Orleans procurement dollars examined in the study were made with firms with locations in the New Orleans metropolitan area marketplace (see Appendix D). Therefore, understanding marketplace conditions for minority- and women-owned firms provides important context for the disparity study.

3-a. There is evidence of disparities for people of color and women in entry and advancement, business ownership, access to capital and business success in the New Orleans marketplace.

There is evidence that there would be more minority- and women-owned firms in the New Orleans construction, professional services, goods and other services industries but for the effects of past discrimination in employment and advancement in these industries and other factors affecting business formation. Data also indicate that, once companies are formed, there is not a level playing field for minority- and women-owned businesses in the New Orleans metropolitan area.

Entry and advancement as employees into the construction, professional services, goods and other services industries. Based on U.S. Census Bureau data, people of color are 44 percent of the New Orleans metropolitan area workforce. Nearly one-half (48%) of workers in the metropolitan area are women. However, minorities and women do not appear to have the same opportunities to enter certain industries as non-minorities and men. Examining the New Orleans construction industry as one example, evidence included the following.

- Relatively few African Americans working in the industry (only 21% of employees were African Americans based on 2011-2015 U.S. Census data, compared with 31% of metro area workers overall).
- Large differences in employment opportunities for people of color between construction trades (for example, minorities were two-thirds of laborers but only one-third of workers in trades such as plumbing).
- Almost complete exclusion of women from certain trades (for example, there were no female electricians, plumbers, masons or roofers among the 291 workers in the Census Bureau sample data for the New Orleans metropolitan area for 2011–2015).
- Differences in opportunities for advancement of people of color and women in industries such as construction (for example, African Americans working in construction reached a manager level at one-half the rate of non-minorities, and Latinos reached a manager level at about one-quarter the rate of non-minorities).

Appendix E of this report provides detailed information about entry and advancement for workers in the New Orleans marketplace. Appendix I describes the data sources used.

Disparities in business ownership. There were disparities in the rates of business ownership for people of color and women working in the New Orleans construction, professional services, goods and other services industries. Further statistical modeling of business ownership rates showed that the following groups did not own businesses at the same rate as non-minorities and men with similar education, age and other characteristics:

- African Americans in the construction, goods and other services industries;
- Asian Americans in the professional services industry;
- Hispanic Americans in the construction industry; and
- Women in the construction and professional services industry.

Appendix F of this report presents Keen Independent's analysis of business ownership data.

Disparities in access to capital. Keen Independent researched whether minorities and women have equal access to sources of capital to start and expand businesses (see Appendix G for more detail).

Wealth created through homeownership can be an important source of funds to start or expand a business. Keen Independent identified unequal access to home equity and home mortgages for people of color in the New Orleans metropolitan area. Key results include:

- Home equity is an important source of funds for business start-up and growth. Fewer African Americans and Hispanic Americans own homes compared with non-Hispanic whites. People of color who do own homes tend to have lower home values.

- High-income African Americans applying for conventional home mortgages in the New Orleans metropolitan area were more likely than high-income non-Hispanic whites to have their applications denied. And, among all African Americans receiving home loans, the share that was subprime loans was much higher than for other groups.

Any race- or gender-based barriers in the application or approval processes of business loans could also affect the formation and success of minority- and women-owned firms. The Federal Reserve Board's Survey of Small Business Finances (SSBF) provides the most comprehensive national source of information on this issue. Data from 2003 are the most recent available from the SSBF.[5] The study team examined data for the West South Central Region (where New Orleans is located).

- Seventeen percent of business loans for minority- and women-owned firms were denied compared with 2 percent for non-minority male-owned companies;

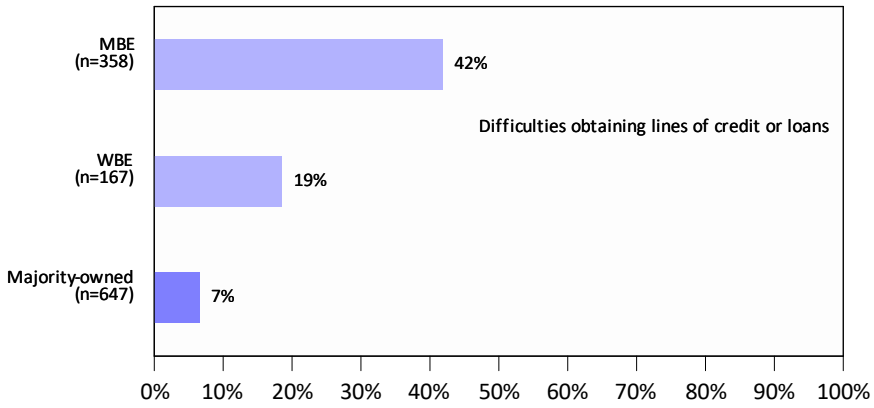
- Among firms that needed loans, MBE/WBEs were twice as likely as majority-owned firms to not apply for those loans due to fear of loan denial; and

- The loans that were approved for MBE/WBEs were one-quarter the size of loans for white male-owned businesses.

[5] More recent national data are consistent with 2003 SSBF results, as discussed in Appendix G.

As part of the availability surveys conducted in summer 2017, Keen Independent asked questions related to potential barriers in the local marketplace. The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?" As shown in Figure 4, minority-owned businesses were six times more likely than majority-owned companies to indicate they had experienced such barriers. (Note that "majority-owned firms are those that are not minority- or women-owned.)

Figure 4.
Percent responding "Yes" to, "Has your company experienced any difficulties in obtaining lines of credit or loans?" for MBEs, WBEs and majority-owned firms qualified and interested in public sector work



Source:
2017 availability surveys.

Keen Independent also asked companies that had obtained or tried to obtain a bond for a project if they had difficulties obtaining that bond. MBEs (42%) and WBEs (21%) were much more likely than majority-owned firms (7%) to indicate they had experienced such difficulties.

Business failure rates. Keen Independent analyzed many different measures of the success of minority- and women-owned firms in the New Orleans metropolitan area marketplace. These data showed additional disparities for minority- and women-owned firms. For example, the business failure rate for MBEs was higher than non-minority-owned companies in Louisiana.

3-b. There are substantial disparities in the utilization of MBE/WBEs in the New Orleans marketplace.

Keen Independent analyzed different data sources indicating whether or not there were disparities for MBE/WBEs in the construction, professional services, goods and other services industries in the New Orleans marketplace.

2011-2015 U.S. Bureau of the Census data for the New Orleans metropolitan area. Results based on U.S. Census data show disparities in earnings for:

- Minority-owned construction, professional services, goods and other services firms; and
- Women-owned professional services, goods and other services businesses. (Appendix H of the report examines these results in detail.)

2017 availability survey data for the New Orleans metropolitan area. Firm revenue data collected as part of the 2017 availability survey show disparities for:

- Minority-owned construction, professional services, goods and other services firms; and
- White women-owned professional services and goods businesses (see Appendix H).

2012-2016 utilization of MBEs and WBEs as general contractors on public and commercial construction projects in the New Orleans metropolitan area. Keen Independent analyzed Dodge Reports data for 2012-2016 (not including City contracts) to develop estimates of MBE/WBE participation as general contractors. Appendix C describes these data and Appendix L provides disparity results.

- MBE general contractors received only 2.6 percent of the contract dollars for public and commercial projects in the New Orleans metropolitan area, less than 14.5 percent that might be expected from the availability of minority-owned general contractors for this work. (Only 1 percent of these contract dollars went to African American-owned companies.)

- Utilization of WBEs as general contractors was 4.3 percent for these projects, less than the 5.5 percent that might be expected based on the relative availability of white women-owned firms for these contracts.

2012-2016 utilization of MBEs and WBEs as design firms on public and commercial construction projects in the New Orleans metropolitan area. Dodge Reports data also provided information on the architecture and engineering (A&E) firms used for public and commercial construction projects in the metropolitan area (but not the dollar value of those contracts). Based on these data:

- 6 percent of the design contracts for those projects went to MBEs, much less than the 20 percent that might be anticipated from the availability of MBEs for that A&E work.

- 4 percent of the design contracts went to WBEs, also a substantial disparity given the 13 percent availability of white women-owned firms for these contracts.

2012-2016 utilization of MBEs and WBEs as construction contractors on public and commercial construction projects requiring building permits within New Orleans city limits. Keen Independent also compiled names of contractors listed in the building permits for public and commercial construction projects within New Orleans city limits. (See Appendices C and L.)

- MBEs were listed as the contractor for 20 percent of those permits, less than the 33 percent that might be anticipated from the availability of MBEs for that work.

- WBEs were listed for 4 percent of those permits, also a substantial disparity given the 13 percent availability of white women-owned firms for those projects.

3-c. There is qualitative evidence of discrimination against minority and female business owners within the New Orleans marketplace.

In-depth interviews, input from telephone surveys, comments from public forums and other qualitative information indicated evidence of discrimination affecting minority and female business owners in the New Orleans marketplace. Comments were received from African American, Latino, Asian American, Native American, female and white male business owners and managers, trade association representatives and other individuals. Almost 500 people provided input. Appendix J reviews this information, which is summarized below.

Discrimination affecting the number of MBE/WBE companies in business. Some of the qualitative evidence indicates that there are fewer minority- and women-owned firms in business today than there would be in a discrimination-free environment.

- Interviewees reported exclusion of minorities in certain white male-dominated industries, and the perception that "skin color" gave non-minorities an advantage in these industries. Some interviewees said that minority and women business owners are not invited to "sit at the table."
- A number of women brought up the challenge of "not being taken seriously" in "male-dominated fields." "Being a female in a man's world is a challenge."

Difficulties obtaining financing and bonding. Access to capital was discussed by many interviewees.

- A large number of minority- and women-owned businesses interviewed reported access to financing as a "primary barrier" to starting and operating their businesses. Some said that financing was nonexistent for African Americans and other minority business owners. Being "a black business" became a "stigma," according to one interviewee. Other business owners of color had negative experiences as well. For example, an Asian American female business owner reported not having access to the capital needed to operate her firm.
- Many business owners reported self-financing their businesses with personal credit cards and other savings. One interviewee said that even "with contracts in hand," minority businesses cannot secure line of credits or other financing.
- Many construction business owners interviewed reported difficulty securing bonding to compete in the New Orleans marketplace. For example, a focus group participant said that bonding was the deciding factor that limited minority-owned firms to subcontractor roles and prevented them from expanding into the prime contractor arena. A Native American business owner said that acquiring bonding was a key challenge for his firm.

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

Difficulties establishing business relationships. Existing relationships are important to receiving work opportunities according to many interviewees.

Interviewees frequently reported the following:

- Many minority and female business owners had comments such as "I'm not even sitting at the table."
- "Favorites" in public sector contracts are difficult to dislodge.
- Many minority, female and white male interviewees reported the presence of a "good ol' boy" network in New Orleans that negatively affects opportunities for minority- and women-owned firms. A Hispanic American business owner commented, "It is all about who you know." When asked about any closed networks, a white female business owner said, "Absolutely … they keep the money and the power in the same pocket." One interviewee said, "There's definitely a club there, they know each other ... deals are cut on the golf course." Another comment was, "In Louisiana, blackballing is real. They're calling the good ol' boys to say, 'Is he in or is he out?'"

Stereotyping and other negative treatment. There was some evidence that some prime contractors or customers held negative stereotypes concerning minority- and women-owned firms, and sometimes treated minority- and women-owned companies differently from other firms.

- Some interviewees reported that the stereotype is that MBE/WBEs and other small businesses "will not deliver." Some interviewees said that they constantly had to "jump through hoops" because they were minority or female business owners.
- One business owner reported that primes had strategies to keep women and minority business owners "in their place." Some interviews from certified MBE/WBE businesses reported experiences with "retaliation," "bullying" and "blackballing" by primes.
- Another business owner reported a past instance of a federal agency revoking a contract he had, directly saying to him that they did not want a [black person] have the contract.
- Other interviewees reported hearing racial slurs and gender-based insults used against minority and female business owners.

Barriers affecting local small businesses in general. Some of the interviewees commented on disadvantages related to the size of their companies. For example:

- Lack of knowledge of business operations at start-up;
- Difficulties marketing and identifying contract opportunities;
- "Cumbersome" paperwork that often comes with public sector work;
- Large size and scope of public sector contracts and subcontracts that present a barrier to bidding;
- Public agencies that favor bidders and proposers they already know;
- The "catch-22" for many small businesses of needing experience to get work, but not being able to "get a foot in the door" to obtain that experience; and
- Slow payment or non-payment by owners or by prime contractors, which can be especially damaging to small companies.

Also, interviewees reported that after Hurricane Katrina, there was much more competition from large companies coming into New Orleans for work, which persists today.

Because minority- and women-owned firms are disproportionately small, MBE/WBEs may be more likely to experience difficulties facing any small business.

3-d. Without City action, there would be disparities in MBE/WBE utilization in City contracts.

Based on the information in the disparity study, there is strong evidence that the playing field is not level for minority- and women-owned firms in the New Orleans marketplace. The results suggest that, without City initiatives such as the SLDBE Program, there would be disparities in MBE/WBE utilization in City contracts.

4. To avoid being a passive participant in marketplace discrimination, there is a need for City efforts to assist minority- and women-owned companies in its procurement.

However, race-conscious programs are subject to legal challenge based on the equal protection clause in U.S. and state constitutions. Gender-conscious programs can be challenged as well.

The City of New Orleans enters contracts with firms operating within the New Orleans metropolitan area marketplace. From the results of the marketplace analyses discussed above, it appears that there are disparities for minority- and women-owned firms absent actions to address those disadvantages.

Throughout the country, state and local governments have enacted minority- and women-owned business enterprise programs to ensure that they are not passive participants in private marketplace discrimination. Such programs can be subject to legal challenge.

In its *Croson* decision, the U.S. Supreme Court held the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment.[6] The U.S. Supreme 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.

Article I, Section 3 of the Louisiana Constitution provides that no law shall discriminate against a person because of race or sex.[7] The Louisiana Constitution, according to the courts, provides greater equal protection rights than that of the United States Constitution.[8] Therefore, any race- or gender-conscious programs enacted by state and local governments in Louisiana could also be challenged based on the Louisiana Constitution.

The law firm Holland & Knight LLP prepared a review of relevant legal standards and court cases (see Appendix B of this report).

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[6] 488 U.S. 469 (1989).

[7] La. Const., Art. I, Sec. 3.

[8] *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al*, 669 So. 2d 1185 (La. 1996).

5. The City currently operates a program that determines eligibility based on factors other than race or gender.

The City has had a program to assist small businesses, including MBE/WBEs, for many years. It made substantial changes to its program in 2014, and the following discussion relates to the City's new State and Local Disadvantaged Business Enterprise (SLDBE) Program.

5-a. To achieve its overall goals for MBE/WBE participation, the City operates the SLDBE Program. The City sets contract goals for SLDBE firms on certain contracts, and makes other efforts to encourage participation of small businesses, including MBE/WBEs.

5-b. To be certified as an SLDBE, a firm must show that it is socially and economically disadvantaged. Determination of social disadvantage is not based solely on race, ethnicity or gender.

The SLDBE Program is open to white male-owned companies and minority- and women-owned businesses that are socially and economically disadvantaged.

- Unlike certification as a disadvantaged business enterprise under the Federal DBE Program, a minority or female business owner is not presumed to be socially disadvantaged due to his or her race, ethnicity or gender when considered for SLDBE certification;
- The City does not approve or deny SDLBE certification based just on race or gender;
- Some of the minority- and women-owned firms that have sought certification with the City have been denied because they did not show social disadvantage; and
- In 2017, 56 of 926 companies that were SLDBE-certified were owned by white men.

Definitions of economic disadvantage under the SLDBE Program are restrictive and consider firm revenue and the inability of business owners to accumulate substantial wealth. The City's process for reviewing economic disadvantage is very similar the Federal DBE Program.

Currently, the City only offers provisional certification to companies certified as a DBE under the Louisiana Unified Certification Program (LA UCP).

5-c. The City's current operation of the SLDBE Program is relatively new. The Office of Supplier Diversity was established in 2012, but procedures were not written until 2014. The program was not fully implemented until 2014-2016. As a result, City data collection concerning participation of companies in its contracts and subcontracts was more complete in 2014 through 2016 than in the start of the study period for this disparity study (2012-2013).

In addition to setting goals and enforcing them since 2014, the City operates a number of its own neutral technical assistance programs and partners with others' programs. The City has also developed bonding and access to capital programs. It is unbundling contracts, attempting to reduce or waive bonding requirements and examining alternative surety methods.

In addition to the SLDBE Program, there are many programs that assist minority- and women-owned businesses and other small businesses in the New Orleans marketplace (see Appendix K).

6. In recent years, overall MBE/WBE utilization on City contracts roughly matched what would be expected based on the availability analysis.

There was no overall disparity between MBE/WBE utilization and availability.

MBE/WBEs received 47 percent of the City procurement dollars examined for 2014 through 2016. This level of participation exceeded the 41 percent availability benchmark for MBE/WBE participation, as shown in Figure 5.

Figure 5.
MBE/WBE utilization and availability for City procurements, 2014–2016

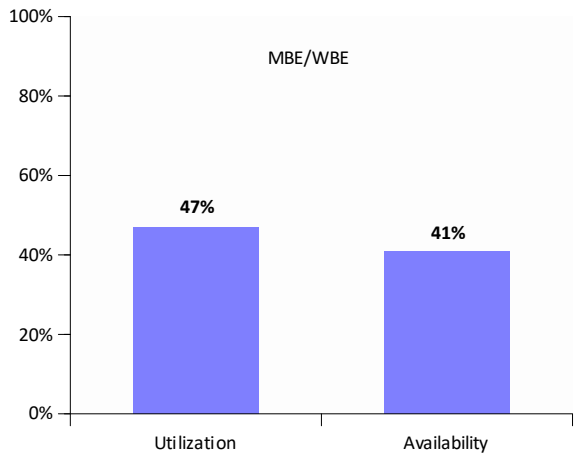
Note:

1,260 procurements examined.

Utilization based on City procurements above $10,000; does not include those below $10,000, which are typically made through purchase orders (but includes subcontracts regardless of size).

Source:

Keen Independent utilization and availability analyses for City procurements.



The 2014 through 2016 MBE/WBE utilization of 47 percent is considerably higher than what Keen Independent was able to measure from existing City data for 2012 through 2013 (29% MBE/WBE utilization). It is likely that the increase is due to both full implementation of the new program and more comprehensive data for City contracts and subcontracts.

The MBE/WBE utilization percentages presented in the disparity study include participation of non-certified minority- and women-owned firms, which is one reason that the utilization results are higher than indicated in City reports (which only counts participation of certified firms).

7. There were disparities in utilization in City contracts for some MBE/WBE groups for some types of work.

There were no disparities between the utilization and availability of African American-, Native American- and white women-owned firms for the City contracts examined for 2014 through 2016:

- Utilization of African American-owned firms on City contracts across industries (29%) exceeded what might be expected from the availability analysis (25%).
- Utilization of Native American-owned firms (0.5%) was in line with availability.
- Utilization of white women-owned firms across industries (14%) exceeded the availability benchmark for WBEs (9%).

There were disparities for Asian American- and Hispanic American-owned businesses, however:

- Utilization of Asian American-owned firms (1%) was less than what might be expected from availability analysis (2%).
- The participation of Hispanic American-owned firms in City contracts (2%) was less than availability (3%).

Figure 6 shows utilization, availability and disparity results for individual MBE groups as well as white women-owned firms. As discussed in Appendix L, Keen Independent calculated a "disparity index" to gauge the size of the disparity. An index below 80 indicates that the disparity is "substantial," according to guidance from the courts.

Figure 6.
Disparity analysis for City contracts, 2014-2016

	Utilization	Availability	Disparity index
African American-owned	29.00 %	25.29 %	115
Asian American-owned	1.00	2.45	41
Hispanic American-owned	2.30	3.43	67
Native American-owned	0.48	0.38	126
Unknown MBE	0.00		
Total MBE	32.78 %	31.55 %	104
WBE (white women-owned)	14.19	9.11	156
Total MBE/WBE	**46.97 %**	**40.66 %**	**116**

Note: Disparity index = 100 x Utilization/Availability.

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

Keen Independent also separately examined MBE/WBE utilization and availability for construction, professional services, goods and other services contracts (see Appendix L). Overall MBE/WBE utilization was close to or exceeded the availability benchmarks for MBE/WBEs in each industry except for goods. For the City's construction, professional services and other services procurements:

- There was a substantial disparity between the utilization (11%) and availability (27%) of African American-owned firms in construction. Among MBE/WBE groups, much of the construction work went to companies owned by white women (26% utilization).
- Utilization of Asian American-owned companies was below what might be expected from the availability for the other services contracts.
- There were substantial disparities in the utilization of Hispanic American-owned firms in each of the study industries.
- Utilization of Native American-owned companies was substantially below availability for other services industry contracts.
- White women-owned firms received only 3 percent of other services contract dollars, substantially below the 4 percent that might be expected based on availability.

8. On types of City contracts where the program was not applied, there were substantial disparities between utilization and availability for each minority group and for white women-owned firms.

The City's SLDBE Program primarily operates through setting contract goals on contracts with subcontract opportunities. As goods purchases typically do not involve subcontracts, this set of City procurements provides another test of whether there would be disparities in City contracts but for the SLDBE Program.

MBE/WBE utilization was 7 percent for goods contracts based on available data for procurements above $10,000 for 2014-2016.[9] This level of participation was substantially below what might be expected from the availability analysis for goods procurements (21%). There were disparities between utilization and availability for each MBE group and for WBEs for the City's goods purchases (see Appendix L).

9. The City might consider adding stronger measures to its SLDBE Program, including programs focused on vendors, prime contractors and consultants.

The Keen Independent study team provides the following recommendations for City consideration:

a. The City should change the name of the program to the Socially Disadvantaged Business Enterprise Program (SDBE), or similar name, and no longer refer to it as the State and Local Disadvantaged Business Enterprise Program. Or, the City might retain the acronym and rename the program "Small Local Disadvantaged Business Enterprise Program." The program should be revised based on the following:

- To show economic disadvantage, the City should require firms to meet the same eligibility requirements as for the Federal DBE Program, including rules concerning annual revenue, personal net worth and the ability of the owner to accumulate substantial wealth under Title 49 of the Code of Federal Regulations (CFR) Section 26.67.

- The City should restrict eligibility for the program to firms that have a location within the federally-defined New Orleans metropolitan area or that can document that they have been doing business within the local area.

- The City should discontinue reciprocity with LA UCP, and instead allow firms that have DBE certification to automatically meet the economic criteria for City certification. Those DBE-certified firms would also need to meet the requirements that they be (a) are located within the metropolitan area or do business within the area, and (b) face social disadvantage as defined by the City.

[9] Keen Independent included all information about goods procurements above $10,000 obtained from the City, however, City data systems limited the amount of procurements provided to the study team. There were only 25 goods procurements examined for this time period.

b. As much as possible, there should be centralized, unified certification of firms eligible for other local programs using these same criteria.

- With this certification system, a firm that is certified for the City's program would be automatically eligible for other New Orleans metropolitan area programs for socially- and economically-disadvantaged firms.
- This would not affect operation or certification under the Federal DBE Program for U.S. Department of Transportation-funded contracts.

c. The City should consider additional measures that specifically assist vendors, consultants, prime contractors and others directly bidding on City procurements. These measures might include:

- Limited competition programs for small procurements (where there are at least three certified firms that might be expected to bid on the procurement). This program is similar to the SBE limited competition procurement method implemented at the New Orleans Regional Transit Authority for contracts up to $1 million. The Airport also has authority for such a program.
- Further investment in access to capital and bonding programs to make more contracts up to $10 million accessible to certified firms.
- New rules for construction contracts that allow subcontractors (as well as prime contractors) to bill in advance for mobilization.
- Accelerated payment of prime contractors and subcontractors on City construction contracts (and City-assisted contracts). The City might consider paying prime contractors within 20 days of receiving acceptable invoices, and requiring those primes to pay subcontractors within 7 days of receiving payment from the City. The Airport has successfully implemented these prompt payment requirements in its Terminal Expansion project. (Currently, the City follows state rules concerning prompt payment.)

d. The City should further expand its outreach to groups that showed disparities, especially Asian American- and Hispanic American-owned companies.

- There are improvements in outreach and procurement methods that the City might consider to further open opportunities to small businesses, including MBE/WBEs.
- Especially among newer MBE/WBEs, there is continued need for outreach and education about how to learn about and bid on City procurement.

e. The City should also expand its tracking of certified firm participation and utilization of certified and non-certified minority- and women-owned firms in its contracts and subcontracts.

10. To maintain defensibility of the SLDBE Program, the City will need to closely monitor its operation and results in the future, and make additional changes if needed.

The City will need to:

- Ensure that white male-owned firms that are socially and economically disadvantaged can continue to be certified for the program.

- Ensure that minority- and women-owned firms that are not socially and economically disadvantaged cannot be certified for the program. (For example, consider adding rules from the Federal DBE Program that deny certification for those with substantial wealth.)

- Monitor utilization to ensure that it is remedying the effects of discrimination for all groups in the future. The City is currently transitioning to an ERP procurement system that will consolidate information about its purchases. It will also include information about all subcontracts, starting in 2018. Keen Independent recommends monitoring utilization for all types of procurements, including items purchased off of cooperative contracts. This will provide the City a more complete picture of the utilization of certified firms and MBE/WBEs.

APPENDIX A.
Definition of Terms (to be augmented in final report)
(draft, 01032018, not for public distribution)

Appendix A provides explanations and definitions useful to understanding the 2017 City of New Orleans Disparity Study. The following definitions are only relevant in the context of this report.

A&E. "A&E" refers to architecture and engineering (i.e., "A&E contracts").

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

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

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

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

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

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

Certified MBE or WBE. A firm certified as a minority- or woman-owned business. Without the word "certified" in front of "MBE" or "WBE," Keen Independent is referring to a minority- or woman-owned firm that might or might not be certified as such.

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

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

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

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

Contractor. A contractor is a business performing construction contracts.

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

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

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

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

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

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

Disparity index. A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates "parity" or utilization "on par" with availability. Disparity index figures closer to 0 indicate larger disparities between utilization and availability. For example, the disparity index would be "50" if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

Dun & Bradstreet (D&B). D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). 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.

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

Establishment. See "business establishment."

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

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

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

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

Firm. See "business."

Federally-funded contract. A federally-funded contract is any contract or project funded in whole or in part (a dollar or more) with U.S. Department of Transportation, U.S. Environmental Protection Agency, U.S. Department of Housing and Urban Development or other federal financial assistance, including loans.

Hudson Initiative (SE). Louisiana Department of Economic Development provides the Hudson Initiative SE certification to assist small businesses in the state to gain access to purchasing and contracting opportunities that are available at the state level. Eligible firms are located in Louisiana, are independently owned and operated and meet certain financial criteria.

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

Louisiana Unified Certification Program (LA UCP DBE). The Louisiana Department of Transportation, Louis Armstrong International Airport, New Orleans Regional Transit Authority and Orleans Levee Board provide certification to disadvantaged business enterprises (DBEs), which are small businesses owned and controlled by socially and economically disadvantaged individuals who

are eligible for the program. A firm certified as a DBE by one entity is recognized as a DBE by any entity in Louisiana for purposes of the Federal DBE Program.

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

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

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

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

- Black Americans (or "African Americans" in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- Native Americans, which include persons who are American Indians, Eskimos, Aleuts or Native Hawaiians.
- Asian-Pacific Americans, which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong.
- Subcontinent Asian Americans, which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

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

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

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

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

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

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

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

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

Procurement. A direct purchase, consulting agreement, prime contract, subcontract or other acquisition of construction, professional services, goods or other services. This term is intended to encompass all types of government purchasing and contracting.

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

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

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

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

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

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

Remedial measure. A remedial measure, sometimes shortened to "remedy," is a program designed to address barriers to full participation of a targeted group.

SBA 8(a). SBA 8(a) is a U.S. Small business Administration business assistance program for small disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

Service-Disabled Veteran-Owned Small Business (SDVOSB). A firm certified as a service-disabled veteran-owned small business according to the criteria of the federal Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Program.

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

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

Small and Emerging Business Development Program (SEBD). The Louisiana Department of Economic Development's Small and Emerging Business Development (SEBD) Program provides managerial, technical assistance and training needed to grow and sustain a small business for firms whose principal place of business is Louisiana, 51 percent of the ownership is by a small and emerging business person, the net worth of the firm is less than $1.5 million and the firm owner anticipates creating full-time jobs. SEBD- certification is not race conscious or gender conscious.

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 and Local Disadvantaged Business Enterprise (SLDBE) Certification Program. In partnership with the Sewerage and Water Board, New Orleans Aviation Board and Harrah's New Orleans, the City of New Orleans' Office of Supplier Diversity (OSD) administers the State and Local Disadvantaged Business Enterprise (SLDBE) Program. The SLDBE Program is race and gender neutral and does not presume social disadvantage based on race or gender.

State- or locally-funded contract. A state- or locally-funded contract is any contract or project that is entirely funded with State of Louisiana, local government or other non-federal funds.

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

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

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 the City of New Orleans.

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

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

Subrecipient. A subrecipient is a local agency receiving financial assistance passed through another agency such as the City of New Orleans.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project or sells supplies directly to an end user.

United States Environmental Protection Agency (EPA). EPA is the federal agency that administers regulations and programs regarding environmental protection. The EPA has certain requirements regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-funded contracts for construction, equipment, services and supplies.

United States Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and women-owned business participation in HUD-funded contracts, as well as participation of project residents in those contracts.

United States Department of Transportation (USDOT). USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Rail Administration (at the time of this report).

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

Veteran Initiative/Service-Connected Veteran- owned/Service Connected Disabled Veteran-owned (VSE). The Louisiana Department of Economic Development provides a Veteran Small Entrepreneurship (VSE) program and the Small Entrepreneurship (VE) program for eligible firms that are more than 50% owned by either a veteran or a disabled-in-service veteran.

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

Women-owned business (WBE). A WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are non-minority women. A business need not be certified

as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a "WBE-certified businesses" is one certified as a woman-owned firm by a public agency.

APPENDIX B.
Legal Framework and Analysis

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise ("MBE/WBE/DBE") programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise ("Federal DBE") Program[1] and the implementation of the Federal DBE Program by local and state governments. The Federal DBE Program recently was continued and reauthorized by the Fixing America's Surface Transportation Act (FAST Act)[2]. The appendix provides a summary of the legal framework for the disparity study as applicable to the City of New Orleans ("NOLA").

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 the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study and the strict scrutiny analysis. This analysis reviews the Fifth Circuit decision in *W.H. Scott Construction Co., Inc. v. City of Jackson, Mississippi*,[5] district court decision in *Kossman Contracting Co., Inc. v. City of Houston*,[6] and the Louisiana Supreme Court decision in *Louisiana Associated General Contractors, Inc. v. State of Louisiana, et. al.*[7] The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study.

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

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

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

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

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

[6] *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[7] *Louisiana Associated General Contractors, Inc. v. State of Louisiana, et. al*, 669 So. 2d 1185 (S. Ct. La. 1996).

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, including: *Dunnet Bay Construction Co. v. Illinois DOT,*[8] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.,*[9] *Western States Paving Co. v. Washington State DOT,*[10] *Mountain West Holding Co. v. Montana, Montana DOT, et al.,*[11] *M.K. Weeden Construction v. Montana, Montana DOT, et al.,*[12] *Northern Contracting, Inc. v. Illinois DOT,*[13] *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads,*[14] *Adarand Construction, Inc. v. Slater*[15] *("Adarand VII")*, *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[16] *Geyer Signal, Inc. v. Minnesota DOT,*[17] *Geod Corporation v. New Jersey Transit Corporation,*[18] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[19]

The analyses of these and other recent cases summarized below are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

B. U.S. Supreme Court Cases

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

In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" governmental programs.[20] J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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[8] *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.,* 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), *cert. denied*, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT*, et al. 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay,* 2015 WL 4934560 (7th Cir., 2015).

[9] *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.,* F.3d 1187, (9th Cir. April 16, 2013).

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

[11] *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017).

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

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

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

[15] 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

[16] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied,* 2017 WL 497345 (2017).

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

[18] 766 F. Supp.2d. 642 (D. N.J. 2010).

[19] 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[20] 488 U.S. 469 (1989).

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

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."[21] 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.[22] 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 overinclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.[23]

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.,[24]. 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." [25]

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."[26] "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." [27]

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[21] 488 U.S. at 500, 510.

[22] 488 U.S. at 480, 505.

[23] 488 U.S. at 507-510.

[24] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

[25] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

[26] 488 U.S. at 502.

[27] *Id.*

The Supreme Court stated that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."[28] 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." [29]

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."[30] "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."[31]

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."[32]

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 State and Local Government MBE/WBE/DBE Programs

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

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[28] 488 U.S. at 509.

[29] *Id.*

[30] 488 U.S. at 509.

[31] *Id.*

[32] 488 U.S. at 492.

1. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[33] 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.[34]

a. The Compelling Governmental Interest Requirement.

The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to implement a race- and ethnicity-based program.[35] 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.[36] 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.[37]

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[38] 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).[39] 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

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[33] *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) ; *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; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999).

[34] *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"),* 6 F.3d 990 (3d Cir. 1993).

[35] *Id.*

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

[37] *See, e.g., Concrete Works I,* 36 F.3d at 1520.

[38] *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.

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

race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.[40]

- 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.[41]

- 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.[42]

- 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.[43]

- FAST Act and MAP-21. In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal DBE Program.[44] Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal DBE Program.[45]

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[40] *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.

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

[42] *Id.* at 1172-74; *see DynaLantic,* 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

[43] *Adarand VII*, 228 F.3d at 1174-75; *see H. B. Rowe,* 615 F.3d 233, 241-2, 247-258 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 973-4.

[44] Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

[45] *Id.* at § 1101(b)(1).

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.[46] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[47] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[48]

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.[49] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[50] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[51]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[52] "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"[53] Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[54]

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

[47] *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

[48] *See*, *e.g.*, *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *see also Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

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

[50] *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); *see Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016).

[51] *Croson*, 488 U.S. at 500; *see e.g., Midwest Fence, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Geyer Signal, Inc., 2014* WL 1309092.

[52] *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed,* 840 F.3d 932 (7th Cir. 2016); *see, e.g.*, *Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3rd at 1195-1200; *H. B. Rowe v. NCDOT,* 615 F.3d 233 (4th Cir. 2010); *Geyer Signal, Inc.,* 2014 WL 1309092 (D. Minn. 2014); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

[53] *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509); *see also, Sherbrooke Turf*, 345 F.3d at 973; *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010).

[54] *Croson*, 488 U.S. at 509*; see, e.g., AGC, SDC v. Caltrans*, 713 R.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); *H. B. Rowe v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010).

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[55] 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.[56] 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.[57]

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.[58] 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.[59] Conjecture and unsupported criticisms of the government's methodology are insufficient.[60] 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.[61]

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.'"[62] It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.[63] 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.[64] It has been further held that the statistical evidence be

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[55] *Adarand Constructors, Inc. v. Pena*, ("*Adarand III*"), 515 U.S. 200 at 235 (1995); *See, e.g.*, *Midwest Fence,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820.

[56] *Majeske*, 218 F.3d at 820; *see, e.g., Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence,* 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 *7, *affirmed,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

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

[58] *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*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also*, *Sherbrooke Turf,* 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

[59] *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).

[60] *Id; see also, Midwest Fence,* 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf,* 345 F.3d at 971-974; *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.,* 2014 WL 1309092.

[61] *Midwest Fence,* 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, at 242; *see Concrete Works,* 321 F.3d at 991; *see also, Sherbrooke Turf,* 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[62] *H.B. Rowe*, 615 F.3d at 241, *quoting Rothe Dev. Corp. v. Dep't of Def.,* 545 F.3d 1023, 1049 (Fed. Cir. 2008) (*quoting W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

[63] *H.B. Rowe Co.*, 615 F.3d at 241; *see e.g., Midwest Fence,* 840 F.3d 932, 948-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958.

[64] *Croson*, 488 U.S. 509, *see e.g., Midwest Fence,* 840 F.3d 932, 948-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241.

"corroborated by significant anecdotal evidence of racial discrimination" or bolstered by anecdotal evidence supporting an inference of discrimination.[65]

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.[66] "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."[67]

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.[68] 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.[69] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[70]

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.[71] There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,[72]

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[65] *H.B. Rowe*, 615 F.3d at 241, *quoting, Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); *see e.g.*, *Midwest Fence,* 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; *see also*, *Kossman Contracting Co, Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[66] *See*, *e.g.*, *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf,* 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.,* 2014 WL 1309092.

[67] *Croson*, 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *See Midwest Fence,* 840 F.3d 932, 953; *AGC , SDC v. Caltrans,* 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf,* 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

[68] *Croson*, 448 U.S. at 509; *see Midwest Fence,* 840 F.3d 932, 948-953 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* ("*Concrete Works II*"), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[69] *See*, *e.g.*, *Croson*, 488 U.S. at 509; *Midwest Fence,* 840 F.3d 932, 949-952; *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *see, also, Western States Paving*, 407 F.3d at 1001; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

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

[71] *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; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[72] *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 603 (3d Cir. 1996); *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1197, *quoting, Croson*, 488 U.S. at 706 ("degree of specificity required in the findings of discrimination … may vary."); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

"An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[73]

- Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[74]

- Disparity index. An important component of statistical evidence is the "disparity index."[75] 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."[76]

- 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.[77]

The Fifth Circuit Court of Appeals in *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, in discussing the *Croson* decision stated the U.S. Supreme Court made clear that combating racial discrimination is a compelling government interest.[78] The Fifth Circuit said that the Supreme Court noted a governmental entity can enact a race-conscious program to remedy past or present discrimination only where it has actively discriminated in its award of contracts or has been a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."[79] The court in *W. H. Scott* held, therefore, the governmental entity must "identify] that discrimination with the particularity required by the Fourteenth Amendment,"[80] so that there is "'a strong basis in evidence for its conclusion that remedial action was necessary.[81]"'

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[73] *Id.*

[74] *See Midwest Fence,* 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

[75] *See, e.g., Midwest Fence,* 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

[76] *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence,* 840 F.3d 932, 950 (7th Cir. 2016); *AGC, SDC v. Caltrans,* 713 F.3d at 1191; *H.B. Rowe Co.,* 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

[77] *See, e.g., H.B. Rowe Co. v. NCDOT,* 615 F.3d 233, 243-245; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp*., 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

[78] 199 F.3d 206, 218, *citing Croson,* 448 U.S. at 492.

[79] *Id.*

[80] *Id.*

[81] *Id., citing Croson,* 448 U.S. at 500 (*quoting Wygant v. Jackson B. of Educ,* 476 U.S. 267, 277, (1986)).

The Fifth Circuit pointed out that the Supreme Court stressed a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry.[82] The court in *W. H. Scott* found the Supreme Court provided some guidance in determining what types of evidence would justify the enactment of a remedial scheme. The Fifth Circuit quoted the Supreme Court as follows:

> [i]f 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. *Where there is a significant statistical disparity* between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.
>
> ... Moreover, evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified.[83]

The Fifth Circuit concluded 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.[84]

The Fifth Circuit stated that disparity studies are probative evidence of discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered.[85]

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.[86] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[87] 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.[88]

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[82] 199 F.3d 206, 218, *citing Croson,* 448 U.S. at 499 (noting that the "defects are readily apparent in this case. The 30 percent quota cannot in any realistic sense be tied to any injury suffered by anyone.").

[83] *Id., citing Croson*, 448 U.S. at 509 (emphasis in original).

[84] 199 F.3d 206, 218, *citing Croson,* 448 U.S. at 499.

[85] 199 F.3d 206, 218.

[86] *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).

[87] *See*, *e.g.*, *Midwest Fence,* 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe,* 615 F.3d 233, 248-249; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

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

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.[89]

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.[90]

b. The Narrow Tailoring Requirement.

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.[91]

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[89] *See*, *e.g.*, *AGC, SDC v. Caltrans, 713 F.3d at 1197*; *H. B. Rowe,* 615 F.3d 233, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *e.g.*, *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, *see Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic,* 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

[90] *See*, *e.g.*, *AGC, SDC v. Caltrans,* 713 F.3d at 1197; *H. B. Rowe,* 615 F.3d 233, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

[91] *See*, *e.g.*, *Midwest Fence,* 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *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); *see, also*, Geyer Signal, Inc., 2014 WL 1309092; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999).

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[92]

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."[93] Courts have found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[94]

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.'"[95]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[96] 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."[97] The Court found that the District failed to show it seriously considered race-neutral measures.

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[92] *See, e.g., Midwest Fence,* 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *see, also, Geyer Signal, Inc.*, 2014 WL 1309092; *see generally*, *H.B. Rowe Co. v. NCDOT,* 615 F.3d 233, 243-245, 252-254; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

[93] *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).

[94] *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf,* 345 F.3d at 972; *see also Adarand I*, 515 U.S. at 237-38.

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

[96] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

[97] 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).

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.[98] And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.[99]

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."[100]

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;

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[98] *See, e.g.*, *Midwest Fence,* 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

[99] *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.

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

- 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.[101]

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.[102]

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.[103] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[104] (2) good faith efforts provisions;[105] (3) waiver provisions;[106] (4) a rational basis for goals;[107] (5) graduation provisions;[108] (6) remedies only for groups for which there were findings of discrimination;[109] (7) sunset provisions;[110] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[111]

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[101] *See e.g.*, *Croson*, 488 U.S. at 509-510; *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927-29; 49 CFR § 26.51(b).

[102] *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, c*iting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng'g Contractors Ass'n*, 122 F.3d at 927.

[103] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *Eng'g Contractors Ass'n*, 122 F.3d at 927.

[104] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* ("AGC of Ca."), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

[105] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP* I, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

[106] *See, e.g., Midwest Fence,* 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *CAEP* I, 6 F.3d at 1009; AGC of Ca., 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

[107] *Id; Sherbrooke Turf,* 345 F.3d at 971-973.

[108] *Id.*

[109] *AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *See, e.g., H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), aff'd 345 F.3d 964 (8th Cir 2003); *AGC of Ca.*, 950 F.2d at 1417.

[110] *Sherbrooke Turf*, 345 F.3d at 971-972; *See, e.g., H. B. Rowe,* 615 F.3d 233, 252-255 (4th Cir. 2010); *Peightal*, 26 F.3d at 1559.

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

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Fifth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.[112] The Fifth Circuit has applied "intermediate scrutiny" to classifications based on gender.[113] Restrictions subject to intermediate scrutiny are permissible so long as they are narrowly tailored to serve a significant governmental interest.[114]

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both "sufficient probative" evidence or "exceedingly persuasive justification" in support of the stated rationale for the program; and

2. Substantially related to the achievement of that underlying objective.[115]

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.[116]

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. [117]The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[118]

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[112] *See generally, AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n,* 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Geyer Signal, Inc., 2014* WL 1309092.

[113] *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)).

[114] *Serv. Emp. Int'l Union, Local 5 v. City of Hous*., 595 F.3d 588, 596 (5th Cir. 2010); *see, e.g., State v. Granger*, 982 So. 2d 779, 787-788 (La. 2008).

[115] *Id.*; *See generally*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.").

[116] *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*.

[117] *See generally*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.").

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

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."[119]

3. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.[120] When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose."[121]

The Fifth Circuit Court of Appeals has found that under a rational-basis review, the court presumes state legislation to be constitutionally valid.[122] A classification imposed by statute or law, according to the Fifth Circuit, must merely be reasonable in the light of its purpose and must bear a rational relationship to the objectives of the legislation so that all similarly situated people will be treated similarly.[123] If evaluation of challenged legislation reveals any conceivable state purpose that can be considered as served by the legislation, then it must be upheld.[124]

Under a rational basis review standard, a legislative classification will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[125] Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[126] The Fifth Circuit holds that legislation need not pursue its permissible goal by using the least restrictive means of classification; consequently, the Equal Protection Clause is not violated "merely because the classifications made…are imperfect."[127].

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program.

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[119] 122 F.3d at 929 (internal citations omitted).

[120] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *State v. Granger*, 982 So. 2d 779, 787-788 (La. 2008); *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al,* 669 So. 2d 1185 (La. 1996).

[121] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *see also, La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al, 669 So. 2d 1185* (La. 1996).

[122] *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); *see R. T. Faulk III v. Union Pacific R. Co.*, 2011 WL 77905 (W.D. La. 2011).

[123] *Id.*; *see*, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, *reh'g denied*, 450 U.S. 960 (1981).

[124] *Id.*; *see*, *McGowan v. Maryland*, 366 U.S (1961); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir.1986).

[125] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

[126] *Id.*

[127] *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997), *cert. denied*, 522 U.S. 995 (1997) (quotation omitted).

The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations ("FAR")[128].

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration ("TSA") issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: "Government anticipates an overall Small Business goal of 40 percent," and that "[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5 percent; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent."[129]

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.[130] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[131]

The court found that "an agency may rationally establish aspirational small business subcontracting goals for prospective offerors…." Consequently, the court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals.[132] The court, in an exercise of judicial restraint, found the "40 percent goal is a rational expression of the Government's policy of affording small business concerns…the maximum practicable opportunity to participate as subcontractors …."[133]

4. Louisiana Constitution equal protection provision: La. Const., Art I, Sec. 3. The Louisiana Constitution, according to the courts, provides a different equal protection standard than that of the United States Constitution.[134] Article I, Section 3 of the Louisiana Constitution provides:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.[135]

The Louisiana Supreme Court has found that the United States Constitution is more limited than the Louisiana Constitution Equal Protection clause, in that it provides only the following with respect to equal protection under state laws: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., art. 14. The Louisiana Supreme Court has concluded that States are permitted under the U.S. Constitution to afford their citizens greater equal protection rights than those afforded under the U.S. Constitution.[136] "Both the express language adopted in Art. I, Sec. 3 as well as the

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[128] 2012 WL 5939228 (Fed. Cl. 2012).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *La. Associated Gen. Contractors, Inc. v. State of Louisiana, et.al*, 669 So. 2d 1185 (La. 1996).

[135] La. Const., Art. I, Sec. 3.

[136] *See La. Associated Gen. Contractors*, 669 So. 2d at 1196. (See summary in Section D.3 below).

proceedings of the 1973 Constitutional Convention support [the] holding that Art. I, Sec. 3 was intended to give the citizens of this state greater equal protection rights than are provided under the Fourteenth Amendment."[137]

The Louisiana Supreme Court distinguished equal protection analysis under the federal law and Louisiana state law. Under federal equal protection strict scrutiny analysis, if a law distinguishes between individuals on the basis race, it will be presumed unconstitutional, but may be upheld if the law is shown to be necessarily related to a compelling state interest.[138] "On the other hand, Art. I, Sec. 3 provides that '[n]o law shall discriminate against a person because of race.'"[139] The Louisiana Supreme Court held that pursuant to the Louisiana Constitutional provision by its very terms, "it is irrelevant whether there is arguably a compelling state interest that justifies the racially discriminatory law, and once it is determined that a law discriminates against persons on the basis of race, there is no further inquiry."[140]

Therefore, according to the Louisiana Supreme Court, when a law discriminates against a person by classifying him or her on the basis of race, it shall be "forbidden completely," regardless of the justification behind the racial discrimination.[141]

The court stated that for classifications based on race, there is no scrutiny under the Louisiana Constitution equal protection provision.[142] According to the court, where a law of the state discriminates on the basis of race, it shall be forbidden completely, regardless of the race of the persons benefitted or burdened by the law.[143]

This principle was re-affirmed by the Louisiana Supreme Court in *State v. Granger*.[144] In *Granger*, the Louisiana Supreme Court reviewed the history of the adoption of the state Constitution as compared to the text of the U.S. Constitution and noted that while the "federal standard of equal protection analysis provides a minimal level of protection, states can afford greater protection than it requires … Louisiana has done just that." *Id.* (internal citations omitted). The court concluded that based on the stricter levels of scrutiny in the Louisiana Constitution, Art. I, sec. 3, "laws creating the type of classification listed in the first situation [based on race or religious beliefs] always fail."[145]

Federal courts interpreting the Louisiana Constitution are in accord. The Fifth Circuit Court of Appeals addressed this interplay between federal and state constitutions and held that "[u]nder the United States Constitution, classifications based on race are permissible if they are narrowly tailored to serve a compelling government interest. However, under the Louisiana Constitution, classifications based on race shall be repudiated completely, regardless of the justification."[146]

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[137] *Id.*

[138] *Id.* at 1197.

[139] *Id.* at 1197.

[140] *Id.* (See discussion in Section D.3 below).

[141] *Id.* at 1198; *see Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Board,* 764 So. 2d 31, 32 (La. 1999).

[142] *Id.* at 1198.

[143] *Id.* at 1199.

[144] 982 So. 2d 779, 787-789 (La. 2008).

[145] *Id.*

[146] *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006) (internal citations and quotations omitted)).

The Fifth Circuit in *Dean v. City of Shreveport* concluded that "Article I, Section 3 of the Louisiana Constitution provides far greater protection against racial discrimination than does its federal counterpart."[147] Under this framework, the Fifth Circuit held that "[h]ere, the City's hiring process unquestionably classifies according to race. The City separates white and black firefighter applicants when deciding which applicants will proceed to phase two of the hiring process. The City's actions violate Article I, Section 3 of the Louisiana Constitution."[148]

5. Pending cases (at the time of this report)

Pending cases on appeal at the time of this report, which may potentially impact and be instructive to the study, include:

- *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (Not for Publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, *dismissing in part, reversing in part and remanding* the U.S. District Court decision found at 2014 WL 6686734 (D. Mont. Nov. 26, 2014) (See Section F below).

- *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *Petition for a Writ of Certiorari filed with the U.S. Supreme Court*, 2017 WL 511931 (Feb. 2, 2017), *cert. denied,* 2017 WL 497345 (June 26, 2017). (See Section F below).

- *Rothe Development Inc. v. United States Department of Defense, United States Small Business Administration, et al.,* 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds*, *Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration,* 107 F. Supp. 3d 183, 2015 WL 3536271 (D. D.C., 2015). *Petition for Rehearing En Banc*, filed on October 19, 2016, in the U.S. Court of Appeals, District of Columbia Circuit, was denied on January 13, 2017. *Petition for a Writ of Certiorari filed with the U.S. Supreme Court*, April 13, 2017, Docket No. 16-1239. The Petition was denied on October 16, 2017. 2017 WL 1375832. (See Section G below).

It is instructive to the study to point out the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds*, *Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration*, *et al,* 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C., 2015).

Rothe filed this action against the U.S. Department of Defense and the U.S. Small Business Administration challenging the constitutionality of the Section 8(a) Program on its face. The *Rothe* case is nearly identical to the challenge brought in *DynaLantic Corp. v. U.S. Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). *DynaLantic's* court rejected the plaintiff's facial attack and held the Section 8(a) Program facially constitutional.

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[147] *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006).

[148] *Id.* at 464-65; *see also Faulk v. Union Pac. R. Co.*, 2011 WL 777905, at *15 (W.D. La. Mar. 1, 2011) ("The Louisiana Constitution provides a different equal protection standard than the United States Constitution.").

Plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in *DynaLantic*, and urged the court to strike down the race-conscious provisions of Section 8(a) on their face. The district court in *Rothe* agreed with the court's findings, holdings and reasoning in *DynaLantic*, and thus concluded that Section 8(a) is constitutional on its face.

The district court 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 appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal has just been decided as of the writing of this report. The majority of the three judge panel affirmed the district court's decision, but on other grounds. [149]

The Court of Appeals in *Rothe* found that the challenge was only to the Section 8(a) statute, not the implementing regulations, and thus held the Section 8(a) statute was race-neutral.[150] Therefore, the court held the rational basis test applied and not strict scrutiny.[151] The court affirmed the grant of summary judgment to the government defendants applying the rational basis standard, and upheld the validity of Section 8(a) based on the limited challenge by Rothe to the statute and not the regulations.

The Court of Appeals held that Section 8(a) of the Small Business Act does not warrant strict scrutiny because it does not on its face classify individuals by race.[152] Section 8(a), the Court said, unlike the implementing regulations, uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. [153] See Section G below.

Rothe filed a Petition for Rehearing and Rehearing En Banc to the full Court of Appeals. The court denied the Petition on January 13, 2017.

Rothe filed a Petition for a Writ Certiorari to the U.S. Supreme Court, which was denied on October 16, 2017.[154]

This list of pending cases is not exhaustive, but are cases that will be followed during the study.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs. 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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[149] 836 F.3d 57, 2016 WL 4719049 (September 9, 2016).

[150] 836 F.3d 57, 2016 WL 4719049, at *1-2.

[151] *Id.*

[152] 836 F.3d 57, 2016 WL 4719049 at **1-2.

[153] *Id.*

[154] 2017 WL 1375832.

Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Fifth Circuit Court of Appeals

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

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5 percent of all city contracts. 199 F.3d at 208. *Id.* The 5 percent goal was not based on any objective data. *Id.* at 209. Instead, it was a "guess" that was adopted by the City. *Id.* The goal was later increased to 15 percent because it was found that 10 percent of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program's adoption, the City's Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set-aside 20 percent of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City's adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African American and Asian American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15 percent. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15 percent MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5 percent WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1 percent. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City's Financial Legal Departments, approved Scott's bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15 percent minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co. Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15 percent DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15 percent of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id.* at 218, n.11. The sufficiency of a municipality's findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study's findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City's Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15 percent DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott's low bid because Scott failed to meet the Special Notice's DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

2. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston's Minority and Women Owned Business Enterprise ("MWBE") program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded. The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the

Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 4 percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than 4 percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native American-owned businesses. The study found that Native American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native American-owned businesses would drop to statistically significant levels if two Native American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native American-owned businesses. *Id.* The court noted that a preference for Native American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native American-owned businesses in Houston's construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data r or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the 4 percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

3. *Louisiana Associated General Contractors, Inc. v. State of Louisiana, et. al*, 669 So. 2d 1185 (S. Ct. La. 1996)

In 1994, the Louisiana Health Care Authority advertised for bids for a capital renovation project in New Orleans. 669 So. 2d at 1189. The project was designated as a minority set-aside project in accordance with the Louisiana Minority and Women's Business Enterprise Act ("Act"). Thus, only minority business enterprise contractors could bid on the project. *Id.*

Plaintiff Louisiana Associated General Contractor's, Inc. filed a petition for Declaratory Injunctive Relief and sought to enjoin the acceptance of the bids by the Authority for the project, to enjoin any further enforcement of the Act, and to have the Act declared unconstitutional alleging that it discriminated on the basis of race in violation of the Louisiana Constitution equal protection provision (La. Const. Art. I, Sec. 3). *Id* at 1189. The trial court issued a temporary restraining order restraining the Authority from

continuing to treat the project as a minority set-aside project and from awarding any other public works contracts as set-aside projects under the Act. *Id* at 1189-1190. Subsequently, the Authority withdrew the pending bid request and re-bid the project without the minority set-aside designation. *Id.* at 1190.

Because the Authority stated that it would continue to issue future minority set-aside designated bids under the Act, the Louisiana AGC filed a supplemental and amending petition reiterating its previous request for declaratory and injunctive relief. *Id.* at 1190. Thereafter, the Louisiana AGC filed a motion for summary judgment. *Id.* The trial court granted the motion, finding that those portions of the Act which denied the opportunity to bid or granted bidding preferences based on race were unconstitutional. *Id.* The trial court also held the remaining portions of the Act were so interrelated that they were not severable, including the provisions relating to gender based preferences, and therefore declared the entire Minority Business Enterprise Act to be an unconstitutional violation of the Louisiana Constitution equal protection provision (Art. I. Sec. 3) and permanently enjoined the authority from any implementation or enforcement of the Act. *Id.*

The Act. The Louisiana Minority Women's Business Enterprise Act was initially enacted in 1984 and later amended and reenacted in 1992. The Act required a certain percentage of funds expected to be expended on public works and procurement contracts be designated solely for participation by certified minority business enterprises and women's business enterprises. *Id.* at 1188. The Act provided that the percentage applicable to each agency cannot exceed 10 percent MBEs and 2 percent for WBEs. *Id.* The Act was mandatory on each state agency and applied to all public works contracts and all contracts for the procurement of goods and services by state agencies and educational institutions. *Id.* Each agency was required to comply with the overall annual participation goals established for the individual agency under the Act. *Id.*

In order to meet the goals set for participation by MBEs and WBEs, the agencies set-aside public works or procurement contracts solely for bidding by certified business enterprises. *Id.* at 1189. The Act also mandated that preferences be used in certain situations, including where a contract for the construction of public works was to be awarded by the Division of Administration and the amount of the contract was $200,000 or more. *Id.* In such cases, the award was required to be made to a minority-owned business when the price bid by such business was within 5 percent of the otherwise lowest responsive and responsible bidder, and where the minority business enterprise agreed to adjust its bid to that of the lowest bidder, as long as the minority business enterprises original bid was within 5 percent of that bid. *Id.*

In sum, the court stated, the Act mandated that state agencies employ a system of set-asides and preferences in procurement of public works contracts from which only certified MBEs and WBEs benefit. *Id.* at 1189. The court said, therefore, while certified MBEs were able to bid on 100 percent of the public works and procurement contracts let by the state, non-minority businesses were only able to bid equally on approximately 90 percent of such constructs put out to bid by state agencies. *Id.*

Article I. Section 3 of the Louisiana Constitution. Article I, Section 3 of the Louisiana Constitution provides that no person shall be denied the equal protection of the laws, and that no laws shall discriminate against a person because of race or religious ideas, beliefs, or affiliations, and that no law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. *Id.* at 1195.

The Louisiana Supreme Court concluded that the Fourteenth Amendment to the United States Constitution provides only with respect to equal protection that no states shall deny any person within its jurisdiction the equal protection of the laws. *Id.* at 1195. By its own terms, the Louisiana Supreme Court found that the Fourteenth Amendment does not specify or delineate which classifications will receive particular levels of scrutiny nor does it explain how a particular level of scrutiny will operate in application. *Id.* at 1195-1196. Generally, the Louisiana Supreme Court said under the Fourteenth Amendment to the United States Constitution, governmental action will receive strict scrutiny if a classification infringes on a fundamental or express constitutional right or if it discriminates on the basis of a "suspect" classification, such as race. *Id.* at 1196. The law is presumed to be unconstitutional and will be struck down unless shown to be necessarily related to a compelling state interest. *Id.*

A classification will generally receive intermediate scrutiny if it involved discrimination based on certain classes such as gender. *Id* at 1196. To be upheld on this level of review the classification must be substantially related to a legitimate state interest. *Id.* The lowest tier of review applies to any other classification and requires the party challenging the law to prove that the classification is not rationally related to any legitimate government interest. *Id.*

The framers of the 1974 Louisiana Constitution had the voters ratify the equal protection provision which gave greater rights and protection than its federal counterpart. *Id.* at 1196. The court held that Article I, Section 3 was intended to give the citizens of Louisiana greater equal protection rights than are provided under the Fourteenth Amendment. *Id.* The court thus held as follows: "The section on its face absolutely prohibits any state law which discriminates on the basis of race." *Id.* at 1196.

The court rejected the argument by the state that it has a constitutional duty under the Fourteenth Amendment to engage in discrimination, finding that the United States Supreme Court has never interpreted the Fourteenth Amendment to require discrimination on the basis of race for any reason whatsoever. *Id.* at 1199. The Louisiana Supreme Court said that the United States Supreme Court pointed out that states do not have a duty to engage in race preference programs but instead have the "authority" to do so, should they so desire, provided this authority be exercised within the constraints of the Fourteenth Amendment. *Id.* at 1199. Thus, the court concluded that although a state has the authority to participate in race preference programs under the Fourteenth Amendment, that same provision does not mandate that it do so. *Id.* Consequently, the court found that a state constitution which prohibits a state from enacting such programs is not in violation of the Fourteenth Amendment. *Id.*

The state also argued that the Louisiana Constitution provision should be interpreted to allow for racial classifications in the imposition of quotas or set-aside programs because to hold otherwise would require the state to withdraw from federal programs, which may condition the state's receipt of federal funds on, among other things, the state's use of minority preferences and set-asides in use of the funds. *Id.* at 1200. The Louisiana Supreme Court rejected that argument finding that the absolute and mandatory language used in the prohibition against laws which discriminate on the basis of race found in the Louisiana Constitution does not change because the state may stand to lose federal funds if it has to withdraw from participating in voluntary federal programs wherein the distribution of federal funds may be contingent on the state's violation of its own constitution. *Id.* at 1200.

The Louisiana Supreme Court held the language of the second sentence in the Louisiana Constitution equal protection provision does not allow for the consideration of any hypothetical loss of federal funds, and that the legislature can suggest, and the people can vote for, an amendment to the Louisiana Constitution which would allow for the state to participate in such federal programs without the state's having to violate its own constitution. *Id.* at 1200. The Louisiana Supreme Court in a footnote pointed out that the court did not decide or predict a federal court's decision as to whether a federal funds program that mandates both state participation and the use of set-asides would preempt the state's constitution under the federal Supremacy Clause. *Id.* at n.14.

The Louisiana Minority and Women's Business Enterprise Act is Held Unconstitutional. The Louisiana Supreme Court found that the Act sets up a system whereby state agencies are mandated to meet annual goals for participation by certified MBEs, and that the goals were to be met under the Act mainly through the use of set-asides and also through preferences in the awarding of public works and procurement contracts. *Id.* at 1200. Because only members of certain races can obtain a MBE designation, and only certified MBEs may bid on a minority set-aside project, the court held the set-aside provisions under the Act discriminated against members of those races which cannot obtain a MBE designation because they cannot bid on the set-aside project. *Id.* at 1200-1201. The court concluded the Act deprives certain citizens of the opportunity to compete for contracts that have been set-aside solely on the basis of race, thereby creating an absolutely prohibited racial classification. *Id.* at 1201.

Similarly, the court found certain provisions under the Act create a system of preferences that generally operate such that although members of all races can bid on a project, a certified MBE will receive a contract if its bid is within 5 percent of the lowest responsive and responsible bidder provided the MBE agrees to adjust its bid to the amount of the original lowest bid. *Id.* at 1201. The court held that preferences such as this also discriminated against non-minority business enterprises. *Id.* Therefore, with respect to these preferences, the court concluded the Act on its face treats business enterprises differently solely because of the race of its owner's and officer's.

The court thus held that the set-asides and preferences under the Act discriminate against a person on the basis of race, and the Act, to that extent, was unconstitutional under the Louisiana Constitution equal protection provision (La. Const. Art. I, Sec 3.). *Id.* at 1201.

The court determined the trial court correctly found the Act unconstitutional in so far as it adopts racial classifications in the application and implementation of its set-aside preference programs, *Id.* at 1201. The court then held that because the legislature would not have passed the Act without the presence of the MBE set-aside and preference features, the unconstitutional portions of the law having to do with these racially based set-asides and preferences were so interrelated with the remaining portions of the Act having to do with women's business enterprises that they could not be separated without destroying the intent of the legislature in enacting it at all. *Id.* at 1201-1202. Therefore, the court also found the remaining portions of the Act relating to gender based preferences were not severable from the unconstitutional portions relating to race based preferences; thus, the entire Act was held unconstitutional. *Id.* at 1202.

Dissent. There was one dissenting Justice of the Louisiana Supreme Court who would have sent the case back to the trial court to determine if there was evidence of past discrimination. *Id.* at 1203-1204. If there was determined to be past discrimination, the dissent would hold that the state has the authority to take remedial action narrowly tailored to eliminate that discrimination. *Id.* at 1203-1204.

4. *Louisiana Associated General Contractors, Inc. V. New Orleans Aviation Board*, 764 So.2d 31 (La. 1999)

The Louisiana Associated General Contractors filed a Petition for Declaratory and Injunctive relief against the New Orleans Aviation Board's Disadvantaged Business Enterprise Plan, alleging that it created unconstitutional race- and gender-based classifications. 764 So. 2d 31 (La. 1999). The trial court granted relief, and the Aviation Board filed an appeal to the Louisiana Supreme Court. The Louisiana Supreme Court held that Board's Program violated the City's Interim Small Disadvantaged Business Development Ordinance. *Id.* at 31.

Facts and procedural background. The New Orleans Aviation Board (NOAB) adopted the "Disadvantaged Business Enterprise Plan for the New Orleans International Airport" (Program). *Id.* at 32. The Program provided participation goals, preferences, and set-asides on airport and heliport related contracts for businesses that qualify as disadvantaged business enterprises (DBE). *Id.* Before the NOAB would qualify a business as a DBE, at least 51 percent of a business must be owned and controlled by individuals who were socially and economically disadvantaged. Under the Program particular gender and racial groups were presumed to be socially and economically disadvantaged. *Id.* This presumption may be rebutted if challenged by a third party. *Id.*

The Louisiana Associated General Contractors (LAGC) filed a Petition for Declaratory and Injunctive Relief against the NOAB alleging that the Program created unlawful race- and gender-based classifications in violation of Article I § 3 of the Louisiana Constitution, which the Louisiana Supreme Court stated forbids the creation and application of laws that discriminate on the basis of race or "arbitrarily, capriciously, or unreasonably discriminate" on the basis of sex. *Id.* at 32. LAGC further contended that Section 38:2233.2 of the Revised Statutes, which provided for set-asides in public works contracts for minority contractors, was also unconstitutional. Alternatively, LAGC alleged that the Program lacked authority because it violated the low bid requirements of the Louisiana Public Bid Law and the New Orleans Home Rule Charter by awarding contracts on the bases of race and gender. *Id.* Upon LAGC's motion, the trial court issued a temporary restraining order which enjoined NOAB from receiving bids on the Project. *Id.*

The LAGC moved for summary judgment based on the Louisiana Supreme Court's opinion in *Louisiana Associated General Contractors, Inc. v. State*, 669 So. 2d 1185 (La. 1996), which the Louisiana Supreme Court stated it found that the Louisiana Constitution "absolutely" bans race-based classifications. *Id.* The trial court granted LAGC's motion for summary judgment declaring Rev. Stat. 38:2233.2 and the Program unconstitutional as to city projects, and permanently enjoined NOAB from utilizing the Statute or the Program in non-federal public works projects. *Id.*

Following some appeal issues, the case was remanded back to the trial court, and the trial court ruled that the City of New Orleans Home Rule Charter gave NOAB authority to adopt the Program. *Id.* at 33. But, the trial court again declared the Program an unconstitutional violation of Article I, § 3, and issued a permanent injunction restraining NOAB from enforcing the Program on any non-federal works projects. *Id.* NOAB appealed the trial court's ruling of unconstitutionality, and LAGC cross appealed the trial court's ruling that NOAB had authority under local law to authorize the Program. *Id.*

The City Interim DSBD Ordinance. The City of New Orleans' "Interim Disadvantaged Small Business Development Ordinance" (Interim Ordinance), authorized establishment of "a program for participation goals, preferences, and set-asides in city contracts and procurement for firms owned by socially and economically disadvantaged persons," and "[provides] for the interim suspension of all race-based set-asides, goals, and preferences." *Id.* at 33. Under the Interim Ordinance, if a public works or construction project exceeds $50,000, the general contractor was required to make a reasonable effort to subcontract at least 25 percent of the total dollar in subcontracts to New Orleans' DBE's. *Id.*

To qualify as a DBE under the ordinance, at least 51 percent of the business must be owned and controlled by socially and economically disadvantaged individuals. According to the Interim Ordinance, socially disadvantaged individuals were "individuals … who have been subjected to discrimination, prejudice, or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* at 33. The social disadvantage must stem from circumstances beyond their control. Also, the Interim Ordinance defined economically disadvantaged individuals as "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 and competitive market area who are not socially disadvantaged." *Id.* Before a person could qualify as a socially disadvantaged individual, the person must prove by clear and convincing evidence he has actually suffered a disadvantage. *Id.* Merely claiming membership in a group which may be considered socially disadvantaged was not enough to qualify for disadvantaged status under the Interim Ordinance. *Id.*

When determining which businesses qualify as economically or socially disadvantaged, the Interim Ordinance strictly prohibited race- and gender-based discrimination or preferential treatment. Section 2–604(A)(1) of the Interim Ordinance stated:

> A) 1)No person or business firm shall be certified for inclusion or included in the registry of firms owned and controlled by socially and economically disadvantaged persons and no contract shall be set-aside for award, nor shall any person or firm be awarded any city contract or subcontract or preference in contracting, subcontracting or vending to or with the city, on the basis of race, color, creed, national origin, or gender.

Id. at 33. The Interim Ordinance also prevented the City of New Orleans from issuing or carrying out any policy dealing with city contracts that provided preferential treatment on the basis of race or gender. Section 2–603 provided that all ordinances, executive or administrative policy memoranda, directives, or orders which required or authorized race- or gender-based preferences in city contracts were, on an interim basis, superceded and suspended by the Interim Ordinance. *Id.* at 33-34.

According to the NOAB Program individuals who belonged to the following groups were presumed socially and economically disadvantaged: (a) Women; (b) African Americans; (c) Hispanic Americans; (d) Native Americans; (e) Asian–Pacific Americans; and (f) Asian–Indian Americans. *Id.* at 34. Generally, the NOAB did not investigate the actual disadvantaged status of those individuals presumed to be disadvantaged unless their status was challenged by a third party. *Id.* If challenged, the business may lose its status as a DBE. Individuals who did not belong to one of the aforementioned groups may also apply for DBE qualification to be reviewed on a case by case basis. *Id.* No presumption was afforded to individuals whose race or gender was not listed in the Program. Before the NOAB would certify these individuals, they must prove that their disadvantaged status arose from individual circumstances, rather than by membership in a particular group. *Id.*

Holding the Program violated the Interim Ordinance. The court found that the Program facially violated the Interim Ordinance on two points. First, the Program's standard for determining if an individual is socially and economically disadvantaged, the court held, fell far below the standard commanded by the Interim Ordinance. *Id.* at 34. Under the Program, if an individual was female or belonged to a specific race-based group included in the Program's list, he was presumed to be socially and economically disadvantaged. *Id.* at 34-35. The Interim Ordinance, however, refused to consider an individual as disadvantaged simply because the individual belonged to a particular race or gender group. *Id.* at 35. The individual must provide clear and convincing evidence that proved he actually suffered a disadvantage by belonging to a particular group. *Id.*

The Interim Ordinance's burden of proof fell upon the individual seeking disadvantaged status. *Id.* But, no burden of proof, according the court, existed under the Program unless the presumption was rebutted by a third party. *Id.* Thus, the court held that the Program's presumption on its face violated the standard required by the Interim Ordinance. *Id.*

Second, the court held the Program violated § 2–604 of the Interim Ordinance which prohibited showing preference toward or discriminating against individuals on the basis of gender or race when qualifying them for socially or economically disadvantage set-aside contracts. *Id.* at 35. The Program, however, specifically stated that individuals who were female or belonged to a specific race-based group automatically qualified as socially and economically disadvantaged. *Id.* Thus, the court found that if they own and control at least 51 percent of the business they were automatically allowed to bid on and receive up to 100 percent of the full dollar amount of the contracts offered to subcontractors under the Program. *Id.*

The court said that, however, the individuals who were not included within the Program's list of people presumed to be disadvantaged, may only bid on and receive up to 50 percent of the full dollar amount of the contracts offered to subcontractors under the Program unless they can prove that they have actually suffered a disadvantage because of their individual circumstances. *Id* at 35. In addition, the court noted that during oral arguments before the trial court, NOAB's counsel conceded that the Program's requirements provided preferential treatment on the basis of race and gender by stating, "This is just a preference …. It is not a set-aside." *Id.*

The court agreed with the argument that the Program's presumption was preferential, and further held that it also allowed unlawful discriminatory practices by providing set-asides on the bases of race and gender. *Id.* at 35. Because the court found the Program's burden of proof for qualifying individuals as socially disadvantaged fell short of the burden required under the Interim Ordinance, and because the Program provided preference toward individuals on the basis of race and gender when awarding public works contracts, the court held that the Program was prohibited by the City of New Orleans' Interim Ordinance. *Id.* Therefore, the court reversed that part of the ruling of the trial court which held that the NOAB had authority under local law to adopt the Program, and the court affirmed the permanent injunction imposed by the trial court. *Id.*

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

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo 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, Hispanic Americans and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

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

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

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether

a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

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

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

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

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

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

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or

statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson.* The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

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

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

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

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

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

The Court's rejection of CWC's arguments and the district court findings.

Use of marketplace data. The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in Adarand VII that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, *citing Adarand VII*, 228 F.3d at 1166-67).

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

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

Consistent with the court's mandate in *Concrete Works II,* the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id.*

The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, *quoting Croson,* 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII,* the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, *quoting Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

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

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

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment

rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra,* the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

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

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

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

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

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

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

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

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

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

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

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

Consistent with the court's mandate in *Concrete Works II,* at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, *quoting Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on

City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

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

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

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

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

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver's initial burden. *Id.* at 989-90, *citing Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, *quoting Concrete Works II,* 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, *quoting Adarand VII,* 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II,* 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000),

which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (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 overinclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action …" and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, *quoting* in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women's "set-aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is "to be expected that there would be more soliciting of these contractors on public than on private projects." *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County "conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance." 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a "public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy." 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry "tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County." 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that "[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit … to be entitled to take remedial action." *Id.* But, the court found "of that there is no evidence either." *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found "puzzling" to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would "flunk the constitutional test" by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* "Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons." *Id.* The court, therefore, held that the ordinance was not "narrowly tailored" to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of "favored minorities" included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to "presume" discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case — "that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project." 256 F.3d at 647-648.

8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), *affirming* Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business ("MBE"), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio's state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act ("MBEA") was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court's Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation "set-aside" 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set-aside, for MBEs only, bidding for construction of the Toledo Correctional Facility's Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such "racially preferential set-asides" were to be evaluated. *Id.* (*see City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Pena* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, *citing Croson*, 488 U.S. at 492. But, the Court stated "statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil." *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry's discriminatory practices. *Id.* at 735, *quoting Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, *quoting Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of "racially discriminatory systems" such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on "mere underrepresentation" by showing a lesser percentage of contracts awarded to a particular group than that group's percentage in the general population. *Id.* at 735. "Raw statistical disparity" of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, "such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant." *Id.*

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio "did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts." *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore "made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size." *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. "If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete." *Id.* at 736.

The Court stated the only cases found to present the necessary "compelling interest" sufficient to justify a narrowly tailored race-based remedy, are those that expose "pervasive, systematic, and obstinate discriminatory conduct. …" *Id.* at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting …." *Id.* at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from "overinclusiveness." *Id.* at 737, *quoting Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of African Americans, Native Americans, Hispanic Americans and Asian Americans, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10 percent of state contracts, while African Americans receive none. *Id.*

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the· use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

9. *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.

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

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

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five "contract measures" to reach the participation goals: (1) set-asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id.* Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs;

3. Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program; and

4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." *Id.* The Eleventh Circuit further noted:

> "In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest."

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." *Id.*, *citing Croson*, 488 U.S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id.* at 907, *citing Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*)). However, the

Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." *Id.* (internal citations omitted).

Notwithstanding the "exceedingly persuasive justification" language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide "sufficient probative evidence" of discrimination, which is a lesser standard than the "strong basis in evidence" under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical "anecdotal" evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially "post-enactment" evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, "such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Id.* at 912. A district court should not "speculate about what the data *might* have shown had the BBE program never been enacted." *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County's statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was "insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County's stated rationale for imposing a gender preference." *Id.* The district court's view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no "consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate 'share' … when the bidder percentages are used as the baseline." *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were "decidedly mixed" as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

> "[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent."

Id. at 914. "The utility of disparity indices or similar measures … has been recognized by a number of federal circuit courts." *Id.*

The Eleventh Circuit found that "[i]n general … disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." *Id.* The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination." *Id.*, *citing* 29 CFR § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id.*, *citing Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." *Id.* The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id.*

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." *Id.* at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

> "[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'"

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a "neutral explanation" by: "(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." *Id.*

The plaintiffs alleged that the disparities were "better explained by firm size than by discrimination … [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

> The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

> Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the

requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another." *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that "the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as 'Simpson's Paradox,' which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated." *Id.* at 919, n. 4 (internal citations omitted). "Under those circumstances," the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a "strong basis in evidence" of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County's subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), "the study compared the proportion of the designated group that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

> Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor's release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, *quoting Croson*, 488 U.S. at 501, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id.* "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and

MBE/WBEs that do enter the construction business earn less money than similarly situated white males." *Id.*

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*" *Id.*, *quoting Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held "the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason." *Id.*, *quoting Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms." *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

> Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: "difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms." *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id.* However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id.* In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." *Id.*, *quoting Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third,

Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." *Id.*

Narrow tailoring. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences … must only be a 'last resort' option." *Id.*, *quoting Hayes v. North Side Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) and *citing Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard … forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id.* at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical structure." *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id.*

The Eleventh Circuit

> flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, *citing Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") … Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County "clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures." *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an "equally conclusory analysis" in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the "institutional youth" of black- and Hispanic-owned construction firms. *Id.* "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part." *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *Croson*:

> [T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect … The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., *quoting Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. "Most notably … the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process." *Id.*

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

11. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed $14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling 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.

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

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver

provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

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

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

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

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

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

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

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

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

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

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs

and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

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

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

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

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

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

Recent District Court Decisions

13. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), *affirmed in part, reversed in part, and remanded*, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* ("*Rowe*"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 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.

14. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), *affirmed*, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), *cert. denied*, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt

"aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

15. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined "Georgia's racist history" in contracting and procurement, and examined certain data related to Augusta's contracting and procurement. *Id.* at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City's implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a "good faith effort" to ensure DBE participation. *Id.* at *6. The court rejected this argument noting that bidders were required to submit a "Proposed DBE Participation" form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: "Because a person's business can qualify for the favorable treatment based on that person's race, while a similarly situated person of another race would not qualify, the program contains a racial classification." *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing* to *Croson*), that a state or local government must identify that discrimination, "public or private, with some specificity before they may use race-conscious relief." The court cited the Eleventh Circuit's position that "'gross statistical disparities' between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work" may justify an affirmative action program. *Id.* at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City's disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson's Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at *8. Noting that affirmative action is permitted only sparingly, the court found: "[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit." *Id.* The court held in conclusion, that the plaintiffs were "substantially likely to

succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause." *Id.* at *9.

In a subsequent Order dated September 5, 2007, the court denied the City's motion to continue plaintiff's Motion for Summary Judgment, denied the City's Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff's Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City's challenge to the plaintiffs' standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract "that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors" satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

16. *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.

17. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious "preferences" in order to increase the numeric representation of "MBEs" in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity ("OSD") to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute's purpose. The statute provided that each State agency is "encouraged" to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were "precatory." The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, "if true," constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as "'simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.'" *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng'g Contractors Ass'n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is "permissive." The court, however, held that "there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute 'induces an employer to hire with an eye toward meeting … [a] numerical target.' *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be "permissive," the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

18. *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).

19. *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.

20. *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 overinclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of overinclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

21. *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.

22. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *affirmed per curiam* 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. 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).

23. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District,* 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict Scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

> (1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.
>
> (2) a program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id.*
>
> (3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id.* at 745.
>
> (4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*
>
> (5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas

according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to "race-based quotas". *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise "dooms Ohio's program of race-based quotas". *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business." *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set-aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set-aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the "narrowly tailored" requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court's prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court's order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

24. *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.

E. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments in Other Jurisdictions

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

Recent Decisions in Federal Circuit Courts of Appeal

1. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, *dismissing in part, reversing in part and remanding* the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014)

Note: The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.,* MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to

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

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

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

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Mountain West*, 2014 WL 6686734 at *2, *quoting Western States*, at 997-998, and *Mountain West,* 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, *quoting AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only

narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

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

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

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

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

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

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

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West,* 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) , *dismissed in part, reversed in part, and remanded,* U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum,

May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see,* 407 F.3d at 987.

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West's expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. W. States Paving, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results Mountain West, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that "some of the population samples were very small and the result may not be significant statistically." 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than 10 percent of total contract volume in the State's transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 ("If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination."); *id.* at 1001 ("The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs."). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep't of Transp., *Western States Paving Co. Case* Q&A (Dec. 16, 2014) ("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting, Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and *quoting, Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11.

2. *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert.denied,* 2017 WL 497345 (2017)

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.,* 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race– and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.

2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.

3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no "affirmative evidence" that IDOT's implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence's challenge to the Tollway's program paralleled the challenge to IDOT's program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT's program, the Tollway's program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT "target market program." *Id.* at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at *6. The court stated that IDOT had not set-aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a "compelling interest" to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 *citing Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires "a close match between the evil against which the remedy is directed and the terms of the remedy." *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) "the necessity for the relief and the efficacy of alternative [race-neutral] remedies," (b) "the flexibility and duration of the relief, including the availability of waiver provisions," (c) "the relationship of the numerical goals to the relevant labor [or here, contracting] market," and (d) "the impact of the relief on the rights of third parties." *Id.* at *7 *quoting United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, *citing* 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of "any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts," § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state's progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence "mismatch" argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is overinclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state's compliance with part of the federal program "impractical," and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a "mismatch" in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states' overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals "*only* on those [USDOT]-assisted contracts that have subcontracting possibilities." *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the "mismatch." *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found "[t]his prospect is troubling." *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs' ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Overinclusive argument. Midwest Fence also argued that the federal program is overinclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence's criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a

difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study found that DBEs made up 25.55 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below $500,000 and 8.25 percent of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under $500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5 percent of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84 percent.

Tollway program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01 percent across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence's criticisms. Midwest Fence's expert consultant argued that the study consultant failed to account for DBEs' readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs' relative capacity, "meaning a firm's ability to take on more than one contract at a time." The court noted that one of the study

consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under $500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence's report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, "speculative at best." *Id.* at *15. The court said the consultant's relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to $500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence's expert similarly argued that the existence of the DBE program "may" cause an upward bias in availability, that any observations of the public sector in general "may" be affected by the DBE program's existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence's speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence's strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination", according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

3. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.,* 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over $52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77 percent

contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set-aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over $52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, *quoting*, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is

narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set-aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to

secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

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

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

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

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

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

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

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

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id.* at 1192.

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

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific, 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.*

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

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

gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

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

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

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (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.

6. *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.*

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

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

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

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

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

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

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff's bid due to the minority utilization requirement. *Id.*

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

preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

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

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

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

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

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

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

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

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

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

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

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

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

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

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

8. *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*.).

9. *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.

Recent District Court Decisions

10. *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015*), affirmed,* 840 F.3d 932 (7th Cir. 2016).[155]

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).

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[155] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

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

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

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

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set-aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.,* 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727*, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173

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

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to

address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT,* the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730*, citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730.The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731.For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under $500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal–Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the

use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non–DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race–neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals

contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as–applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education,

age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

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

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

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

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

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

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

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

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

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

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

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

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

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

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE

Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

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

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

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

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

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

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

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

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

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

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

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

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

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

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

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

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

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

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

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

12. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), *affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE

Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project , was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to

perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of 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.

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only 0.81% DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

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

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately $26 million, and that MDT had $50 million more in highway construction projects to be let during the

remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

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

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

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

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

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

14. *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.*

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

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

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in

order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

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

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

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

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

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

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

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

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

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

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

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

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

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

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

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

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

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

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

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

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

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

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

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

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

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

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

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

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

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

16. *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 overinclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

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

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

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(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.

17. *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.

18. *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.

19. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), *affirmed,* 473 F.3d 715 (7th Cir. 2007)

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

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

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

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

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

whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

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

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

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

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

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

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to

meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

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

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

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

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

4. "Unbundling" large contracts; and

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

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

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

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

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

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative action program … If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." *Id.* The court held that challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." *Id.* at *17.
To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction." *Id.* at *16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id.*

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

The court further found:

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

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

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

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

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

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

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

throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

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

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

20. *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 overinclusive 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.

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

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

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

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

> by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

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

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

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

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

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

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as

highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

23. *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 and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), *cert. denied,* 2017 WL 1375832 (Oct. 16, 2017), *affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, *quoting* 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. *Rothe Development Corp. v. U.S. Dept. of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically 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 overinclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on

the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing* to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to

calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of

discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in Croson that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), *affirmed on other grounds*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016).

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense ("DOD") and the U.S. Small Business Administration ("SBA") (collectively, "Defendants") challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at

the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, *citing DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set-aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment

to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.,* 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian-Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." DynaLantic, at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id. quoting Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 *quoting Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, *citing Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before

Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the

Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different 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 5 percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United 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.

5. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.
Utilization Data Collection

Keen Independent compiled data about procurements made by the City of New Orleans. The study team analyzed both prime contractors and, when available, subcontractors on those procurements.

Combined, Keen Independent examined more than $1 billion worth of City contracts. From these data, the study team determined the geographic market area and subindustries representing the majority of City expenses. Keen Independent also calculated the percentage of payments that went to minority-, women- and majority-owned businesses.

Appendix C describes Keen Independent's utilization data collection in eight parts:

A. General scope of the utilization analysis;
B. Prime contract data collection;
C. Subcontract data collection;
D. Avoiding duplication between datasets;
E. Restoration Tax Abatement projects;
F. Compilation of data on other similar construction in the New Orleans area;
G. Steps to the utilization analysis; and
H. City and project committees review.

A. General Scope of the Utilization Analysis

The scope of the disparity study was City of New Orleans procurements from 2012 through 2016. The study did not include the New Orleans Aviation Board or the New Orleans Sewerage and Water Board (those two agencies were not study participants). Additionally, Restoration Tax Abatement projects were not included in the final contract dataset since they are not typical procurement actions.

A number of expenditures typically excluded from disparity studies were not examined in the utilization analysis. These include:

- Small contracts and payments (less than $10,000);
- Payments to government agencies;
- Payments to or contracts with not-for-profit agencies (these do not have ownership information and cannot inform the utilization analysis);
- Payments to regulated utilities and some national goods purchases (where the City does not have an option as to where to purchase);
- Insurance fees and financial transactions; and
- Office or property leases.

There was $238 million in contracts and payments that Keen Independent identified for the study period that were not included in the contract data.

B. Prime Contract Data Collection

Keen Independent compiled information on City construction, professional services, other services prime contracts and subcontracts, as well as on goods procurements.

The study team examined procurements from January 2012 through December 2016. For the entirety of the study period, the City used BuySpeed as its central procurement portal, where vendors both register and submit proposals/bids. The City monitors procurement opportunities and awards a through BuySpeed as well as information about vendors.

Data sources used. The City provided Keen Independent with four main information sources for prime contract data: BuySpeed (the City's online Procurement monitoring system), GreatPlains (the financial management software tracking City payments to vendors), Quickbase (from Capital Projects) and B2GNow (from the Office of Supplier Diversity).

The City also provided additional payment data collected through AFIN, which according to the City does not include payments to all vendors and was therefore solely used as a supplementary data source against which to check other data.

The Department of Property Management also provided the study team with its Job Order Contracts (JOC) tracking for January 2013 to December 2016. This was also used as a supplementary data source when examining JOC-related data collected through BuySpeed, B2GNow and invoices (addressed separately below).

Prime contract data from BuySpeed. Keen Independent reviewed a number of BuySpeed files, including a list of all construction, professional services, goods and other services prime contracts awarded between January 2012 and December 2016. The BuySpeed file included the following data:

- PO number;
- PO date;
- Vendor number;
- Prime contractor name;
- Prime contractor address;
- Project description; and
- Contract amount (note that when amounts were not provided Keen Independent identified other sources to determine appropriate contract or payment amounts to prime contractors).

The BuySpeed files included master order contracts, or indefinite quantity contracts, awarded in the study period, but did not report individual task orders issued under such contracts and did not report complete contract amounts. Therefore, for applicable contracts, payment information was gathered from the City's GreatPlains information system. For these contracts, if awarded over multiple years,

the study team allocated the total payment amount equally between each contract and year in the contract dataset.

During the study period, goods purchases under $20,000 were made by individual departments through purchase orders (POs). The City did not track POs in a central location and does not include POS in the BuySpeed data. Therefore, goods purchases examined as part of the disparity study only cover goods purchased under master agreements that were included in BuySpeed.

For a small number of larger goods purchases, the City uses existing State cooperative purchase agreements. Such purchases also do not appear in the BuySpeed data.

Payment information from GreatPlains. In addition to the BuySpeed contract data, Keen Independent examined GreatPlains data to identify payments made to each company with a master order contract in BuySpeed.

The GreatPlains report included the following information for vendor payments during our study period:

- Check date;
- Check amount;
- Recording number;
- Vendor ID; and
- Vendor name.

Keen Independent matched the BuySpeed prime contractors and vendors with GreatPlains payments based on vendor name as no other common identifier is shared between those two data systems. Overall, these master order contracts and related payments amounted to approximately $282 million in City spending for the study period, including expenditures for goods and other services otherwise not tracked in BuySpeed.

To ensure consistency, dollar amounts from GreatPlains were used rather than amounts from AFIN when both data sources were available for a contract.

Quickbase reports. Because the construction prime contracts shown in BuySpeed did not show full contract amounts, the study team gathered additional construction contract data from Capital Projects through its Quickbase project tracking system. The Quickbase report included approximately $340 million in capital project payments, including some payments on contracts awarded outside of the study period, which were excluded.

Capital Projects used Quickbase more systematically during the last few years of the study period.

The Quickbase reports included the following information:

- Project ID (this is unique to Capital Projects in Quickbase);
- Project name;
- Vendor name;
- Invoice number;
- Expenditure/Invoice date;
- Invoice amount;
- Date of check;
- Check number; and
- Check amount.

B2GNow data. Finally, Keen Independent obtained a B2GNow contracts report. B2GNow is the Office of Supplier Diversity's (OSD) DBE compliance software that tracks prime contracts and subcontracts, as well as payments from primes to DBE subcontractors.

OSD first used the B2GNow system in 2014. Therefore, much of the subcontract data examined in this study are for DBE subcontractors tracked for the last three years of the study period. However, OSD has been entering information for pre-2014 contracts as well, so there were some data for earlier contracts and subcontracts.

The B2GNow report showed the following information:

- B2GNow Project ID;
- Contract number (unique to OSD and not from BuySpeed);
- Contract title;
- Goal on contract;
- Contract start and end dates;
- Prime contractor name;
- Prime contract value;
- Total payments to prime;
- Subcontractor name;
- Subcontract value;
- Subcontractor payments;
- Solicitation type;
- Issuing agency;
- Vendor ID;
- B2GNow contract vendor ID;
- FEIN;
- Ownership of prime and subcontractor (this was not provided for all vendors); and
- Full contact information for each prime and subcontractor.

The B2GNow contract data included information for Restoration Tax Abatement projects.

C. Subcontract Invoice Data Collection

After identifying construction contracts awarded during the study period in Quickbase, the study team provided a list of project ID numbers to Capital Projects requesting the associated invoices and backup documentation. The City provided thousands of construction project invoices, which the study team reviewed for subcontractor activity and payments.

Overall, this effort revealed $16 million in subcontractor information for the first two years of the study period (2012 and 2013) not available from other sources, and $5 million in additional subcontract dollars for 2014 through 2016 (both DBE and non-DBE subcontractors).

D. Avoiding Duplication Between Data Sources

Considering the lack of common identifier between the four main data sources used, once contract data were combined, the study team had to individually review each prime contract and subcontract and determine any duplicate records based on information such as vendor name, address, project description, award year and issuing agency.

For example, the study team identified duplicate information for 2014 to 2016 contracts appearing in BuySpeed and the B2GNow data (which included prime contract data tracking).

Once Keen Independent had prepared the final prime contract and subcontract data, the study team subtracted the total dollars of subcontracts identified from the total contract value for those contracts that had subcontracts. The non-subcontracted portion of each contract is referred to as the "self-performed prime amount" used in the utilization analysis. This amount represents the total prime contract award or payment amount less related subcontract award or payment amount. Keen Independent made this calculation so that subcontract dollars would not be double-counted in the analysis. (The utilization of a prime contractor would only be counted as $6 million if it was a $10 million contract that had $4 million of subcontracts.)

E. Restoration Tax Abatement (RTA) Projects

The study team reviewed additional Office of Supplier Diversity utilization reports to City Council to determine DBE utilization on Restoration Tax Abatement (RTA) projects. These reports were provided for January 2015 to September 2017. Keen Independent analyzed the reports that fell within the study period, January 2015 to December 2016; results are presented in Appendix L.

F. Compilation of Data for Similar Construction Projects in the New Orleans Metro Area

Keen Independent analyzed the utilization of minority- and women-owned construction firms as contractors and design firms on non-City construction projects in the New Orleans area. The study team examined information from two data sources:

- Dodge Reports data for public and commercial construction projects within the New Orleans Metropolitan Area with a start date of January 2012 through December 2016 (excluding projects for the City).

- City building permits for public and commercial construction projects within the New Orleans city limits for January 2012 through December 2016 (excluding projects for the City).

Dodge Reports data. Keen Independent examined Dodge Reports data for public and commercial construction projects within the New Orleans Metropolitan Area that had start dates from January 2012 through December 2016. The Dodge Reports data included information on the value of the project.

Keen Independent purchased electronic Dodge Reports data from Dodge Data & Analytics. These data identify the general contractor or construction manager for each project. For some projects, the Dodge Reports data also identify the design firm. Data concerning dollars for the design work were not provided, so the analysis was based on number of design contracts rather than dollars.

Keen Independent obtained data on 2,208 non-City public and commercial construction projects. The study team was able to compile ownership information for companies listed on 2,174 projects.

The Dodge Reports data provided information for design contracts involved in these projects. Keen Independent analyzed 1,481 design contracts for which company ownership information could be determined.

City building permit data. Keen Independent examined building permits for public and commercial construction projects within New Orleans city limits from January 2012 through December 2016. These projects include new construction, alterations and repairs.

The City requires general contractors to obtain permits as well as companies performing certain specialty trades (e.g. electrical and mechanical). The data identified the specific type of work for the permit, which Keen Independent coded into standard work types.

At Keen Independent's request, the City of New Orleans provided electronic records for building permits issued by the City from January 2012 through December 2016. After excluding City properties and nonprofit firms, Keen Independent was able to determine ownership for the listed company on 36,201 permits.

G. Steps to the Utilization Analysis

For each firm identified as working on City contracts, or identified in the Dodge and City of New Orleans construction permits data, Keen Independent attempted to collect the race, ethnicity and gender of the business owner.

Sources of information to determine whether firms were owned by minorities or women (including race/ethnicity) included:

- Louisiana UCP DBE certification data showing race and gender information when available;
- Small Business Administration (SBA 8a) business program data;
- City of New Orleans SLDBE certification data;
- Study team telephone interviews with firm owners and managers conducted by Customer Research International;
- B2GNow contract data;
- The New Orleans Black Book; and
- Additional Keen Independent phone interviews and online research.

H. City Review

City staff along with standing project committees reviewed Keen Independent utilization data for contracts awarded during several stages of the study process.

Keen Independent also reviewed the information with the Oversight Committee and Internal Working Group at October 6, 2017 meetings in New Orleans.

The feedback gathered provided potential revisions to the ownership information. Upon review of this feedback, the study team decided to conduct the utilization analysis for City prime and subcontracts for the last three years of the study period (January 2014 to December 2016). These data appeared to be more complete and therefore more representative of actual procurement actions (both at the prime and subcontractor level).

APPENDIX D.
General Approach to Availability Analysis (draft, 01102018, not for public distribution)

The study team used an approach similar to a "custom census" to compile data on minority- and women-owned businesses and majority-owned firms available for City of New Orleans contracts and developed dollar-weighted estimates of MBE/WBE availability based on analysis of City prime contracts and subcontracts. Appendix D further explains the availability data collection methodology in nine parts:

A. Relevant geographic market area and types of work in City contracts;
B. General approach to collecting availability information;
C. Development of the survey instruments;
D. Execution of surveys;
E. Businesses included in the availability database;
F. MBE/WBE calculations on a contract-by-contract basis;
G. Dollar-weighted availability results;
H. Additional considerations related to measuring availability; and
I. The survey instrument.

A. Relevant Geographic Market Area and Types of Work in City Contracts

The first step in the availability analysis process was to determine the relevant geographic market area for City procurement and the specific subindustries within construction, professional services, goods and other services contracts that accounted for more City contract and subcontract dollars.

Relevant geographic market area. Analyses of local marketplace conditions and the availability of firms to perform City contracts focus on businesses within the "relevant geographic market area" for City of New Orleans contracts.

The relevant geographic market area for construction, professional services, goods and other services procurements was determined through the following steps:

- For each prime contractor and subcontractor, Keen Independent determined whether the company had a business establishment in the New Orleans Metropolitan Statistical Area[1] based upon City vendor records and additional research.
- Keen Independent then added the dollars for firms with New Orleans metropolitan area locations and compared the total with that for all companies.

[1] Corresponding to the federally-defined New Orleans-Metairie, LA Metropolitan Statistical Area (MSA), which includes Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, St. John the Baptist and St. Tammany parishes.

- The study team performed this analysis for all contracts and subcontracts for 2014-2016 examined in the utilization analysis.

The analysis described above found that 92 percent of City contract dollars went to firms with locations in the New Orleans Metropolitan Area.

As shown in Figure D-1, the share of procurement dollars going to companies with locations within the New Orleans metropolitan area was 97 percent for City goods purchases (types of procurements primarily made from a national market were previously excluded from the analysis). For construction contracts and subcontracts, 94 percent of City contract dollars went to businesses that had locations within the New Orleans metropolitan area.

Figure D-1.
Dollars of City of New Orleans prime contracts and subcontracts by location of firm, 2014–2016

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

Source:
Keen Independent from City of New Orleans contract data.

	Dollars (millions)	Percent of dollars
Construction		
New Orleans metro area	$ 196	94 %
Other regions	13	6
Total	$ 209	100 %
Professional services		
New Orleans metro area	$ 152	87 %
Other regions	22	13
Total	$ 173	100 %
Goods		
New Orleans metro area	$ 28	97 %
Other regions	1	3
Total	$ 29	100 %
Other services		
New Orleans metro area	$ 120	95 %
Other regions	7	5
Total	$ 127	100 %
Total		
New Orleans metro area	$ 495	92 %
Other regions	42	8
Total	$ 538	100 %

Construction contract dollars. Figure D-2 presents information about contract dollars for the different types of work on City construction contracts. Dollars for prime contracts are based on the portion of the contract self-performed by the prime (not subcontracted out).

Figure D-2.
City of New Orleans construction contract dollars by type of work, 2014–2016

Type of work	Total Dollars (1,000s)	Percent
Paving and other street work	$ 53,839	25.7 %
Office and public building construction	29,290	14.0
Excavation, site prep, grading and drainage	24,578	11.7
Multifamily housing construction	22,342	10.7
Sports and recreational facility construction	12,449	5.9
Electrical work	11,061	5.3
Construction materials and supplies	7,488	3.6
Plumbing, heating and air conditioning	6,572	3.1
Architecture and engineering	4,834	2.3
Sewer and other underground utilities work	3,549	1.7
Trucking	3,004	1.4
Waste disposal	2,412	1.2
Landscape contracting	2,210	1.1
Demolition and remediation	1,257	0.6
Environmental consulting	6	0.0
Other construction	13,456	6.4
Other non-construction	10,966	5.2
Total	$ 209,312	100.0 %

Source: Keen Independent from City of New Orleans contract data.

Professional services contract dollars. Figure D-3 examines contract dollars by type of work for City professional services contracts. A&E and information technology were the two largest categories.

Figure D-3.
City of New Orleans professional services contract dollars by type of work, 2014–2016

Type of work	Total Dollars (1,000s)	Percent
Architecture and engineering	$ 81,875	47.2 %
IT and data services	22,114	12.8
Legal services	17,809	10.3
Business research and consulting	13,432	7.7
Environmental consulting	6,896	4.0
Advertising, marketing, graphic design and public relations	4,656	2.7
Legal services	1,294	0.7
Accounting	800	0.5
Surveying and mapping	695	0.4
Other professional services	16,925	9.8
Other services	63	0.0
Construction-related	6,843	3.9
Total	$ 173,401	100.0 %

Source: Keen Independent from City of New Orleans contract data.

Goods procurement dollars. Figure D-4 presents dollars by type of goods purchased by the City during the study period. Fuel purchases accounted for over one-half of goods dollars. (Computers, off-the-shelf software and other goods usually purchased from a national market are excluded from the analysis as they are typically not procured from a local market.)

Figure D-4.
City of New Orleans goods contract dollars by type of work, 2014–2016

Type of work	Total Dollars (1,000s)	Percent
Fuel	$ 17,401	60.7 %
Janitorial supplies	6,552	22.9
Construction materials and supplies	1,162	4.1
Office supplies	117	0.4
Other goods	3,358	11.7
Construction-related	65	0.2
Total	$ 28,656	100.0 %

Source: Keen Independent from City of Saint Paul contract data.

Other services procurement dollars. Procurement dollars by type of other services work are shown in Figure 4-6. Waste disposal represented the largest area of spending for City other services procurements during the study period.

Figure D-5.
City of New Orleans other services contract dollars by type of work, 2014–2016

Type of work	Total Dollars (1,000s)	Percent
Waste disposal	$ 84,657	66.9 %
Janitorial services	4,577	3.6
Guards and security services	4,100	3.2
Staffing services	4,091	3.2
Landscape maintenance	2,195	1.7
Property management	1,456	1.2
Vehicle maintenance	1,095	0.9
Other services	18,851	14.9
Other professional services	5,275	4.2
Construction-related	241	0.2
Total	$ 126,538	100.0 %

Source: Keen Independent from City of New Orleans contract data.

B. General Approach to Collecting Availability Information

Keen Independent collected information from firms about their availability for City contracts through a telephone survey as well as online, through the study's website.

D&B call list. Keen Independent compiled the list of firms to be contacted in the phone survey from businesses that Dun & Bradstreet (D&B) identified in certain subindustries related to City procurement that had locations in the New Orleans metropolitan area (D&B's Hoover's business establishment database). D&B provided phone numbers for these businesses.

The availability analysis focused on companies in the New Orleans metropolitan area performing types of work most relevant to entity construction, professional services, goods and other services contracts (including subcontracts). As such, Keen Independent did not include all of the listings in the D&B database in the list of firms to be contacted in the availability survey, as described below.

Dun & Bradstreet Hoover's database. Keen Independent identified firms in the Dun & Bradstreet (D&B) database that had locations in the New Orleans metro area and performed work in relevant subindustries. (Dun & Bradstreet's Hoover's affiliate maintains the largest commercially-available database of U.S. businesses.)

Keen Independent identified relevant subindustries based on the types of work involved in City contracts. The study team totaled the prime contract and subcontract dollars awarded for different types of work during the study period to determine the worktypes accounting for the most procurement dollars within construction, professional services, goods and other services contracts. Keen Independent then chose the firms identified by D&B doing business in the construction, professional services, goods and other services subindustries matching those types of work.

There were some types of work excluded from the analysis because entities primarily procure them from national rather than local markets (purchase of computers from HP, for example).

D&B classifies types of work by 8-digit work specialization codes (based on SIC codes).[2] Figure D-6 on the following pages identifies the work specialization codes the study team determined were the most related to the City contracts and subcontracts based on analysis of contract dollars.

Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a "custom census."

D&B provided 13,292 unique business listings for the availability surveys.

[2] D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Figure D-6.
D&B 8-digit codes for availability list source

Construction

Demolition and remediation
17950000 Wrecking and demolition work
17959901 Concrete breaking for streets and highways
17959902 Demolition, buildings and other structures

Multifamily building construction
15220000 Residential construction, nec
15220101 Apartment building construction
15220102 Co-op construction
15220103 Condominium construction
15220106 Multifamily dwelling construction, nec
15220107 Multifamily dwellings, new construction
15220201 Remodeling, multifamily dwellings

Office and public building construction
15410000 Industrial buildings and warehouses
15419900 Industrial buildings and warehouses, nec
15419909 Renovation, remodeling and repairs, industrial buildings
15419910 Steel building construction
15420000 Nonresidential construction, nec
15420100 Commercial and office building contractors
15420101 Commercial and office building, new construction
15420102 Commercial and office buildings, prefabricated erection
15420103 Commercial and office buildings, renovation and repair
15420400 Specialized public building contractors
15420402 Fire station construction
15420403 Hospital construction
15429901 Custom builders, non-residential
15429903 Institutional building construction

Paving and other street work
16110000 Highway and street construction
16110100 Highway signs and guardrails
16110200 Surfacing and paving
16110202 Concrete construction, roads, highways, sidewalks, etc.
16110203 Grading
16110204 Highway and street paving contractor
16110205 Resurfacing contractor
16110206 Sidewalk construction
16110207 Gravel or dirt road construction
16119901 General contractor, highway and street construction
16119902 Highway and street maintenance
16119903 Highway reflector installation
17210303 Pavement marking contractor
17710200 Curb and sidewalk contractors
17710201 Curb construction
17710202 Sidewalk contractor
17710300 Driveway, parking lot and blacktop contractors
17710301 Blacktop (asphalt) work
73899921 Flagging service (traffic control)

Electrical work
17310000 Electrical work

Construction materials and supplies (see Goods)

Landscape maintenance (see Other services)

Landscape contracting
07820207 Sodding contractor
07820210 Turf installation services, except artificial
07829903 Landscape contractors
07830101 Planting services, ornamental bush
07830102 Planting services, ornamental tree
07830103 Pruning services, ornamental bush
07830104 Pruning services, ornamental tree

Plumbing, heating or air conditioning
17110000 Plumbing, heating, air-conditioning

Site prep, excavation, drainage and grading work
16290105 Drainage system construction
16290108 Irrigation system construction
16290112 Pond construction
16290400 Land preparation construction
16290401 Land leveling
16290402 Land reclamation
16290403 Rock removal
16290404 Timber removal
16299901 Blasting contractor, except building demolition
16299902 Earthmoving contractor
16299903 Land clearing contractor
16299904 Pile driving contractor
16299906 Trenching contractor
17940000 Excavation work
17949901 Excavation and grading, building construction
17950000 Wrecking and demolition work
17959901 Concrete breaking for streets and highways
17959902 Demolition, buildings and other structures
17959903 Dismantling steel oil tanks
17990900 Building site preparation

Sports and recreational facilities construction
15429905 Stadium construction
17990100 Athletic and recreation facilities construction
17990102 Court construction, indoor athletic
17990103 Playground construction and equipment installation
17990105 Swimming pool construction
16290302 Golf course construction
16290303 Tennis court construction

Sewer and other underground utilities work
16230000 Water, sewer and utility lines
16230300 Water and sewer line construction
16230301 Aqueduct construction
16230302 Sewer line construction
16230303 Water main construction
16239902 Manhole construction
16239903 Pipe laying construction
16239904 Pipeline construction
16239905 Pumping station construction
16239906 Underground utilities contractor

Trucking (see Other services)

Figure D-6.
D&B 8-digit codes for availability list source (cont.)

Professional services

Architecture and engineering

87110000	Engineering services
87110100	Sanitary engineers
87110101	Pollution control engineering
87110400	Construction and civil engineering
87110401	Building construction consultant
87110402	Civil engineering
87110403	Heating and ventilation engineering
87110404	Structural engineering
87119900	Engineering services, nec
87119901	Acoustical engineering
87119903	Consulting engineer
87120000	Architectural services
87120100	Architectural engineering
87120101	Architectural engineering
87110202	Mechanical engineering
87119905	Electrical or electronic engineering

Advertising, marketing and public relations

73110000	Advertising agencies
73119900	Advertising agencies, nec
73119901	Advertising consultant
87430000	Public relations services
87439900	Public relations services, nec
87480300	Communications consulting

IT and data services

73710000	Custom computer programming services
73710100	Custom computer programming services
73710101	Computer software systems analysis and design
73730200	Systems integration services
73730201	Local area network (LAN) systems integrator
73730202	Office computer automation systems integration
73740000	Data processing and preparation
73740100	Computer processing services
73749900	Data processing and preparation, nec
73749901	Data entry service
73749902	Data processing service
73749903	Data verification service
73749904	Keypunch service
73749905	Optical scanning data service
73749906	Tabulating service
73790000	Computer related services, nec
73790100	Computer related maintenance services
87480302	Telecommunications consultant
87480400	Systems analysis and engineering consulting services
87480401	Systems analysis or design
87480402	Systems engineering consultant

Accounting

87210000	Accounting, auditing and bookkeeping

Environmental consulting

87310302	Environmental research
87489905	Environmental consultant

Business research and consulting

87320000	Commercial nonphysical research
87320100	Market analysis, business and economic research
87320101	Business analysis
87320102	Business economic service
87320103	Business research service
87320104	Economic research
87320105	Market analysis or research
87320107	Opinion research
87320108	Research services, except laboratory
87320200	Commercial sociological and educational research
87320201	Educational research
87320202	Sociological research
87410000	Management services
87410100	Business management
87410101	Administrative management
87410103	Office management
87410104	Personnel management
87419900	Management services, nec
87420000	Management consulting services
87420104	Maintenance management consultant
87420105	Management engineering
87420200	Human resource consulting services
87420201	Compensation and benefits planning consultant
87420202	Incentive or award program consultant
87420203	Labor and union relations consultant
87420204	Personnel management consultant
87420205	Programmed instruction service
87420206	Training and development consultant
87420201	Compensation and benefits planning consultant
87489900	Business consulting, nec
87489902	Educational consultant

Legal services

81110000	Legal services
81110100	Specialized legal services
81110200	Specialized law offices, attorneys
81110201	Administrative and government law
81110208	Environmental law
81110210	Labor and employment law
81110214	Real estate law
81119901	General practice attorney, lawyer
81119902	General practice law office

Mapping and surveying

87130000	Surveying services
87139901	Surveying services, nec
87129902	Aerial digital imaging
73890800	Mapmaking services
73890801	Mapmaking or drafting, including aerial
73890802	Photogrammatic mapping

Figure D-6.
D&B 8-digit codes for availability list source (cont.)

Other services

Janitorial services

72170000	Carpet and upholstery cleaning
72170100	Carpet and upholstery cleaning on customer premises
72170101	Carpet and furniture cleaning on location
72170102	Upholstery cleaning on customer premises
73490000	Building maintenance services
73490100	Building and office cleaning services
73490101	Building cleaning service
73490102	Building maintenance, except repairs
73490103	Hospital housekeeping
73490104	Janitorial service, contract basis
73490105	Lighting maintenance service
73490106	Office cleaning or charring
73490107	School custodian, contract basis
73499902	Cleaning service, industrial or commercial

Guards and security services

73810100	Guard services
73810102	Burglary protection service
73810104	Protective services, guard
73810105	Security guard service
73820000	Security systems services
73829900	Security systems services, nec
73829901	Burglar alarm maintenance and monitoring
73829902	Fire alarm maintenance and monitoring
73829903	Protective devices, security
73829904	Confinement surveillance systems

Landscape maintenance

07820000	Lawn and garden services
07830000	Ornamental shrub and tree services

Property management

65310000	Real estate agents and managers
65310200	Real estate managers
74490000	Building maintenance, nec

Staffing services

73610000	Employment agencies
73610100	Placement agencies
73610101	Executive placement
73610102	Labor contractors (employment agency)
73630000	Help supply services
73630100	Labor resource services
73630101	Employee leasing service
73630102	Manpower pools
73630103	Temporary help service
73639900	Help supply services, nec
73639903	Engineering help service
73639907	Office help supply service

Trucking

42120000	Local trucking, without storage
42129904	Draying, local, without storage
42129905	Dump truck haulage
42129908	Heavy machinery transport, local
42129912	Steel hauling, local
42139902	Building materials transport
42139904	Heavy hauling, nec
42139905	Heavy machinery transport
42139908	Liquid petroleum transport, non-local

Vehicle maintenance

75320400	Exterior repair services
75320401	Body shop, automotive
75320402	Body shop, trucks
75320403	Bump shops, automotive repair
75320404	Collision shops, automotive
75320405	Tops (canvas or plastic), installation or repair
75329900	Top and body repair and paint shops, nec
75330000	Auto exhaust system repair shops
75360000	Automotive glass replacement shops
75370000	Automotive transmission repair shops
75380000	General automotive repair shops
75390000	Automotive repair shops, nec
75399900	Automotive repair shops, nec
75490102	Inspection and diagnostic service, automotive
75490103	Lubrication service, automotive

Waste disposal

49530000	Refuse systems
49530100	Hazardous waste collection and disposal
49530101	Acid waste, collection and disposal
49530102	Chemical detoxification
49530103	Radioactive waste materials, disposal
49530200	Refuse collection and disposal services
49530201	Garbage, collecting, destroying and processing
49530202	Liquid waste, collection and disposal
49530203	Rubbish collection and disposal
49530204	Street refuse systems
49530300	Nonhazardous waste disposal sites
49530301	Dumps, operation of
49530302	Sanitary landfill operation
49530303	Sludge disposal sites
49539900	Refuse systems, nec
49539901	Ashes, collection and disposal
49539902	Dead animal disposal
49539903	Incinerator operation
49539904	Medical waste disposal
49539905	Recycling, waste materials

Figure D-6.
D&B 8-digit codes for availability list source (cont.)

Goods

Construction materials and supplies	
29110501	Asphalt or asphaltic materials, made in refineries
29110505	Road materials, bituminous
29110506	Road oils
29110507	Tar or residuum
29510000	Asphalt paving mixtures and blocks
29520000	Asphalt felts and coatings
29520100	Roofing materials
30890300	Plastics hardware and building products
32419901	Masonry cement
32419902	Natural cement
32419903	Portland cement
32419904	Pozzolana cement
32510000	Brick and structural clay tile
32530000	Ceramic wall and floor tile
32550000	Clay refractories
32590000	Structural clay products, nec
32610000	Vitreous plumbing fixtures
32640000	Porcelain electrical supplies
32649900	Porcelain electrical supplies, nec
32649901	Cleats, porcelain
32649902	Ferrite and ferrite parts
32649903	Insulators, electrical, porcelain
32649904	Knobs, porcelain
32710000	Concrete block and brick
32720000	Concrete products, nec
32730000	Ready-mixed concrete
32810300	Building stone products
32810400	Slate products
32810600	Curbing, paving and walkway stone
32819900	Cut stone and stone products, nec
32990000	Nonmetallic mineral products
32990100	Mica products
32990200	Sand lime products
32990300	Ornamental and architectural plaster work
32999902	Floor composition, magnesite
33120400	Structural and rail mill products
33120500	Bar, rod and wire products
33120600	Pipes and tubes
33150000	Steel wire and related products
33170000	Steel pipe and tubes
33210000	Gray and ductile iron foundries
33210100	Cast iron pipe and fittings
33210101	Pressure pipe and fittings, cast iron
33210102	Sewer pipe, cast iron
33210103	Soil pipe and fittings, cast iron
33210104	Water pipe, cast iron
33219900	Gray and ductile iron foundries, nec
33219905	Manhole covers, metal
34290100	Furniture, builder and other household hardware
34290101	Builder hardware
34290102	Cabinet hardware
34290103	Door opening and closing devices, except electrical
34290200	Keys, locks and related hardware
34310000	Metal sanitary ware
34320000	Plumbing fixture fittings and trim
34330000	Heating equipment, except electric
34410000	Fabricated structural metal
34410200	Fabricated structural metal for bridges
34419900	Fabricated structural metal, nec
34420000	Metal doors, sash and trim
34430000	Fabricated plate work (boiler shop)
34440000	Sheet metalwork
35340000	Elevators and moving stairways
35640000	Blowers and fans

Construction materials and supplies (continued)	
50310000	Lumber, plywood and millwork
50320000	Brick, stone and related material
50330000	Roofing, siding and insulation
50390000	Construction materials, nec
50510000	Metals service centers and offices
50720000	Hardware
50740000	Plumbing and hydronic heating supplies
50750000	Warm air heating and air conditioning
50780000	Refrigeration equipment and supplies
52110000	Lumber and other building materials
52310000	Paint, glass and wallpaper
Fuel	
28690400	Fuels
29110100	Gases and liquefied petroleum gases
29110102	Liquefied petroleum gases, LPG
29110200	Light distillates
29110201	Alkylates
29110203	Jet fuels
29110204	Kerosene
29110205	Naphtha
29110206	Solvents
29110300	Intermediate distillates
29110301	Acid oil
29110302	Diesel fuels
29110303	Oils, fuel
29110304	Oils, illuminating
29110305	Oils, partly refined, sold for rerunning
29110306	Still oil
29110400	Heavy distillates
29110401	Mineral jelly
29110402	Mineral oils, natural
29110403	Mineral waxes, natural
29110404	Oils, lubricating
29110405	Paraffin wax
29110500	Residues
29110503	Greases, lubricating
29110504	Petrolatums, nonmedicinal
29110505	Road materials, bituminous
29920000	Lubricating oils and greases
51710000	Petroleum bulk stations and terminals
51720000	Petroleum product wholesalers,except bulk stations
51720100	Gases
51720200	Engine fuels and oils
51720202	Diesel fuel
51720203	Gasoline
51720204	Lubricating oils and greases
51720205	Service station supplies, petroleum
51729900	Petroleum products
59830000	Fuel oil dealers
59840000	Liquefied petroleum gas dealers
59890000	Fuel dealers, nec
Janitorial supplies	
50870300	Cleaning and maintenance equipment and supplies
50870304	Janitors supplies

Figure D-6.
D&B 8-digit codes for availability list source (cont.)

Goods (continued)

Industrial supplies

28410000	Soap and other detergents
28419900	Soap and other detergents, nec
28419901	Detergents, synthetic organic or inorganic alkaline
28419904	Scouring compounds
28419905	Soap, granulated, liquid, cake, flaked, or chip
28420102	Cleaning or polishing preparations, nec
28420103	Degreasing solvent
28420104	Drain pipe solvents or cleaners
28420106	Paint and wallpaper cleaners
28420107	Rust removers
28420109	Sweeping compounds, oil or water absorbent, clay or sawdust
28420111	Window cleaning preparations
28420203	Dusting cloths, chemically treated
28420301	Rug, upholstery, or dry cleaning detergents or spotters
28420400	Sanitation preparations, disinfectants and deodorants
28420401	Deodorants, nonpersonal
28420403	Industrial plant disinfectants or deodorants
28420404	Sanitation preparations
28429900	Polishes and sanitation goods, nec
28429901	Bleaches, household, dry or liquid
28430000	Surface active agents
28430100	Oils and greases
28430101	Soluble oils or greases
28430102	Sulfonated oils, fats, or greases
28210000	Plastics materials and resins
28420000	Polishes and sanitation goods
28910000	Adhesives and sealants
28990000	Chemical preparations, nec
51690000	Chemicals and allied products, nec

Office equipment

50440000	Office equipment
50440103	Cash registers
50440201	Blueprinting equipment
50440202	Brownprinting equipment
50440203	Duplicating machines
50440204	Microfilm equipment
50440205	Micrographic equipment
50440206	Mimeograph machines
50440208	Whiteprinting equipment
50440300	Typewriter and dictation equipment
50440301	Dictating machines
50440302	Typewriters
50440400	Addressing and mailing machines
50440401	Addressing machines
50440402	Mailing machines
50449902	Check writing, signing and endorsing machines

Office supplies

39530000	Marking devices
39550000	Carbon paper and inked ribbons
51110000	Printing and writing paper
51120000	Stationery and office supplies
51999918	Packaging materials
59430000	Stationery stores

Telephone surveys. Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with selected D&B businesses.

CRI used the following steps to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls were made on behalf of the City of New Orleans for purposes of expanding their lists of companies interested in performing their work.
- Some firms indicated in the phone calls that they did not perform relevant work or had no interest in work with the City, so no further survey was necessary. (Such surveys were treated as complete at that point.)

Other avenues to complete a survey. Businesses and individuals interested in doing business with the City that had registered as a vendor through BuySpeed received an email notification about the survey. Keen Independent gathered the list of registered vendors from BuySpeed, for relevant subindustries in construction, professional services, goods and other services. Using GovDelivery.com, the City of New Orleans informed those businesses of the telephone and online survey.

Additional outreach to businesses was conducted through online publications and the survey was advertised on the Home Page of the study website. Even if a company was not directly contacted by the study team, business owners could complete a survey for their company online or request a fax version of the survey.

The website survey successfully obtained an additional 158 completed surveys.

C. Development of the Survey Instruments

Keen Independent developed the survey instruments through the following steps:

- Keen Independent drafted an availability survey instrument; and
- The Internal Working Group (IWG) members had an opportunity to review the draft survey instrument.

The final survey instrument is presented at the end of this appendix.

Survey structure. The availability survey 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 survey.

Areas of survey questions included:

- Identification of purpose. The surveys began by identifying the City of New Orleans as the survey sponsor and describing the purpose of the study (i.e., "the information developed in this survey will add to the City of New Orleans' data on companies interested in working with the City" on construction, professional services, goods and other services contracts).

- Verification of correct business name. CRI confirmed that the business reached was in fact the business sought out.

- Contact information. CRI then collected complete contact information for the establishment and the individual who completed the survey.

- Verification of work related to public sector projects. For construction companies, the interviewer asked whether the organization does construction on public sector projects.

- Verification of for-profit business status. The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity. Interviewers continued the survey with businesses that responded "yes" to that question.

- Identification of main lines of business. The study team asked businesses to briefly describe their main line of business as an open-ended question. In a later section (B) for construction and professional services businesses, respondents then chose from a list of work types that their firm performed (interviewees could select multiple work types).

- Sole location or multiple locations. The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined relevant responses from multiple locations into a single record for multi-establishment firms.)

- Whether the company was an affiliate or independent business. The interviewer then asked if the company was a subsidiary or affiliate of another firm and, for those who answered "yes," asked for the name of the other firm.

- Past bids or work related to public agencies. The survey then asked about bids and work on past public sector contracts. The questions were asked in connection with both prime contracts and subcontracts.

- Qualifications and interest in future public sector work. The interviewer asked about businesses' qualifications and interest in future work with the City of New Orleans, and for some firms, whether they were interested in prime contracts and/or subcontracts. (Keen Independent did not ask companies providing goods whether they were interested in working as subcontractors as this is less relevant for goods companies than for construction or professional services.)

- Largest contracts. The study team asked businesses to identify the value of the largest contract or subcontract on which they had bid or had been awarded in the New Orleans metro area 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. For companies which identified as "other," Keen Independent reviewed and assigned the correct minority classification when possible and otherwise identified them as "Majority." For a duplicate response with "Don't know" or "Refused," priority was given to the responses with "yes" or "no" and specific racial information. Companies that did not provide answers to the ownership questions were called or researched by the study team.

- Business background. The study team asked respondents to identify the approximate year in which the business was established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.

- Potential barriers in the marketplace. Establishments were asked a series of questions on whether barriers came to mind about starting and expanding a business or achieving success in their industry in the New Orleans metro area. In addition, this section included a question asking whether interviewees would be willing to participate in an in-depth interview about marketplace conditions.

D. Execution of Surveys

Keen Independent contracted with Customer Research International (CRI), a survey research firm, to complete the telephone surveys and host the online surveys. CRI conducted availability surveys over the phone in September 2017. Interested firms could also complete surveys by visiting the disparity study website.

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 over the phone (in addition to any contacts via email). CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey.

Establishments that the study team successfully contacted. Figure D-7 presents the disposition of the businesses the study team attempted to contact for availability surveys.

The analysis in Figure D-7 is based on business information that Keen Independent obtained from D&B. The D&B list included 13,292 businesses.

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact turned out to be:

- Non-working phone numbers (1,171); or
- Wrong numbers for the desired businesses (12).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them.

Figure D-7. Disposition of attempts to survey business establishments

Note:

Study team made at least five attempts to complete an interview with each establishment.

Source:

Keen Independent from 2017 Availability Surveys.

	Number of firms	Percent of business listings
Beginning list (unique businesses)	**13,292**	
Less non-working phone numbers	1,171	
Less wrong number	12	
Firms with working phone numbers	**12,109**	**100 %**
Less no answer	5,745	
Less could not reach responsible staff member	894	
Less could not continue in English or Spanish	11	
Less unreturned fax/email	237	
Less said they already completed the survey but didn't	69	
Firms successfully contacted	**5,153**	**42.5 %**

Working phone numbers. As shown in Figure D-7, there were 12,109 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 (5,745 establishments).

- Could not reach responsible staff member. For a small number of businesses (894) a responsible staff person could not be reached to complete the survey after repeated attempts.

- Could not complete the survey in English or Spanish. Businesses with language barriers during an initial call were re-contacted by a Spanish-speaking CRI interviewer, when appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, the first questions of the instrument were asked in Spanish. If the firm appeared that it performed related work, the interviewer asked if the company would like to complete an email or faxed questionnaire (in English), which was then sent (not all firms completed the email or fax survey). This approach appeared to eliminate a majority of language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for only 11 companies (three of which were languages other than Spanish).

- Unreturned fax or email surveys. The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax. There were 237 businesses that requested such surveys but did not return them.

- Respondent indicated that they had already completed a survey. There were 69 respondents who said that they had already completed a phone or online survey that were not found within the responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 5,153 businesses, or 43 percent of those with working phone numbers.

Establishments included in the availability database. Figure D-8 presents the disposition of the 5,153 businesses the study team successfully contacted and how that number resulted in the 1,378 businesses the study team included in the availability database.

Figure D-8. Disposition of successfully contacted businesses

Source:

Keen Independent from 2017 Availability Surveys.

	Number of firms
Firms successfully contacted	**5,153**
Less businesses not interested	3,087
Less no longer in business	249
Firms that completed interviews about business characteristics	**1,817**
Less not a for-profit business	576
Less duplicate responses	21
Firms included in availability database	**1,220**
Plus available firms from online survey	**158**
Total firms included in availability database	**1,378**

Establishments not interested in discussing availability for public sector work. Of the 5,153 businesses that the study team successfully contacted, 3,087 were not interested in discussing their availability for City of New Orleans work. The study team interpreted those responses as "not interested" in City work. In Keen Independent's experience, those types of responses are often firms that do not perform relevant types of work for the public sector.

Establishments no longer in business. Of the 5,153 businesses that the study team contacted, 249 were no longer in business.

Businesses included in the availability database. Some establishments completing availability surveys were not included in the final availability database:

- Of the completed surveys, 576 indicated that they were not a for-profit business. This included non-profits, residences, and government agencies. Surveys ended when respondents reported that their establishments were not for-profit businesses or that there was no company at that phone number.
- There were 21 duplicate responses excluded at this point of the analysis (answers were consolidated).

After those final screening steps, the phone survey effort produced a database of 1,220 businesses potentially available for public sector work.

In addition to the D&B business list, an additional 158 responses were collected online, for an overall final database of 1,378 available businesses.

Coding responses from multi-location businesses. As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.

E. Businesses Included in the Availability Database

From the completed interviews, the study team developed a database of information for 1,378 businesses used in the availability analysis for City work.

The availability survey allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of City construction, professional services, goods and other services contracts; however, the data should not be considered an exhaustive list of every business that could potentially participate in entity contracts (and subcontracts).

Figure D-9 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. Of the 1,378 businesses reporting that they were available for public sector contracts and subcontracts in New Orleans, 614 (45%) were MBEs or WBEs.

Figure D-9.
Number of businesses included in the availability database

Note:

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

Source:

Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	311	22.6 %
Asian Pacific American-owned	22	1.6
Hispanic American-owned	68	4.9
Native American-owned	15	1.1
Total MBE	416	30.2 %
WBE (white women-owned)	198	14.4
Total MBE/WBE	**614**	**44.6 %**
Total majority-owned firms	764	55.4
Total firms	**1,378**	**100.0 %**

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

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

- Dollar-weighted availability estimates represent the percentage of City contract dollars that MBE/WBEs might be expected to receive based on their availability for specific types and sizes of AHA prime contracts and subcontracts.

- Keen Independent's approach to calculating availability was a bottom up, contract-by-contract process of "matching" available firms to specific prime contracts and subcontracts.

Steps to calculating availability. Only a portion of the businesses in the availability database were considered potentially available for any given City construction, professional services, goods or other services contract or subcontract. The study team first examined the characteristics of each specific procurement, including type of work, role (prime or subcontractor) contract size and contract date. The study team then identified businesses in the availability database that perform work of that type, size and role. (The process of considering availability did not include purchase size for goods procurements.)

Steps to the availability calculations. The study team identified the specific characteristics of each of the prime contracts and subcontracts included in the utilization analysis and then took the following steps to calculate availability for each contract element:

1. For each procurement, the study team identified businesses in the availability database that reported that they:
   - Are qualified and interested in performing work in that particular role, for that specific type of work, for the City of New Orleans; and
   - Except for goods firms, had bid on or performed work of that size in the New Orleans area in the past five years (or had done so based on contract data for the study period).

2. For the specific contract element, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in Step 1.

3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure D-10).

The study team repeated those steps for each contract and subcontract examined. The study team multiplied the percentage availability for each procurement by the dollars associated with the procurement, added results across all contracts and subcontracts, and divided by the total dollars for all procurements. The result was a dollar-weighted estimate of overall availability of MBE/WBEs and estimates of availability for each MBE/WBE group. Figure D-10 provides an example of how the study team calculated availability for a specific subcontract in the study period.

Figure D-10.
Example of an availability calculation

One of the City contracts examined was for landscape maintenance ($85,423). To determine the number of MBE/WBEs and majority-owned firms available for that contract, the study team identified businesses in the availability database that:

a. Reported qualifications and interest in working on City contracts;
b. Indicated that they performed landscape maintenance; and
c. Reported bidding on work of similar or greater size in the past five years.

There were 30 businesses in the availability database that met those criteria. Of those businesses, 16 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 53 percent (i.e., 16/30 = 53%).

Special considerations for supply contracts. When calculating availability for a particular type of goods, including construction materials supplies, Keen Independent counted as available all firms supplying those materials that reported qualifications and interest in that work for the City and indicated that they could provide supplies. Bid capacity was not considered in these calculations.

Improvements on a simple "head count" of businesses. Keen Independent used a "custom census" approach to calculating MBE/WBE availability for AHA-related work rather than using a simple "head count" of MBE/WBEs (i.e., simply calculating the percentage of all Atlanta area businesses that are minority- or women-owned). Using a custom census approach typically results in lower availability

estimates for MBEs and WBEs than a headcount approach. This is due in large part to Keen Independent's consideration of "bid capacity" in measuring availability and because of dollar-weighting availability results for each contract element (a large prime contract has a greater weight in calculating overall availability than a small subcontract). The largest contracts that MBE/WBEs have bid on or performed in the Atlanta area tend to be smaller than those of other businesses, as discussed in Appendix H. Therefore, MBE/WBEs are less likely to be identified as available for the largest prime contracts and subcontracts.

There are several important ways in which Keen Independent's custom census approach to measuring availability is more precise than completing a simple head count approach.

Keen Independent's approach accounts for qualifications and interest in City work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors, or both on City contracts, in addition to the consideration of several other factors related to prime contracts and subcontracts (e.g., contract types and sizes).

Keen Independent's approach accounts for the size of prime contracts and subcontracts. The study team considered the size — in terms of dollar value — of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., bid capacity) when determining whether to count that business as available for a particular contract element. When counting available businesses for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value in the New Orleans area in the previous five years, based on the most inclusive information from survey results.

Keen Independent's approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability.

Keen Independent's approach generates dollar-weighted results. Keen Independent examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to the overall availability estimates than those of relatively small contract elements.

G. Dollar-weighted Availability Results

Keen Independent used the approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for each of the contracts awarded by the City during the study period, including associated subcontracts. Figure D-11 presents overall dollar-weighted availability estimates by MBE/WBE group for those contracts.

This analysis provided benchmarks for the percentage of City contract dollars one might expect to go to MBE/WBEs given the current availability of firms to perform specific types and sizes of those prime contracts and subcontracts. The availability analysis considered bid capacity of firms, only counting a company as available for sizes of contracts it had been awarded or had bid on in the local marketplace in the previous five years (except for goods purchases).

Dollar-weighted availability results for all City contracts for 2014-2016 examined in the study. Figure D-11 shows the availability benchmarks for all City contracts and subcontracts examined in the study that were awarded from 2014 through 2016. As shown, minority- and women-owned firms might be expected to receive 40.66 percent of City contract dollars examined for those three years.

Figure D-11.
Percentage of City contract dollars for 2014-2016 that might be expected to go to MBE/WBEs based on availability analysis

	Total City Contracts
African American-owned	25.29 %
Asian American-owned	2.45
Hispanic American-owned	3.43
Native American-owned	0.38
Total MBE	31.55 %
WBE (white women-owned)	9.11
Total MBE/WBE	**40.66 %**

Source: Keen Independent from 2017 availability survey and analysis of City procurements for 2014-2016.

Dollar-weighted availability results for City construction, professional services, goods and other services contracts. Figure D-12 examines availability for construction, professional services, goods and other services contracts awarded by the City from 2014 through 2016.[3] As shown, MBE/WBE availability varies from 21 percent for goods to 48 percent for other services.

Figure D-12.
Percentage of City contract dollars for 2014-2016 that might be expected to go to MBE/WBEs, by industry, based on availability analysis

Race/ethnicity and gender	Construction	Professional Services	Goods	Other services
African American-owned	27.44 %	19.12 %	9.13 %	33.88 %
Asian American-owned	0.66	1.66	0.00	7.48
Hispanic American-owned	5.77	3.29	0.75	0.37
Native American-owned	0.10	0.09	0.00	1.34
Total MBE	33.97 %	24.16 %	9.88 %	43.06 %
WBE (white women-owned)	9.57	11.38	10.93	4.83
Total MBE/WBE	**43.54 %**	**35.54 %**	**20.81 %**	**47.89 %**

Source: Keen Independent from 2017 availability survey and analysis of City procurements for 2014-2016.

[3] Note that subcontracts are classified into the four industries based on the type of prime contract (e.g., an architecture and engineering subcontract on a construction project is included in the availability calculations for construction).

Dollar-weighted availability results for contractors and architects performing non-City projects. As discussed in Appendix C, Keen Independent also collected Dodge reports data and City permits information about the contractors and design firms involved in non-City construction contracts (excluding single family residential construction). Dodge data are for the New Orleans metropolitan area and City permit data are for projects requiring building permits located within city limits. The Dodge data provided both general contractor and architect information. Both the Dodge Reports and City permits data include projects from 2012 through 2016.

Figure D-13 shows the availability benchmarks for the Dodge construction contracts (not including subcontracts). MBE/WBE availability was about 20 percent.

Figure D-13.
Percentage of general contractor dollars on 2012-2016 New Orleans metropolitan area public and commercial construction projects that might be expected to go to MBE/WBEs based on availability analysis

	Number of Construction Projects
African American-owned	11.60 %
Asian American-owned	0.31
Hispanic American-owned	2.26
Native American-owned	0.28
Total MBE	14.46 %
WBE (white women-owned)	5.53
Total MBE/WBE	**19.99 %**

Note: Does not include City projects.

Source: Keen Independent from 2017 availability survey and analysis of Dodge Data & Analytics Dodge Reports data for 2012-2016.

Figure D-14 examines the share of public and commercial design contracts for construction projects in the New Orleans metropolitan area that might go to MBE/WBEs based on the 2017 availability survey and Dodge Reports information about those contracts. The benchmarks consider the type of work (A&E), type of contract (prime versus subcontracts) and year of award, but do not include analysis of size, as this was not provided in the Dodge Reports data. The availability benchmarks can be interpreted as the percentage of design contract awards for these projects that might go to MBE/WBEs if there were a level playing field, given the information known about the projects. MBE/WBE availability was 33 percent.

Figure D-14.
Percentage of design contracts on 2012-2016
New Orleans metropolitan area public and commercial
construction projects that might be expected to go to
MBE/WBEs based on availability analysis

	Number of Projects
African American-owned	13.89 %
Asian American-owned	3.88
Hispanic American-owned	1.91
Native American-owned	0.00
Total MBE	19.68 %
WBE (white women-owned)	13.11
Total MBE/WBE	**32.79 %**

Note: Does not include City projects.

Source: Keen Independent from 2017 availability survey and analysis of Dodge Data & Analytics Dodge Reports data for 2012-2016.

Figure D-15 examines the share of construction permits that might be expected to go to MBE/WBEs based on analysis of public and commercial building permits issued by the City of New Orleans from 2012 through 2016. The availability analysis considered the type of work involved and year of the project. (Data on size of project were not consistently provided in the permits records.) As shown, one might expect 46 percent of the building permits to be issued to MBE/WBE contractors based on the relative availability of minority- and women-owned companies for this work.

Figure D-15.
Percentage of 2012-2016 public and commercial building permits
within New Orleans city limits that might be expected to go to
MBE/WBEs based on availability analysis

	Number of Permits
African American-owned	30.04 %
Asian American-owned	0.05
Hispanic American-owned	3.64
Native American-owned	0.04
Total MBE	33.77 %
WBE (white women-owned)	12.66
Total MBE/WBE	**46.34 %**

Note: Does not include City projects.

Source: Keen Independent from 2017 availability survey and analysis of City of New Orleans building permit data for 2012-2016.

H. Additional Considerations Related to Measuring Availability

There are several additional considerations related to Keen Independent's approach to measuring availability.

Not providing a count of all businesses available for City work. The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of MBE/WBEs potentially available for City work. The purchase of a business list from Dun & Bradstreet appropriately focused on firms in subindustries accounting for the most dollars of combined City contracts. Subindustries that comprised a very small portion of City contract dollars were not included in the D&B list. Keen Independent did not purchase Dun & Bradstreet data for firms outside the New Orleans metro area. And, not all firms on the list of businesses completed surveys, even after repeated attempts to contact them. Therefore, the availability analysis did not provide a comprehensive listing of *every* business that could be available for all types of City work and should not be used in that way.

There were some firms receiving City work that did not complete an availability survey. Further research indicated that some were out of business by the time that the survey was conducted or might have been no longer interested in City work. Keen Independent's review of the firms receiving the most City work that were not on the availability list found that, in most cases, they were either located outside the New Orleans metro area or performed types of businesses outside the focus of the availability survey.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.[4]

Using D&B lists. Keen Independent obtained Dun & Bradstreet business listings for the New Orleans metro area. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in the New Orleans metro area due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.

- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. (Even though small, home-based businesses are more likely than large businesses to be minority- or women-owned, further research shows no evidence that MBE/WBEs are underrepresented in the final availability database.)

- Some businesses providing pertinent work or goods might not be classified as such in the D&B data.

Selection of specific subindustries. Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific

[4] Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise

D&B work specialization codes to define sets of establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent's outreach efforts towards businesses registered in BuySpeed and others in the metro area helps mitigate this potential concern.

Large number of companies reporting that they do not perform City work or were not interested in discussing public sector work. Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in discussing their availability for City contracts or subcontracts. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its call list.

There were some companies that had actually performed City contracts that responded in the availability survey that they were not interested in discussing their availability for City work or did not perform relevant work. These firms accounted for a small share of such responses (only four).

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Differences in success reaching potential interviewees; and
- Language barriers.

Research sponsorship. Interviewers introduced themselves by identifying the City of New Orleans as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

Differences in success reaching potential interviewees. There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences did not lead to lower estimates of MBE/WBE availability than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as plumbing, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). Therefore, response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for plumbing firms to be less likely to complete a survey is less important because the number of MBE/WBE plumbing firms is compared with the number of total plumbing firms when calculating availability for plumbing work.

Keen Independent examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete

telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that Dun & Bradstreet had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B source) that were successfully contacted, MBE/WBE firms were slightly more likely to be successfully contacted than majority-owned firms. There is no indication that that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study.

Potential language barriers. Because of the methods explained previously in this appendix, any language barriers were minimal. Only 11 establishments were not surveyed due to language barriers. Callbacks to firms when an initial call identified an individual who only spoke Spanish appeared to be effective.

Of the 3 not completed due to non-Spanish languages, there were multiple languages apparently spoken by the respondent (including languages from Europe other than Spanish). As a percentage of all working phone numbers, this is fewer than one company out of every 4,000. Therefore, study results do not appear to have been affected by conducting the principal portions of the availability survey in English.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of survey responses in a number of ways. For example:

- Keen Independent reviewed data from the availability surveys in light of information from other sources that the study team collected from the City. This includes data on the race/ethnicity and gender of the owners of DBE-certified businesses and was compared with survey responses concerning business ownership.
- Keen Independent compared survey responses about the largest contracts that businesses won during the past five years with actual City contract data.
- Keen Independent used publicly-available information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability surveys when answers were either incomplete or contradictory (including for duplicates).

Not using a "headcount" based on City lists. Keen Independent used a City list to notify firms that expressed interest in City work of the survey, but contacted other firms potentially available for those contracts by purchasing the larger D&B list. This helped capture firms that might have been discouraged from pursuing City work and would not have previously registered in BuySpeed.

Keen Independent's approach to measuring availability used in this study also incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses' qualifications, size of contracts they bid on and interest in City work, which allowed the study team to take a more refined approach to measuring availability.

A copy of the survey instrument for construction follows.

I. Availability Survey Instrument
New Orleans Office of Supplier Diversity Fax Survey (construction version)

The information developed in this survey will add to the City of New Orleans' data on companies interested in working with the City.

If you have any questions, please contact:

Judith Dangerfield
City of New Orleans
Office of Supplier Diversity
504-658-4904

Z5. What is the name of your business?

_____

Z8. Address of business (if multiple offices, choose a New Orleans Metro Area location if possible):

Street Address: _____

City (Required): _____

State (Required): _____

ZIP: _____

A1. Does your firm do any work related to public sector construction projects?

- ○ 01=Yes
- ○ 02=No
- ○ 98=Don't know

A2. Is your organization a business, as opposed to a non-profit organization, a foundation or a government office?

- ○ 01=Yes
- ○ 02=No
- ○ 98=Don't know

A4. What would you say is the main line of business of your company?

_____

A5. Is the address of your business, as provided earlier, the sole location for your business, or do you have offices in other locations?

- ○ 01=Sole location
- ○ 02=Have other locations
- ○ 98=Don't know

A6. Is your company a subsidiary or affiliate of another firm?

- ○ 01=Independent **[SKIP TO B1]**
- ○ 02=Subsidiary or affiliate of another firm
- ○ 98=Don't know **[SKIP TO B1]**

A7. What is the name of your parent company?

_____

B1. What types of work does your firm perform related to construction? Select all that apply.

- ○ 01=Office and public building construction
- ○ 02=Sports and recreational facility construction
- ○ 03=Multifamily housing construction
- ○ 04=Paving and other street work
- ○ 05=Demolition and remediation
- ○ 06=Excavation, site prep, grading and drainage
- ○ 07=Sewer and other underground utilities
- ○ 08=Landscape contracting
- ○ 09=Electrical work
- ○ 10=Plumbing, heating or air conditioning
- ○ 88=Other (Please specify)_____

_____

C1. In the New Orleans Metro Area in the past five years, has your company bid on or been awarded work on a public sector project?

- ○ 01=Yes
- ○ 02=No **[SKIP TO C3]**
- ○ 98=Don't know **[SKIP TO C3]**

C2. Were those bids or awards to work as a prime contractor, a subcontractor or a supplier?

- ○ 01=Prime contractor
- ○ 02=Subcontractor
- ○ 03=Supplier (or manufacturer)
- ○ 04=Prime and sub
- ○ 05=Sub and supplier
- ○ 06=Prime and supplier
- ○ 07=Prime, sub and supplier
- ○ 98=Don't know

C3. Is your company qualified and interested in working with the City of New Orleans as a prime contractor?

- ○ 01=Yes
- ○ 02=No
- ○ 98=Don't know

C4. Is your company qualified and interested in working with the City of New Orleans as a subcontractor?

- ○ 01=Yes
- ○ 02=No
- ○ 98=Don't know

The next questions are about the firm´s contract history.

D1. In rough dollar terms, what was the largest contract or subcontract your company was awarded (public or private) in the New Orleans Metro Area during the past five years? Includes contracts not yet completed.

- O 01=$100,000 or less
- O 02=$100,000 up to $500,000
- O 03=$500,000 up to $1 million
- O 04=$1 million up to $2 million
- O 05=$2 million up to $5 million
- O 06=$5 million up to $10 million
- O 07=$10 million up to $20 million
- O 08=$20 million up to $100 million
- O 09=$100 million or more
- O 97=None **[SKIP TO E1]**
- O 98=Don't know **[SKIP TO E1]**

D2. Was this the largest contract or subcontract that your company bid on or submitted quotes for (public or private) in the New Orleans Metro Area during the past five years?

- O 01=Yes **[SKIP TO E1]**
- O 02=No
- O 98=Don't know **[SKIP TO E1]**

D3. What was the largest contract or subcontract that your company bid on or submitted quotes for (public or private) in the New Orleans Metro Area during the past five years?

- O 01=$100,000 or less
- O 02=$100,000 up to $500,000
- O 03=$500,000 up to $1 million
- O 04=$1 million up to $2 million
- O 05=$2 million up to $5 million
- O 06=$5 million up to $10 million
- O 07=$10 million up to $20 million
- O 08=$20 million up to $100 million
- O 09=$100 million or more
- O 98=Don't know

The next questions are about the ownership of the business.

E1. A business is defined as woman-owned if more than half - that is, 51 percent or more - of the ownership and control is by women. By this definition, is your firm a woman-owned business?

- ○ 01=Yes
- ○ 02=No
- ○ 98=Don't know

E2. A business is defined as minority-owned if more than half - that is, 51 percent or more - of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is your firm a minority-owned business?

- ○ 01=Yes
- ○ 02=No **[SKIP TO F1]**
- ○ 98=Don't know **[SKIP TO F1]**

E3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American or Native American?

- ○ 01=African American
- ○ 02=Asian Pacific American
- ○ 03=Hispanic American
- ○ 04=Native American
- ○ 05=Subcontinent Asian American
- ○ 88=Other (Please specify)_____
- ○ 98=Don't know

The next questions are about the background of the business.

F1. About what year was your firm established?

_____

The next set of questions pertains to annual averages for your company for 2014 through 2016 (or just years in business if formed after 2014).

F3. On average, about how many employees did you have working out of just your location, identified earlier, from 2014 through 2016? (Includes employees who work at that location and those who work from that location.)

_____

F5. Roughly, what was the average annual gross revenue of your company, just considering your location, from 2014 through 2016?

- O 01=Less than $1 million
- O 02=$1 million to $5 million
- O 03=$5.1 million to $7.5 million
- O 04=$7.6 million to $11 million
- O 05=$11.1 million to $15 million
- O 06=$15.1 million to $20.5 million
- O 07=$20.6 million to 24 million
- O 08=$24.1 million to $27.5 million
- O 09=$27.6 million to $36.5 million
- O 10=$36.6 million to $38.5 million
- O 11=More than $38.5 million
- O 98=Don't know

F6. **[SKIP UNLESS A5=02("Have other locations")]**
About how many employees did you have, on average, for all of your locations from 2014 through 2016?

(Number of employees at all locations should not be fewer than at "just your location.")

_____

F7. **[SKIP UNLESS A5=02("Have other locations")]**
Roughly, what was the average annual gross revenue of your company, for all of your locations from 2014 through 2016 (or for the years your company was in business if started after 2014)?

(Revenue at all locations should not be less than at "just your location.")

- O 01=Less than $1 million
- O 02=$1 million to $5 million
- O 03=$5.1 million to $7.5 million
- O 04=$7.6 million to $11 million
- O 05=$11.1 million to $15 million
- O 06=$15.1 million to $20.5 million
- O 07=$20.6 million to 24 million
- O 08=$24.1 million to $27.5 million
- O 09=$27.6 million to $36.5 million
- O 10=$36.6 million to $38.5 million
- O 11=More than $38.5 million
- O 98=Don't know

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion in your industry, or with obtaining work. Think about your experiences in the past five years as you answer these questions.

G1A. Has your company experienced any difficulties in obtaining lines of credit or loans?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1B. Has your company obtained or tried to obtain a bond for a project?

- ○ 01=Yes
- ○ 02=No **[SKIP TO G1D]**
- ○ 97=Does not apply **[SKIP TO G1D]**
- ○ 98=Don't know **[SKIP TO G1D]**

G1C. Has your company had any difficulties obtaining bonds needed for a project?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1D. Have any prequalification requirements on projects presented a barrier to bidding or proposing?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1E. Have any insurance requirements on projects presented a barrier to bidding?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1F. Has the large size of projects presented a barrier to bidding?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1G. Has your company experienced any difficulties learning about bid opportunities directly with the City of New Orleans?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1H. Has your company experienced any difficulties with learning about bid opportunities in the private sector in general in the New Orleans Metro Area?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1I. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors in the New Orleans Metro Area?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1J. Has your company experienced any difficulties receiving payment in a timely manner from public agencies in the New Orleans Metro Area?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1K. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1L. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1M. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1O. Has your company experienced any difficulties with brand name specifications or other restrictions on bidding?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1P. Has your company experienced any difficulties obtaining supply or distributorship relationships?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G1Q. Has your company experienced any competitive disadvantages due to the pricing you get from your suppliers?

- ○ 01=Yes
- ○ 02=No
- ○ 97=Does not apply
- ○ 98=Don't know

G2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry?

_____

_____

_____

_____

_____

_____

_____

- ○ 97=Nothing/None/No comments
- ○ 98=Don't know

G3. Would you be willing to participate in a follow-up interview about any of these issues?

- ○ 01=Yes
- ○ 02=No

Just a few last questions:

H1. What is your name?

_____

H2. What is your position at the firm?

- ○ 01=Owner
- ○ 02=Principal
- ○ 03=CEO
- ○ 04=President
- ○ 05=Manager
- ○ 06=CFO
- ○ 07=Vice President
- ○ 08=Sales manager
- ○ 09=Office manager
- ○ 10=Assistant to Owner/CEO
- ○ 88=Other (Please specify)
  _____

H4. If you would like to receive information from the City of New Orleans, what mailing address should they use?

Street Address: _____

City: _____

State: _____

ZIP: _____

H5. What fax number should they use to fax any materials to you?

_____

H5P. What phone number should they use to contact you?

_____

H6. What e-mail address should they use to get any materials to you?

_____

Thank you for your time. This is very helpful for the City of New Orleans.

If you have any questions, please contact:

Judith Dangerfield
City of New Orleans
Office of Supplier Diversity
504-658-4904

APPENDIX E.
Entry and Advancement in the New Orleans Construction, Professional Services, Goods and Other Services 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 New Orleans.

Potential barriers to business formation include barriers associated with entry and advancement in the study industries. Appendix E examines recent data on education, employment, and workplace advancement that may ultimately influence business formation in the New Orleans the study industries.[2, 3]

Introduction

Keen Independent examined whether there were barriers to the formation of minority- and women-owned businesses in New Orleans. 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 study industries. Note that Keen Independent considers the entire New Orleans-Metairie Metropolitan Statistical Area (MSA) as part of the New Orleans marketplace. Any discussion of the New Orleans marketplace or New Orleans study industries in the following analysis includes firms and individuals located in the metropolitan area.

Appendix E uses 2011–2015 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that may influence whether individuals start construction or professional services businesses. Keen Independent studied barriers to entry into the study industries separately, because entrance requirements and opportunities for advancement differ for those industries.

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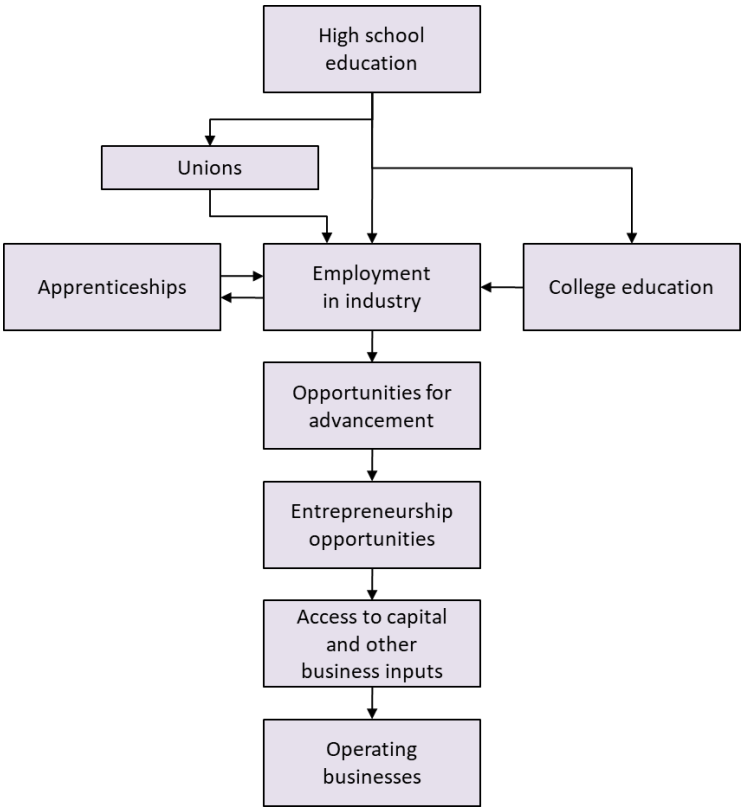
[1] *Sherbrooke Turf, Inc.*, 345 F.3d 964 (8th Cir. 2003) at 970 (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167 – 76); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005) at 992.

[2] In Appendix E and other appendices that present information about local marketplace conditions, information for "professional services" refers to architectural, professional services and related services. Each reference to "professional services" work pertains to those types of services. In the 2000 Census industrial classification system, "Architectural, professional services and related services" was coded as 729. In the 2011–2015 ACS, the same industry was coded as 7290.

[3] Several other report appendices analyze other quantitative aspects of conditions in the New Orleans 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 study industries in New Orleans-Metairie MSA

Source:
Keen Independent.



Representation of minorities among workers and business owners in the New Orleans metropolitan area. Keen Independent began the analysis by examining the representation of people of color and women among business owners and workers in the New Orleans metropolitan area. Figure E-2 shows the demographic distribution of business owners in the study industries, business owners in other industries (excluding the study industries) and the labor force, based on 2011–2015 ACS data. (Demographics of the workforce in each individual study industry are presented separately later in Appendix E.) Analysis for the New Orleans-Metairie MSA in 2011–2015 indicated the following:

- African Americans accounted for roughly 15 percent of business owners in both the study industries and all other industries, while accounting for approximately 31 percent of all workers.
- Asian Americans accounted for less than 2 percent of business owners in study industries compared to 7 percent of business owners in other industries and 3 percent of all workers.
- Hispanic Americans accounted for 12 percent of business owners in the study industries, 10 percent of business owners in other industries and 9 percent of the entire workforce.
- Native Americans and other minorities accounted for 1.2 percent of all business in the study industries as well as in other industries, and 0.8 percent of all workers.
- Non-Hispanic whites accounted for about 70 percent of business owners in the study industries, higher than the 67 percent of business owners in other industries and 56 percent of all workers.

Figure E-2.
Demographic distribution of business owners and the workforce in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	Workforce in all industries	Business owners in study industries	Business owners in all other industries
Race/ethnicity			
African American	31.4 %	15.0 % **	14.7 %
Asian American	3.2	1.8 **	7.2
Hispanic American	8.9	12.1 **	10.0
Native American or other minority	0.8	1.2	1.2
Non-Hispanic white	55.6	70.0 **	66.9
Total	100.0 %	100.0 %	100.0 %
Gender			
Female	48.0 %	21.0 % **	44.7 %
Male	52.0	79.0 **	55.3
Total	100.0 %	100.0 %	100.0 %

Note: *,** Denotes that the difference in proportions between business owners in the study industries 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 professional services industry includes "architectural, professional services and related services."

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata Sample (PUMS). The 2011–2015 raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Keen Independent analyzed demographic data to determine if the differences in business ownership in the study industries and business ownership in other industries by race and ethnicity were statistically significant. This analysis showed that relatively fewer African American and Asian American business owners in study industries compared with representation in the overall metropolitan area workforce.

There were relatively more Hispanic American business owners in the study industries compared to Hispanic American workforce participation.

Representation of women among business owners and workers in the New Orleans metropolitan area. Figure E-2 also examines the percentage of New Orleans-Metairie MSA business owners and workers who are women. In 2011–2015, women accounted for about 21 percent of business owners in the study industries, significantly less than their representation among business owners in other industries (45%) and representation in the overall workforce (48%).

In sum, New Orleans metropolitan area study industries had fewer businesses owners of color and who were women than what might be expected based on results for business owners in other industries and composition of the metropolitan area workforce.

General academic research on conditions in the New Orleans labor market. There is substantial academic research that has investigated race and gender based discrimination and its effect on opportunities for women and minorities in New Orleans. Recent research has focused on the effects of Hurricane Katrina and subsequent recovery efforts. In part because of the increased damage to African American communities and lack of government support, minority residents displaced by the hurricane were slower and less likely overall to return to New Orleans. After the hurricane the population of African Americans in New Orleans fell from 35.8 percent to 21.1 percent.[4] Women were also disproportionally affected compared to men. Female participation in the workforce fell from 50.5 percent to 47.3 percent. After Hurricane Katrina, women experienced a $1,300 drop in median income level while men saw a $3,000 increase.[5]

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 owned in the New Orleans construction industry in 2011–2015.

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 2011–2015 ACS data, 38 percent of construction workers in the New Orleans metropolitan area were high school graduates without post-secondary education and 23 percent had not graduated high school. Only 11 percent of construction workers had a four-year college degree or more, less than the 31 percent found for other industries combined.

Race/ethnicity. Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups in the metropolitan area, one would expect a relatively high representation of those groups in the New Orleans construction industry, especially in entry-level positions.

- Hispanic Americans represented a large population of workers without post-secondary education. In 2011–2015, only 21 percent of all Hispanic American workers 25 and older who worked in the New Orleans area held at least a four-year college degree, far below the figure for non-Hispanic whites 25 and older (40%).

- The percentage of Native American (30%) and African American (20%) workers in New Orleans with a four-year college degree was also substantially lower than that of non-minorities in 2011–2015.

However, 43 percent of Asian American workers 25 and older in New Orleans metropolitan area had at least a four-year college degree in 2011–2015. One might expect representation of Asian Americans in the New Orleans construction industry to be lower than in other industries given this level of education.

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[4] Williams, Erica, Olga Sorokina, Avis Jones-DeWeever, and Heidi Hartmann. 2006. *The Women of New Orleans and the Gulf Coast: Multiple Disadvantages and Key Assets for Recovery Part II. Gender Race and Class in the Labor Market*. Washington, D.C.: Institute for Women's Policy Research.

[5] *Ibid.*

Gender. Based on 2011–2015 data, 34 percent of female workers and 29 percent of male workers age 25 and older had at least a four-year college degree.

Apprenticeship and training. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, or through an apprenticeship or other training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.[6] In response to limited construction employment opportunities during the Great Recession, apprenticeship programs limited the number of new apprenticeships[7] as well as access to knowing when and where apprenticeships are occurring.[8] Apprenticeship programs often refer to an "out-of-work list" when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, some research indicates that apprentices are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.[9]

Employment. With educational attainment for minorities and women as context, Keen Independent examined employment in the New Orleans construction industry. Figure E-3 presents data from 2011–2015 to compare the demographic composition of the construction industry with the total workforce in the New Orleans metropolitan area.

Race/ethnicity. Based on 2011–2015 ACS data, people of color were 48 percent of those working in the New Orleans construction industry. Examination of the New Orleans construction industry workforce in 2011–2015 shows that:

- About 25 percent were Hispanic Americans;
- About 21 percent were African Americans;
- Asian Americans made up about 1 percent; and
- About 1 percent were Native Americans and other minorities.

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[6] Bureau of Labor Statistics, U.S. Department of Labor. (2013, Summer). "Apprenticeship: Earn while you learn." *Occupational Outlook Quarterly*, 3-5.

[7] 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.

[8] 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.

[9] *Ibid.*

In the New Orleans metropolitan area, Hispanic Americans were a significantly larger percentage of workers in construction (25%) than in other industries (8%). In contrast, African Americans (21%) and Asian Americans (1%) accounted for a smaller percentage of workers in the construction industry than in other industries (32% and 3%, respectively). Representation of other minorities, including Native Americans, was about the same in construction as all other industries (less than 1%). Figure E-3 provides these results.

The average educational attainment of African American workers is consistent with requirements for construction jobs, so education does not explain the relatively low number of African Americans employed in the New Orleans construction industry. Several studies throughout the United States have reported that race discrimination by construction unions has contributed to the low employment of African Americans in construction trades.[10] The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced in unions).

Asian Americans made up 1 percent of the construction workforce and 3 percent of all other workers in New Orleans in 2011–2015. The fact that Asian Americans were more likely than other groups to have a college education may explain part of that difference.

Figure E-3.
Demographics of workers in construction and all other industries in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	Construction		All other industries	
Race/ethnicity				
African American	21.2 %	**	32.4 %	
Asian American	1.3	**	3.4	
Hispanic American	24.5	**	7.5	
Native American or other minority	1.1		0.8	
Total minority	48.0 %		44.1 %	
Non-Hispanic white	52.0	**	55.9	
Total	100.0 %		100.0 %	
Gender				
Female	8.1 %	**	48.3 %	
Male	91.9	**	51.7	
Total	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 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[10] Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

Gender. There are large differences in the representation of women in construction compared with women in all industries. For 2011–2015, women represented 8 percent of all construction workers and 48 percent of workers in all other industries in the New Orleans-Metairie MSA.

Academic research concerning any effect of race- and gender-based discrimination in construction labor markets. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for 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.[11] 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.[12] 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.[13]

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.[14] 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.[15] 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.[16]

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.[17] 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

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[11] 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.

[12] 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.

[13] 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.

[14] *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.

[15] 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.

[16] National Women's Law Center, 2014. "Women in Construction: Still Breaking Ground"

[17] Applebaum, Herbert. 1999. Construction Workers, U.S.A. Westport: Greenwood Press.

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.[18] Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering into the industry.[19]

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.[20] Some researchers have historically argued that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.[21]

- 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.[22]

- 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.[23]

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[18] Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

[19] Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." Social Problems. 41(4): 562-584.

[20] U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042.

[21] *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).

[22] Applebaum. 1999. Construction Workers, U.S.A.

[23] *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.

- 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.[24]

- 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.[25]

- 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.[26]

More recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had "much higher enrollments and participation of women and ethnic/racial minorities" and exhibited "markedly better performance for all groups on rates of attrition and completion" compared to employer-run programs.[27]

- 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.[28]

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[24] Waldinger and Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction."

[25] 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).

[26] Feagin and Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems.* 41 (4): 562-584.

[27] Glover, Robert and Bilginsoy, Cihan. 2005. "Registered Apprenticeship Training in the U.S. Construction Industry." *Education & Training,* Vol. 47, 4/5, p 337.

[28] 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.

- 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.[29] Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

Recent union membership data support those findings as well. For example, 2012 Current Population Survey (CPS) data indicate that 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.[30] 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 African American workers and non-Hispanic white workers is 17 percent but the rate for Hispanic American construction workers is only 8 percent.

Union membership in Louisiana is below the national average and has been in decline. In 2016 Louisiana union membership accounted for 4.2 percent of all wage and salary employees, below the national average of 10.7 percent and sixth lowest in the nation. This was also a decline from 5.8 percent of unionized employees in 2015.[31] This is in part due to right-to-work legislation passed in 1976, which prohibits unionized workplaces from compelling employees to join unions. As of 2000, 14.9 percent of all construction workers in Louisiana were part of a union, below the national average of 20.8 percent. This is a decline from 25.4 percent in 1975.[32]

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 Louisiana 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."[33]

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[29] Bilginsoy, Cihan. 2005. "How Unions Affect Minority Representation in Building Trades Apprenticeship Programs." *Journal of Labor Research, 57(1).*

[30] 2012 Current Population Survey (CPS), Merged Outgoing Rotation Groups, U.S. Census Bureau and Bureau of Labor Statistics.

[31] "Union Members in Louisiana — 2016: Southwest Information Office." *U.S. Bureau of Labor Statistics*, U.S. Bureau of Labor Statistics, 7 Feb. 2017, www.bls.gov/regions/southwest/news-release/unionmembership_louisiana.htm.

[32] Belman, Dale, and Paula B. Voos. "Union wages and union decline: Evidence from the construction industry." *ILR Review* 60.1 (2006): 67-87.

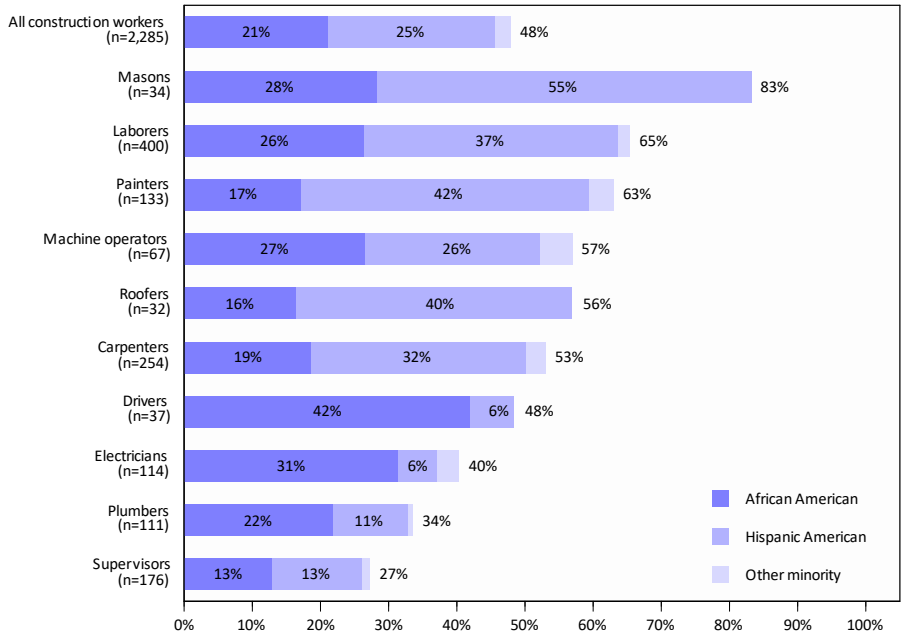
[33] Judd, Ron. 2015. "Seattle's Building Boom is Good News for a New Generation of Workers." *The Seattle Times, Pacific NW Magazine.* 6/25/2015. http://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-for-a-new-generation-of-workers/

Advancement. To research opportunities for advancement in the New Orleans construction industry, Keen Independent examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics.[34] Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2000 Census and 2011–2015 ACS for analysis.

Racial/ethnic composition of construction occupations. Figures E-4 presents the race/ethnicity of workers in select construction-related occupations in the New Orleans-Metairie MSA, including lower-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 presents those data for 2011–2015.

Based on 2011–2015 ACS data, there are large differences in the racial/ethnic makeup of workers in various trades related to construction in the New Orleans area. Overall, people of color comprised 48 percent of construction workers in 2011–2015, as shown in Figure E-4. Most minorities working in the New Orleans construction industry in 2011–2015 were Hispanic Americans and African Americans. The representation of Hispanic Americans was substantially greater among masons (55%), painters (42%), roofers (40%) and laborers (37%) than among all construction workers (25%). Hispanic Americans were only 11 percent of plumbers and 6 percent of electricians, which might be higher-skill occupations..

Figure E-4.
Minorities as a percentage of selected construction occupations in New Orleans-Metairie MSA, 2011–2015



Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[34] Bureau of Labor Statistics, U.S. Department of Labor. 2001. "Standard Occupational Classification Major Groups." Retrieved February 15, 2007, from http://www.bls.gov/soc/major_groups.htm.

African Americans comprised a high percentage of some trades (e.g., 42% of drivers and 31% of electricians) but a much lower share in other trades (e.g., only 19% of carpenters)

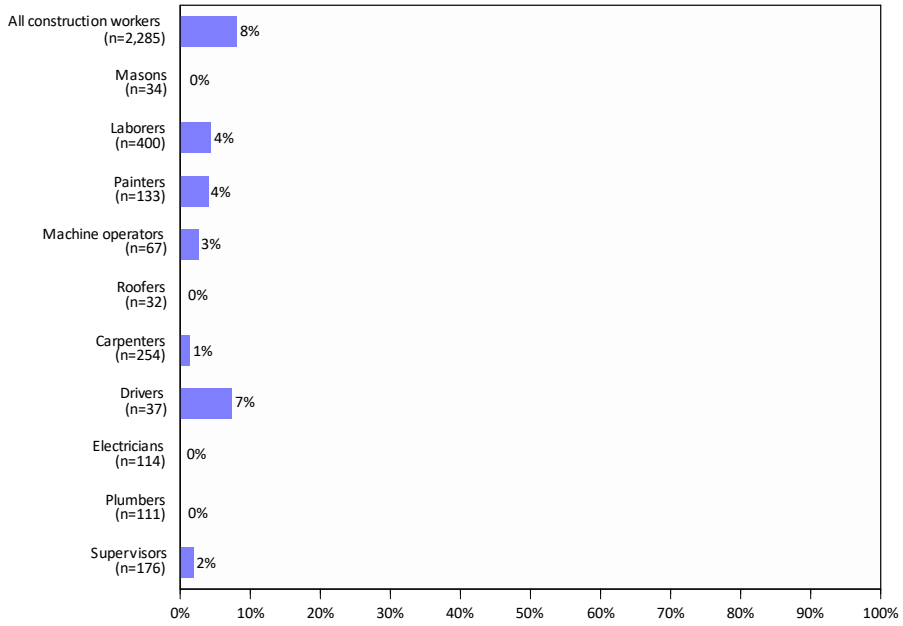
Among first-line supervisors in construction in the New Orleans-Metairie MSA, only 13 percent were African Americans and 13 percent were Hispanic Americans.

Gender composition of construction occupations. Keen Independent also analyzed the proportion of women in construction-related occupations. Figure E-5 summarizes the representation of women in select construction-related occupations for 2011–2015. Overall, women made up only 8 percent of workers in the industry in 2011–2015.

In 2011–2015, women accounted for no more than 4 percent of the workers in most of the largest construction trades. There were no women among the 291 workers in the ACS sample data for people working as masons, roofers, electricians and plumbers.

As shown in Figures E-5, women comprised just 2 percent of first-line supervisors in 2011–2015.

Figure E-5.
Women as a percentage of construction workers in selected occupations in New Orleans-Metairie MSA, 2011–2015



Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 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 New Orleans 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 2011–2015 for New Orleans and the nation, by racial, ethnic and gender group.

In 2011–2015, about 8 percent of non-Hispanic whites in the New Orleans construction industry were managers. Only 4 percent of African American workers and 2 percent of Hispanic American workers were managers, statistically significant differences from non-Hispanic whites.

Figure E-6.
Percentage of construction workers who worked as a manager in 2011–2015 in New Orleans-Metairie MSA

New Orleans-Metairie MSA	2011–2015
Race/ethnicity	
African American	4.1 % **
Hispanic American	2.2 **
All other minority	9.3
Non-Hispanic white	7.9 %
Gender	
Female	2.5 % **
Male	5.9
All individuals	5.6 %

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 2011–2015 ACS Public Use Microdata samples. The 2000 Census and 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Gender composition of managers. In the New Orleans construction industry in 2011–2015, there was a statistically significant difference in the percentage of women and men who were managers (see Figure E-6). About 6 percent of male construction workers were managers in 2011–2015. Less than 3 percent of female construction workers were managers during the same time period.

Professional Services Industry

Keen Independent also examined how education and employment may influence the number of potential minority and female entrepreneurs working in the New Orleans professional services industry.

Education. In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the professional services industry. Many occupations require at least a four-year college degree and some require licensure. According to the 2011–2015 ACS, 67 percent of individuals working in the New Orleans professional services industry had at least a four-year college degree. Approximately 5 percent had an associate's degree.

Therefore, any barriers to college education can restrict employment opportunities, advancement opportunities, and, consequently, business ownership in the professional services industry. Any disparities in business ownership rates in professional services-related work may in part reflect the lack of higher education for particular racial, ethnic and gender groups.[35] Keen Independent explores this issue below.

Race/ethnicity. Figure E-9 presents the percentage of workers age 25 and older with at least a four-year college degree in New Orleans. In New Orleans, about 40 percent of all non-Hispanic white workers age 25 and older had at least a four-year degree in 2011–2015. For other racial/ethnic groups, the data for New Orleans indicated the following percentage of workers age 25 and older with at least a four-year college degree:

- 43 percent for Asian Americans;
- 30 percent for Native Americans and other minorities; and
- 21 percent for Hispanic Americans; and
- 20 percent for African Americans.

The level of education necessary to work in the professional services industry may affect employment opportunities for groups for which college education lags that of non-Hispanic whites. In the New Orleans area, Native American, African American, and Hispanic American workers were far less likely to have at least a four-year college degree than non-minority workers.

Gender. Since 2000, the proportion of women in New Orleans with at least a four-year college degree has surpassed that of men; in 2011–2015, about 35 percent of women and 30 percent of men had a bachelor's degree.

[35] 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 with at least a four-year college degree in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	2011–2015
Race/ethnicity	
African American	19.9 % **
Asian American	43.2
Hispanic American	20.5 **
Native American or other minority	29.5 **
Non-Hispanic white	40.0 %
Gender	
Female	34.8 % **
Male	30.0
All workers	32.9 %

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 2011–2015 ACS Public Use Microdata samples. The 2000 Census and 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Employment. Figure E-10 compares the demographic composition of workers in the New Orleans professional services industry to that of all workers in New Orleans who are 25 years or older and have a college degree.

Race/ethnicity. In 2011–2015, about 23 percent of workers with a four-year college degree in the New Orleans professional services industry were people of color.

- 14 percent were African Americans;
- 6 percent were Hispanic Americans;
- About 3 percent were Asian Americans; and
- About 1 percent were Native Americans or other minorities.

In 2011–2015, all minorities considered together comprised a smaller percentage of workers in professional services-related industries (23%) than minority workers 25 and older with a four-year college degree in other industries (31%). This was primarily due to a smaller representation of African Americans and Asian Americans in the New Orleans professional services workforce than in other industries.

Gender. Compared to their representation among workers 25 and older with a college degree in all industries, relatively fewer women work in the professional services industry. In 2011–2015, women

represented about 47 percent of professional services-related workers in New Orleans with a four-year degree, and 53 percent of workers with a four-year college degree in other industries.

Figure E-10.
Demographic distribution of workers age 25 and older with a four-year college degree in professional services and all other industries in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	Professional services		All other industries
Race/ethnicity			
African American	14.1 %	**	19.7 %
Asian American	2.5	**	4.7
Hispanic American	5.7		5.6
Native American or other minority	0.9		0.8
Total minority	23.1 %		30.8 %
Non-Hispanic white	76.9	**	69.2
Total	100.0 %		100.0 %
Gender			
Female	47.4 %	**	53.1 %
Male	52.6	**	46.9
Total	100.0 %		100.0 %

Note: *,** Denote that the difference in proportions between workers in the professional services industry and workers in 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 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Goods Industry

Keen Independent also examined how workforce composition may affect the number of potential minority and female entrepreneurs in the goods industry.

Race/ethnicity. In 2011–2015, about 31 percent of the workforce in the New Orleans goods industry was represented by minorities. This was smaller than what might be expected given that people of color 45 percent of workers in other industries. This was primarily due to a relatively low representation of African Americans and Asian Americans in the New Orleans goods industry workforce.

Gender. Compared to representation of women among workers in all other industries, relatively few women work in the goods industry. In 2011–2015, women represented about 30 percent of goods-related workers in New Orleans, and 49 percent of workers in other industries.

Figure E-11 compares the demographic composition of workers in the New Orleans goods industry to that of workers in all other industries in the metropolitan area.

Figure E-11.
Demographic distribution of workers in goods and all other industries in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	Goods		All other industries
Race/ethnicity			
African American	22.3 %	**	31.8 %
Asian American	1.8	**	3.3
Hispanic American	6.4		9.0
Native American or other minority	0.5		0.8
Total minority	30.9 %		44.9 %
Non-Hispanic white	69.1	**	55.1
Total	100.0 %		100.0 %
Gender			
Female	29.5 %	**	48.7 %
Male	70.5	**	51.3
Total	100.0 %		100.0 %

Note: *,** Denote that the difference in proportions between workers in the goods industry and workers in all other industries for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Other Services Industry

Keen Independent also examined composition of the New Orleans area other services industry workforce (see Figure E-12).

Figure E-12 compares the demographic composition of workers in the New Orleans other services industry to other industries.

Race/ethnicity. In 2011–2015, about 56 percent of the workforce in the New Orleans other services industry was represented by minorities. Of that workforce:

- About 42 percent was made up of African Americans;
- About 1 percent was made up of Asian Americans;
- About 11 percent was made up of Hispanic Americans; and
- 1 percent was made up of Native Americans or other minorities.

In 2011–2015, all minorities considered together comprised a larger percentage of workers in other services-related industries (56%) than minority workers in all other industries (44%). This was primarily due to a large representation of African Americans in the New Orleans other services workforce compared to other industries.

Gender. Compared to their representation among workers in all other industries, relatively fewer women work in the other services industry. In 2011–2015, women represented about 31 percent of professional services-related workers in New Orleans with a four-year degree, and 49 percent of workers with a four-year college degree in other industries.

Figure E-12.
Demographic distribution of workers in other services and all other industries in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	Other services		All other industries
Race/ethnicity			
African American	42.4 %	**	30.7 %
Asian American	1.1	**	3.4
Hispanic American	11.1		8.8
Native American or other minority	1.0		0.8
Total minority	55.6 %		43.7 %
Non-Hispanic white	44.4	**	56.3
Total	100.0 %		100.0 %
Gender			
Female	30.6 %	**	49.1 %
Male	69.4	**	50.9
Total	100.0 %		100.0 %

Note: *,** Denote that the difference in proportions between workers in professional services 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 2011-2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Summary

Keen Independent's analyses suggest that there are barriers to entry for certain minority groups and for women in the construction, professional services, goods and other services industries in New Orleans, as summarized below.

Although racial and ethnic minorities comprise 44 percent of the New Orleans metropolitan area workforce, people of color are only 30 percent of business owners in the study industries. Women are 48 percent of the New Orleans metropolitan area workforce and 21 percent of the study industries business owners. Keen Independent explored whether barriers to entry and advancement might partly explain these overall differences.

- Fewer African Americans, Asian Americans and women worked in the New Orleans construction industry than what might be expected based on representation in the overall workforce.
- Fewer African Americans and women worked in the New Orleans professional services industry than what might be expected based on analyses of workers 25 and older with a four-year college degree.
- Representation of African American, Asian American and female employees in the New Orleans goods industry was also below what might be expected.
- There were fewer Asian Americans and women working in the New Orleans other services industry than might be anticipated from analysis of the metropolitan area workforce. Representation of African Americans, however, was higher in this industry than in the overall workforce.

Any barriers to entry in the study industries might affect the relative number of minority and female business owners in these industries in New Orleans.

Keen Independent also examined advancement in the New Orleans construction industry.

- Representation of minorities was lower in certain construction trades than others.
- Most construction trades are nearly all male workers.
- Compared to non-Hispanic whites working in the construction industry, African Americans Hispanic Americans were less likely to be first line supervisors and less likely to be managers. Relatively fewer women than men working in the construction industry were first line supervisors or managers.

Any barriers to advancement in the New Orleans construction industry may also affect the number of business owners among those groups.

Appendix F, which follows, examines rates of business ownership among individuals working in the New Orleans the study industries.

APPENDIX F.
Business Ownership in the New Orleans Construction, Professional Services, Goods and Other Services Industries

Nearly one in four construction workers in the New Orleans marketplace was a self-employed business owner in 2011–2015. More than one in five in the local professional services and other services industries was a self-employed business owner. In the goods industry, a mere 7 percent of workers were self-employed. Focusing on these study industries, Keen Independent examined business ownership for different racial, ethnic and gender groups in New Orleans using Public Use Microdata Samples (PUMS) from the 2011–2015 American Community Survey (ACS). (Appendix F uses "self-employment" and "business ownership" interchangeably.)

As discussed in Appendix E, Keen Independent considers the entire New Orleans-Metairie Metropolitan Statistical Area (MSA) to represent the New Orleans marketplace. Any discussion of the New Orleans marketplace or New Orleans construction and professional services industries in the following analysis also includes firms and individuals located in the entire metropolitan area.

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. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and regions.

Construction industry. Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business. In 2011–2015, 24 percent of workers in the New Orleans construction industry were self-employed compared with 10 percent of workers across all industries.

[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.

Figure F-1 shows the percentage of workers who were self-employed in the construction industry by group for 2011–2015 in New Orleans. In 2011–2015, disparities in business ownership rates were present between non-Hispanic whites (32%) and people of color:

- About 15 percent of African American workers in the construction industry were self-employed, less than the one-half the rate for non-Hispanic whites and a statistically significant difference.

- A similar percentage of Hispanic American workers in the construction industry were self-employed, also one-half the rate for non-Hispanic whites and a statistically significant difference.

However, 51 percent of Asian American workers in the construction industry were self-employed, more than the rate for non-Hispanic whites and statistically significant.

The business ownership rate among women was 18 percent in the construction industry, less than the 25 percent rate for men and a statistically significant difference.

Figure F-1.
Percentage of workers in the construction industry who were self-employed in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	2011–2015	
Race/ethnicity		
African American	14.8 %	**
Asian American	50.7	*
Hispanic American	15.3	**
Native American or other minority	28.1	
Non-Hispanic white	31.8	
Gender		
Female	18.4 %	*
Male	24.9	
All individuals	24.3 %	

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.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Professional services industry. Figure F-2 presents the percentage of workers who were self-employed in the professional services industry in 2011–2015. There were large differences in business ownership rates for minority groups compared with non-Hispanic whites (23%):

- About 10 percent of African American workers in the professional services industry were self-employed, less than one-half the rate for non-Hispanic whites and a statistically significant difference.

- About 4 percent of Asian American workers in the professional services industry were self-employed, one-fifth of the rate for non-Hispanic whites and a statistically significant difference.

For 2011 to 2015, about 15 percent of women in the professional services industry were self-employed compared with 26 percent of men. The difference between the two groups was statistically significant.

Figure F-2.
Percentage of workers in the professional services industry who were self-employed in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	2011–2015	
Race/ethnicity		
African American	10.3 %	**
Asian American	4.2	**
Hispanic American	21.1	
Native American or other minority	20.8	
Non-Hispanic white	22.9	
Gender		
Female	14.7 %	**
Male	25.8	
All individuals	20.6 %	

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.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Goods industry. Keen Independent also examined business ownership rates for people working in the New Orleans goods industry in 2011–2015, as shown in Figure F-3. About 1 percent of African American workers were self-employed, far less than the rate for non-Hispanic whites (9%) and a statistically significant difference.

About 8 percent of women in the professional services industry were self-employed, similar to the business ownership rate for men.

Figure F-3.
Percentage of workers in the goods industry who were self-employed in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	2011–2015
Race/ethnicity	
African American	1.1 % **
Asian American	7.2
Hispanic American	10.2
Native American or other minority	26.8
Non-Hispanic white	9.0
Gender	
Female	7.9 %
Male	7.2
All individuals	7.4 %

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.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Other services industry. Figure F-4 presents the percentage of workers who were self-employed in the other services industry in 2011–2015. About 15 percent of African American workers in the goods industry were self-employed, less than the rate for non-Hispanic whites (25.5%). The difference was statistically significant.

For 2011 to 2015, the self-employment rate of both men and women in the other services industry was approximately 21 percent.

Figure F-4.
Percentage of workers in the other services industry who were self-employed in New Orleans-Metairie MSA, 2011–2015

New Orleans-Metairie MSA	2011–2015
Race/ethnicity	
African American	14.7 % **
Asian American	32.7
Hispanic American	26.3
Native American or other minority	26.3
Non-Hispanic white	25.5
Gender	
Female	20.5 %
Male	21.3
All individuals	21.1 %

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.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 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] Access to capital is discussed in more detail in Appendix G.

[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).; 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.

[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).

- 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.[5] Recent research confirms a significant relationship between education and ability to obtain startup capital.[6]

- 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.[7]

- 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.[8]

Business Ownership Regression Analysis

Race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and familial status. 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.[9]

To further examine business ownership, Keen Independent developed multivariate regression models to explore patterns of business ownership in the New Orleans marketplace. 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.

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[5] 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.

[6] 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.

[7] 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.

[8] 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.

[9] 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.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity studies. For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and professional services industries persist after statistically controlling for race- and gender-neutral personal characteristics.[10, 11] 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.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or "explanatory" variables, such as:[12]

- 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 probit regression models using PUMS data from the 2011–2015 ACS:

- A model for the New Orleans construction industry that included 2,046 observations;
- A model for the New Orleans professional services industry that included 2,149 observations;
- A model for the New Orleans goods industry that included 1,099 observations; and
- A model for the New Orleans other services industry that included 1,495 observations.

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[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] 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).

New Orleans construction industry in 2011–2015. Figure F-5 presents the coefficients for the probit model for individuals working in the New Orleans construction industry in 2011–2015. 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, with this effect reversing for the oldest workers;
- Workers whose households contained more children and people over 65 were associated with a higher probability of business ownership; and
- Higher home values were associated with a *higher* probability of business ownership.

After statistically controlling for factors other than race, ethnicity and gender, there were statistically significant disparities in business ownership rates for African Americans, Hispanic Americans, and women working in the New Orleans construction industry. Members of these minority groups and women working in the industry were less likely to own construction businesses than similarly-situated non-minorities or men.

Figure F-5.
New Orleans construction industry business ownership model in New Orleans-Metairie MSA, 2011–2015

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-2.1880 **
Age	0.0617 **
Age-squared	-0.0006 **
Married	0.1310
Disabled	0.1920
Number of children in household	0.0873 **
Number of people over 65 in household	0.2190 **
Owns home	-0.0190
Home value ($0,000s)	0.0007 **
Monthly mortgage payment ($0,000s)	-0.0567
Interest and dividend income ($0,000s)	-0.0028
Income of spouse or partner ($0,000s)	-0.0007
Speaks English well	-0.0260
Less than high school education	-0.1580
Some college	0.1440
Four-year degree	-0.0909
Advanced degree	0.1670
African American	-0.5880 **
Asian American	0.6220 *
Hispanic American	-0.4050 **
Native American	-0.2020
Other minority	0.4400
Female	-0.3980 **

Probit modeling allows for further analysis of the disparities identified in business ownership rates for African Americans, Hispanic Americans and women. Keen Independent modeled business ownership rates for these groups as if they had the same probability of business ownership as similarly situated non-Hispanic white males.

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male construction workers in the dataset.[13]

2. After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of African American, Hispanic American and non-Hispanic white women working in the New Orleans 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 each group. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

Figure F-6 presents the simulated business ownership rate (i.e., "benchmark" rate) for African Americans, Hispanic Americans and non-Hispanic white women, and compares it to the actual, observed mean probabilities of business ownership for that group. The disparity index was calculated by taking the actual business ownership rate for each group, dividing it by that group's benchmark rate, and then multiplying the result by 100. The disparity index expresses the presence of an ownership disparity, or lack thereof, in terms of what would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers. Note that the "actual" self-employment rates are for the dataset used for these regression analyses and do not always exactly match results from the entire 2011–2015 data.

Figure F-6.
Comparison of actual business ownership rates to simulated rates for New Orleans construction workers in New Orleans-Metairie MSA, 2011–2015

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
African American	14.5 %	33.7 %	44
Hispanic American	15.4 %	28.3 %	54
Non-Hispanic white female	25.1 %	36.2 %	69

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[13] 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).

Results from these analyses show lower actual self-employment rates for African Americans, Hispanic Americans and non-Hispanic white women than the simulated ownership rates for these groups:

- African Americans. The actual business ownership rate for African Americans was 14.5 percent, which is less than the benchmark rate of 33.7 percent. Dividing 14.5 percent by 15.4 percent (and then multiplying by 100) gives a disparity index of 44, indicating that African Americans owned construction businesses at less than one-half of the rate that would be expected based on simulated ownership rates of non-Hispanic white males. Because the disparity index is less than 80, it indicates a "substantial" disparity (Appendix B has a discussion of the use of substantial disparity in court cases).

- Hispanic Americans. The actual ownership rate for Hispanic American workers in the construction industry was 15.4 percent, which is less than the benchmark rate of 28.3 percent. With a disparity index of 54, Hispanic Americans owned businesses at about one-half the rate that would be expected based on simulated ownership rates of non-Hispanic white male construction workers. The disparity was substantial.

- Women. The benchmark ownership rate for non-Hispanic white women was 36.2 percent, while the actual rate was only 25.1%. The corresponding disparity index was 69, indicating that business ownership for non-Hispanic white women in the construction industry was about two-thirds of the rate that would be expected based on simulated rates of non-Hispanic white males. The disparity was substantial.

New Orleans professional services industry in 2011 through 2015. Keen Independent developed a separate business ownership model for the New Orleans professional services industry using the same data source (2011–2015 ACS data).

Figure F-7 presents the coefficients from that probit model.[14] After controlling for personal and family characteristics, there were statistically significant disparities in business ownership rates for Asian Americans and women working in the New Orleans professional services industry.

[14] Speaking English well was excluded from the professional services industry model because nearly every individual in the dataset spoke English well.

Figure F-7.
New Orleans professional services industry business ownership model in New Orleans-Metairie MSA, 2011–2015

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-2.8610 **
Age	0.0315
Age-squared	0.0000
Married	0.0306
Disabled	0.2970 **
Number of children in household	0.0582
Number of people over 65 in household	0.0543
Owns home	0.0015
Home value ($0,000s)	0.0003 *
Monthly mortgage payment ($0,000s)	-0.0048
Interest and dividend income ($0,000s)	0.0019
Income of spouse or partner ($0,000s)	0.0008
Less than high school education	-0.2370
Some college	0.2620
Four-year degree	0.5820 **
Advanced degree	1.0290 **
African American	-0.1930
Asian American	-0.9180 **
Hispanic American	0.1130
Native American	0.8550
Other minority	-0.5280
Female	-0.2310 **

Using the same approach as for the construction industry, Keen Independent simulated business ownership rates in the professional services industry (see Figure F-8).

- Asian Americans. The benchmark ownership rate for Asian American businesses in the professional services industry was 14.7 percent, compared to an actual ownership rate of 5 percent. The disparity index was 34, which indicates a substantial disparity.

- Women. The disparity index for non-Hispanic white women compared with non-Hispanic white men was 83. The disparity for women was not substantial.

Figure F-8.
Comparison of actual business ownership rates to simulated rates for New Orleans workers in the professional services industry in New Orleans-Metairie MSA, 2011–2015

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
Asian American	5.0 %	14.7 %	34
Non-Hispanic white female	16.4 %	19.8 %	83

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

New Orleans goods industry in 2011 through 2015. After controlling for personal and family characteristics, there were statistically significant disparities in business ownership rates for African Americans working in the New Orleans goods industry, as shown in Figure F-9[15].

Figure F-9.
New Orleans goods industry business ownership model in New Orleans-Metairie MSA, 2011–2015

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-3.1390 **
Age	0.0390
Age-squared	-0.0003
Married	0.1740
Disabled	0.0380
Number of children in household	-0.0036
Number of people over 65 in household	0.1970
Owns home	0.0927
Home value ($0,000s)	0.0005
Monthly mortgage payment ($0,000s)	0.0161
Interest and dividend income ($0,000s)	0.0064 *
Income of spouse or partner ($0,000s)	0.0013
Less than high school education	0.0961
Some college	0.2830 *
Four-year degree	0.1060
Advanced degree	0.6230 *
African American	-0.8800 **
Asian American	0.0972
Hispanic American	0.2770
Native American	0.9500
Other minority	-3.9750 **
Female	-0.1530

Figure F-10 presents actual and simulated ("benchmark") business ownership rates for African Americans working in the New Orleans goods industry. The benchmark ownership rate for African American businesses in the goods industry was 6.1 percent, compared to an actual ownership rate of 0.9 percent. This is a disparity index of 14, which indicates a "substantial" disparity.

Figure F-10. Comparison of actual business ownership rates to simulated rates for New Orleans workers in the goods industry in New Orleans-Metairie MSA, 2011–2015

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
African American	0.9 %	6.1 %	14

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[15] Speaking English well was excluded from the goods industry model because nearly every individual in the dataset spoke English well.

New Orleans other services industry in 2011 through 2015. Figure F-11 presents the coefficients from the modeling of business ownership for people working in the other services industry[16]. After controlling for other characteristics, there were statistically significant disparities in business ownership rates among African Americans working in the New Orleans other services industry.

Figure F-11.
New Orleans other services industry
business ownership model in
New Orleans-Metairie MSA, 2011–2015

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-3.2380 **
Age	0.1080 **
Age-squared	-0.0011 **
Married	0.0866
Disabled	-0.0095
Number of children in household	-0.0424
Number of people over 65 in household	-0.0756
Owns home	0.0461
Home value ($0,000s)	0.0005
Monthly mortgage payment ($0,000s)	0.0280
Interest and dividend income ($0,000s)	0.0108
Income of spouse or partner ($0,000s)	-0.0012
Less than high school education	0.1700
Some college	-0.0781
Four-year degree	0.0912
Advanced degree	0.0497
African American	-0.3490 **
Asian American	0.5100
Hispanic American	0.1820
Native American	0.3220
Other minority	0.2150
Female	-0.1030

Figure F-12 presents actual and simulated ("benchmark") business ownership rates for African Americans in the other services industry. The benchmark ownership rate for African Americans in the other services industry was 22.1 percent, compared to an actual ownership rate of 14.5 percent. This is a disparity index of 66, which indicates a substantial disparity.

Figure F-12. Comparison of actual business ownership rates to simulated rates for New Orleans workers in the other services industry in New Orleans-Metairie MSA, 2011–2015

Group	Self-employment rate		Disparity index
	Actual	Benchmark	(100 = parity)
African American	14.5 %	22.1 %	66

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2011–2015 ACS Public Use Microdata samples. The 2011–2015 raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[16] Speaking English well was excluded from the other services industry model because nearly every individual in the dataset spoke English well.

Summary of Business Ownership in the New Orleans Metropolitan Statistical Area

There would be more minority- and women-owned firms in the New Orleans marketplace but for disparities in business ownership rates.

- There were statistically significant disparities in business ownership rates for African Americans, Hispanic Americans and women working in the construction industry in 2011–2015. After statistically controlling for factors including education, age, family status and homeownership, statistically significant disparities in business ownership rates persisted for these groups. These disparities were substantial.

- Fewer African Americans, Asian Americans and women in the professional services industry owned businesses than non-minorities and men (statistically significant differences). After controlling for education, age and other personal characteristics, a substantial disparity in firm ownership persisted for Asian Americans working in the industry. There was also a disparity for women in the professional services industry after controlling for other factors.

- There was a statistically significant disparity in the business ownership rate for African Americans working in the goods industry in the New Orleans metropolitan area. This disparity persisted in the statistical model that accounted for other personal characteristics. The disparity was substantial.

- There was also a statistically significant disparity in the business ownership rate for African Americans working in the New Orleans other services industry, which persisted after additional statistical modeling. The disparity was substantial.

APPENDIX G.
Access to Capital for Business Formation and Success in New Orleans (draft, 01102018, not for public distribution)

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 start-up capital can affect long-term business success and, on average, minority- and women-owned businesses appear to have less start-up capital than non-Hispanic white-owned businesses and male-owned businesses.[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 start-up capital of $25,000 or more.[4]
- Only 17 percent of African American-owned businesses indicated a comparable amount of start-up capital, and disparities in start-up capital were identified for every other minority group except Asian Americans.
- Nineteen percent of female-owned businesses reported start-up capital of $25,000 or more compared with 32 percent of male-owned businesses (not including businesses that were equally owned by men and women).

Race- or gender-based discrimination in start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.[5] Therefore, any discrimination in the traditional means to obtain start-up capital (equity in a home and the ability to borrow against that equity) could also have long-term impacts on business ownership and success. Housing discrimination and discrimination in mortgage lending decades ago could have lasting effects today for these current or potential business owners.

Appendix G presents information about homeownership and mortgage lending, because home equity is often an important source of capital to start and expand businesses.

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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] Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

Homeownership and Mortgage Lending

The study team analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Homeownership. Wealth created through homeownership can be an important source of capital to start or expand a business.[6] 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]

Barriers to homeownership and home equity growth for minorities and women can affect business opportunities by constraining their available funding. Similarly, barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. The study team analyzed homeownership rates and home values before considering loan denial and subprime lending.

Homeownership rates. Many studies have documented past discrimination in the national housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.[11] For example, in the past, a woman's participation in homeownership was secondary to that of her husband and parents.[12] The study team used 2011-2015 American Community Survey (ACS) data to examine homeownership rates in the New Orleans Metropolitan Statistical Area (MSA).[13] Figure G-1 presents homeownership rates for each racial/ethnic group in the New Orleans MSA that were homeowners in 2011 through 2015.

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[6] The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

[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.

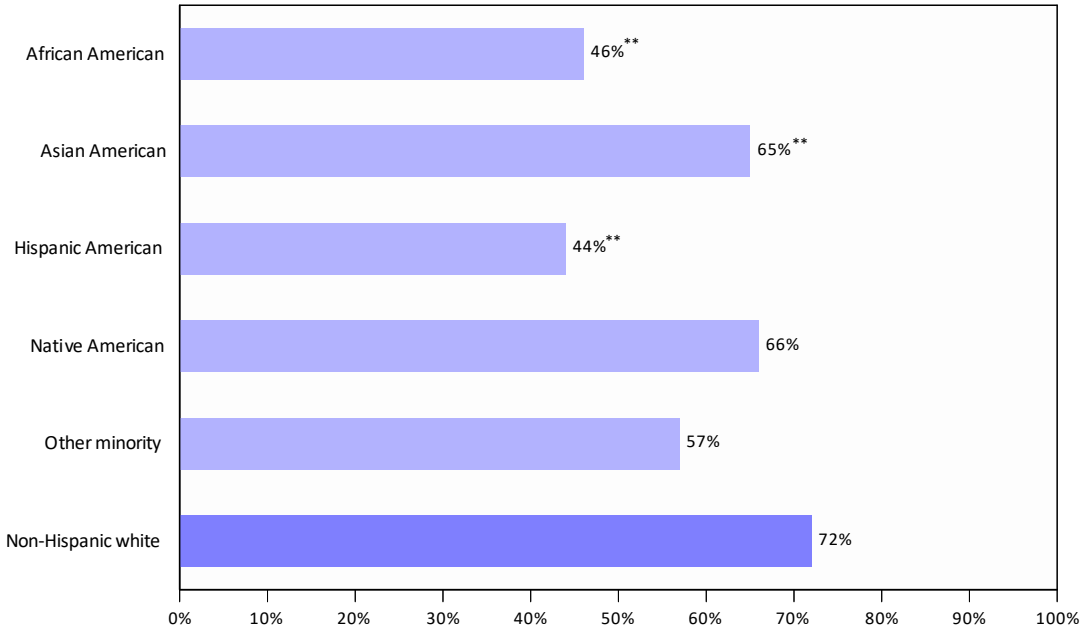
[10] Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth and Discrimination." *Journal of Business.* 78: 2153-2178.

[11] Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review.* 72: 166-170.

[12] Card, Emily. 1980. "Women, Housing Access, and Mortgage Credit." *Signs.* 5: 215-219.

[13] For the purposes of the marketplace analyses in this study (Appendices E, F, G and H), the New Orleans area corresponds to the federally-defined New Orleans – Metairie Metropolitan Statistical Area (MSA).

Figure G-1.
Homeownership rates, 2011–2015



Note: 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 2011-2015 ACS Public Use Microdata sample. The 2011-2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

As shown in the figure above, about three-quarters of non-Hispanic white households in the New Orleans MSA were homeowners. Disparities in homeownership rates between racial/ethnic minorities and non-minorities were apparent in 2011 through 2015.

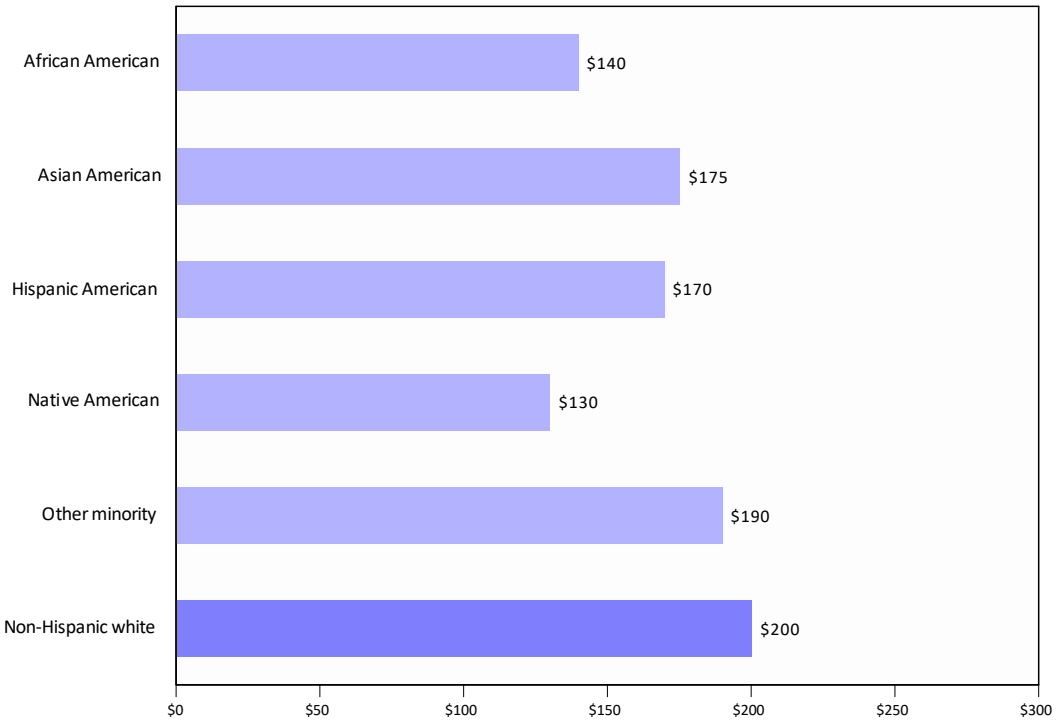
- About 46 percent of African American households were homeowners, compared to 72 percent of non-Hispanic white households;
- About 44 percent of Hispanic American households were homeowners;
- About two-thirds of Native American owned homes; and
- About 65 percent of Asian American households owned homes.

Lower rates of homeownership may reflect lower incomes for minorities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. An older study found that the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.[14]

Home values. Research has shown homeownership and home values to be direct determinants of available capital to form or expand businesses.[15] Using 2011 through 2015 ACS data, the study team compared median home values by racial/ethnic group.

Figure G-2 presents median home values by racial/ethnic groups in New Orleans in 2011 through 2015. African Americans ($140,000), Hispanic Americans ($170,000), Asian Americans ($175,000) and Native Americans ($130,000) had lower median home values than non-Hispanic whites ($200,000) in New Orleans.

Figure G-2.
Median home values, 2011–2015, thousands



Note: The sample universe is all owner-occupied housing units.

Source: Keen Independent Research from 2011-2015 ACS Public Use Microdata sample. The 2011-2015 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[14] Jackman. 1980. "Racial Inequalities in Home Ownership."

[15] Fairlie, Robert W. and Harry A. Krashinky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." IZA Discussion Paper. No. 2201.

Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid $335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of "statistically significant disparities by race and ethnicity" among Countrywide Financial customers.[16]

The study team explored market conditions for mortgage lending in New Orleans. 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.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2007, 2011 and 2015. Although 2015 provides a more recent representation of the home mortgage market, the 2007 data represent a more complete data set from before the recent mortgage crisis. Many of the institutions that originated loans in 2007 were no longer in business by the 2015 reporting date for HMDA data.[18] For example, in 2007, applications were distributed among 8,610 lenders nationwide, while in 2015 the number of lenders had fallen to 6,913.[19] In addition, the percentage of government-insured loans, which the study team did not include in its analysis, increased dramatically between 2007 and 2015, decreasing the proportion of total loans that the study team analyzed in the 2015 data.[20]

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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] Depository institutions were required to report 2015 HMDA data if they had assets of more than $443 million on the preceding December 31 ($36 million for 2007 and $40 million for 2011), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan obligations originations in the past year or b.) exceeding $25 million, had a home or branch office located in an MSA (or receive applications for, purchase or originated five or more home purchase loans mortgages in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

[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 at: http://www.federalreserve.gov/pubs/bulletin/2009/pdf/hmda08draft.pdf.

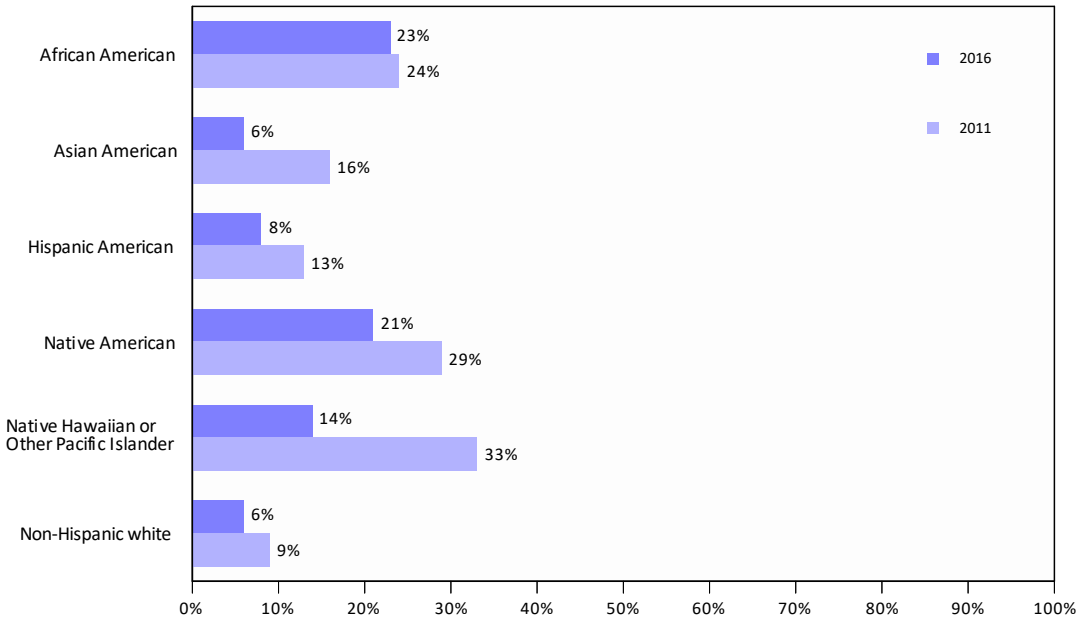
[19] HMDA did not provide the number of total lenders in the 2016 press release, which describes the 2015 data, as had been done in previous years.

[20] Loans insured by government programs have surged since 2006. In 2006, about 10 percent of first lien home loans were insured by a government program. More than half of home loans were insured by the government in 2009. Source: "The 2009 HMDA Data: The Mortgage Market in a Time of Low Interest Rates and Economic Distress," *Federal Reserve Bulletin*. December 2010, pp. A39-A77.

Mortgage denials. The study team examined mortgage denial rates on conventional loan applications made by high-income households. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.[21] 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.[22]

Figure G-3 presents loan denial results for New Orleans in 2011 and 2016. Except for Asian Americans having equal loan denial rates in 2016, all minority groups exhibited higher loan denial rates for high-income households compared with non-Hispanic white applicants in 2011 and 2016. Even as loan denial rates dropped in 2016, loan denial remained higher for all minority loan applicants except Asian Americans relative to non-Hispanic white applicants. For example, the denial rate in 2016 was much higher for Native American (21%) and African American (23%) loan applicants than non-Hispanic white applicants (6%).

Figure G-3. Denial rates of conventional purchase loans to high-income households, New Orleans, 2011 and 2016



Note: High-income borrowers are those households with 120% or more than the HUD area median family income (MFI). 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, 2016 and 2011

[21] Median family income for the City of New Orleans was about $51,286 in 2016 and $46,035 in 2011. Source: US Census Bureau American Fact Finder.

[22] For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

Additional research. Several national studies have examined disparities in loan denial rates and loan amounts for minorities in the presence of other influences. For example:

- A study by the Federal Reserve Bank of Boston is one of the most cited studies of mortgage lending discrimination.[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]
- Findings from a Midwest study indicate a relationship between race and both the number and size of mortgage loans. Data matched on socioeconomic characteristics revealed that African American borrowers across 13 census tracts received significantly fewer loans and of smaller sizes compared to their white counterparts.[27]

Subprime lending. Loan denial is only one of several ways minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Until recent years, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for $330 billion of U.S. mortgages in 2003, up from $35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.[28] With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans also became available to homeowners who did not want to make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost above that for which they would qualify from a prime lender.[29] Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure.

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[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] Avery, Brevoort, and Canner, "The 2006 HMDA Data." Federal Reserve Bulletin, December 2007, pp. A73-A109.

[29] Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure." *Federal Reserve Bank of Boston*.

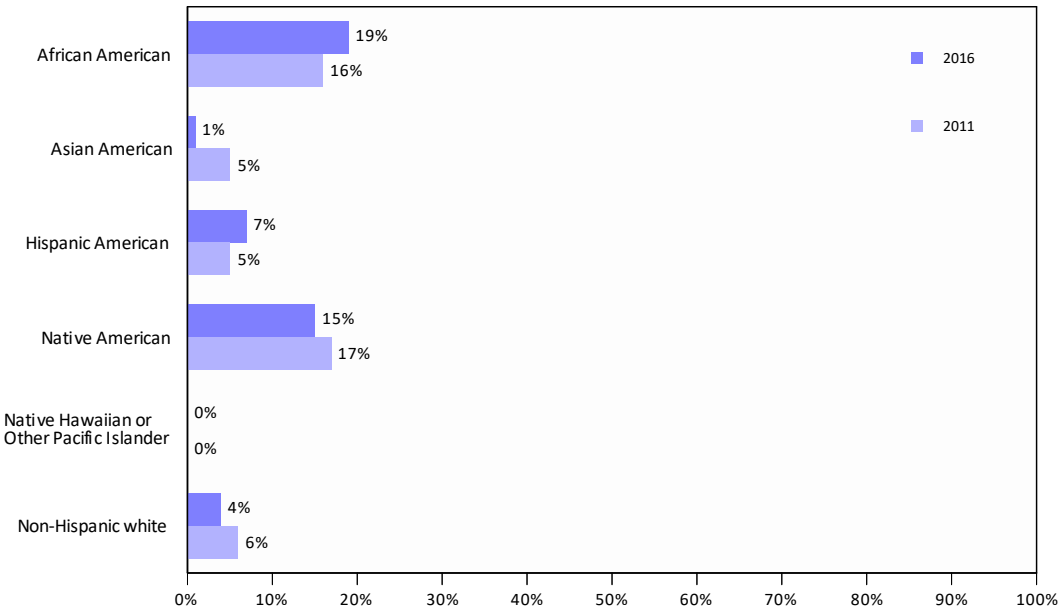
Although there is no standard definition of a subprime loan, there are several commonly-used approaches to examining rates of subprime lending. The study team used a "rate-spread method" — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2011 and 2016.[30] Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans. Patterns in subprime lending did not differ substantially between the different types of loans.

Figure G-4 shows the percent of conventional home purchase loans received that were subprime in New Orleans, based on 2011 and 2016 HMDA data.

- African American, Hispanic American, and Native American borrowers receiving home purchase mortgages were more likely for those loans to be subprime than non-Hispanic white borrowers. This was true in both years examined (2011 and 2016).

- Asian Americans receiving home purchase mortgages were less likely than non-Hispanic whites to receive subprime loans. This was true in both years examined (2011 and 2016).

Figure G-4.
Percent of conventional home purchase loans that were subprime, New Orleans, 2011 and 2016



Note: Subprime rates are calculated as the percentage of originated loans that were subprime.

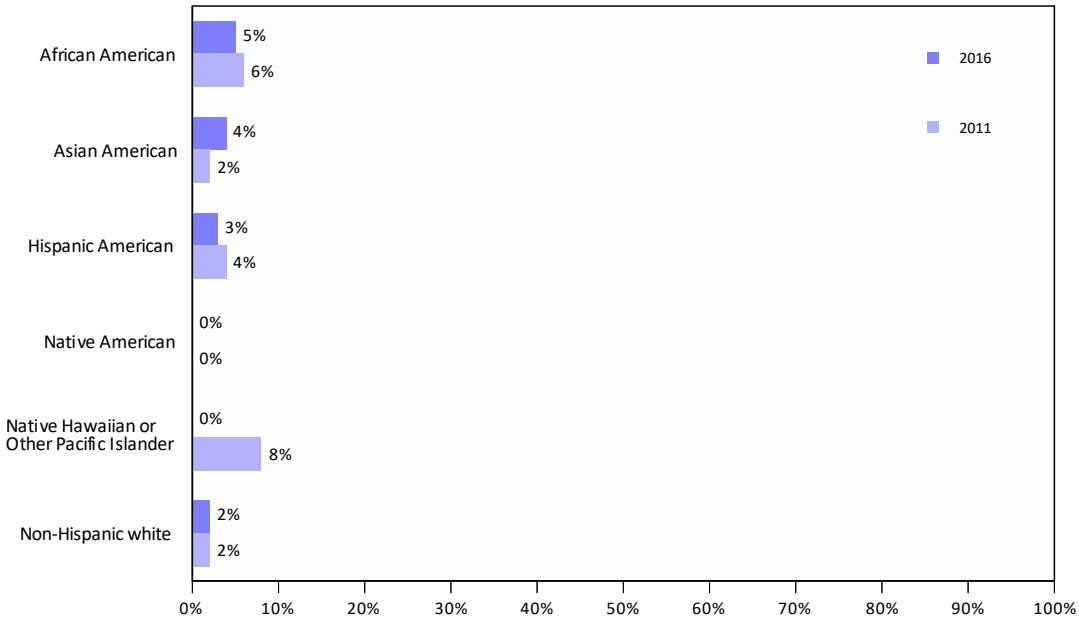
Source: Keen Independent Research from FFIEC HMDA data, 2016 and 2011

[30] Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.

Figure G-5 examines the percentage of conventional home refinance loans that were subprime in New Orleans 2011 and 2016.

- In both 2011 and 2016, subprime loans made up a small proportion of the total conventional home refinance loans issued in New Orleans for all racial/ethnic groups.
- Compared to non-Hispanic white borrowers, African Americans, and Hispanic Americans receiving refinance loans were more likely to obtain subprime loans in both years examined.
- Asian American receiving refinance loans were equally likely as non-Hispanic white borrowers to obtain subprime loans in 2011 but more likely to obtain subprime loans in 2016.

Figure G-5.
Percent of conventional refinance loans that were subprime, New Orleans, 2011 and 2016



Note: Subprime rates are calculated as the percentage of originated loans that were subprime.

Source: Keen Independent Research from FFIEC HMDA data, 2016 and 2011.

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."[31] Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.[32] 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.[33] For example, borrowers in higher-income African American neighborhoods were six times more likely to refinance with subprime loans than borrowers in higher-income white neighborhoods.

Implications of the recent mortgage lending crisis. The turmoil in the housing market starting late 2007 has been far-reaching, resulting in the loss of home equity, decreased demand for housing and increased rates of foreclosure.[34] 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.[35] The preponderance of subprime lending is important because households that are repaying subprime loans have a greater likelihood of delinquency or foreclosure. A 2008 study released from the Federal Reserve Bank of Boston found that "homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages."[36]

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

[31] 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."

[32] Freddie Mac. September, 1996. "Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families." *Freddie Mac.* (accessed February 5, 2007); and Lanzerotti. 2006. "Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California." *Federal Reserve Bank of San Francisco.*

[33] Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.

[34] Joint Center for Housing Studies of Harvard University. 2008. "The State of the Nation's Housing."

[35] *Ibid.*

[36] Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston.*

ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press."[37]

- 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."[38]

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.[39] 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.[40, 41] 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.[42] The study showed that there are substantial wealth disparities between African Americans and whites as well as between Hispanics and whites and that those wealth disparities worsened between 1983 and 2010. In addition to growing over time, the wealth disparity also grows with age — whites are on a higher accumulation curve than African Americans or Hispanics. The study also reports that the 2007 through 2009 recession exacerbated wealth disparities, particularly for Hispanics.

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[37] 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."

[38] 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.*

[39] 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.*

[40] 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.

[41] National Federation of Independent Business (NFIB). 2010. Small Business Credit in a Deep Recession.

[42] McKernan, Signe-Mary, Caroline Ratcliffe, Eugene Steverle and Sisi Zhang. 2013. "Less Than Equal: Racial Disparities in Wealth Accumulation." Urban Institute.

Opportunities to obtain business capital through home mortgages appear to be limited especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

Even though housing markets have improved since the Great Recession, there may be long-lasting effects on current and potential business owners.

Redlining. Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. Those areas are often racially determined, such as African American or mixed-race neighborhoods.[43] That practice can perpetuate problems in already poor neighborhoods.[44] 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.[45] Some studies found the race of an applicant — but not the racial makeup of the neighborhood — to be a factor in loan denials.

Studies of redlining have primarily focused on the geographic aspect of lender decisions. However, redlining can also include the practice of restricting credit flows to minority neighborhoods through procedures that are not observable in actual loan decisions. Examples include branch placement, advertising and other pre-application procedures.[46] Such practices can deter minorities from starting businesses. Locations of financial institutions are important to small business start-up because local banking sectors often finance local businesses.[47] 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.[48] 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.[49] Such steering can affect minority borrowers' perceptions about the availability of mortgage loans.

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[43] 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.

[44] Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." *The Journal of Economic Perspectives.* 12: 41-62.

[45] See Holloway. 1998. "Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio."; Tootell. 1996. "Redlining in Boston: Do Mortgage Lenders Discriminate Against Neighborhoods?"; and Holmes, Andrew and Paul Horvitz. 1994. "Mortgage Redlining: Race, Risk, and Demand." *The Journal of Finance.* 49: 81-99.

[46] Yinger, John. 1995. "Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination." Russell Sage Foundation. New York. 78-79.

[47] Holloway. 1998. "Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio."

[48] Kantor, Amy C. and John D. Nystuen. 1982. "De Facto Redlining a Geographic View." *Economic Geography.* 4: 309-328.

[49] Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 78-79.

A 1996 a study showed that landlords in New Orleans denied the opportunity to rent housing units to African American Housing Choice voucher holders. [50] A 2015 study suggests similar results. African Americans were more likely to being denied the opportunity to rent a housing unit in high income neighborhoods than white renters.[51]

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.[52]

The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets. For example, there is some past evidence that lenders under-appraised properties for female borrowers.[53]

Summary

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

Key results included the following:

- Home equity is an important source of funds for business start-up and growth. Fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans and other minorities in the New Orleans metropolitan area own homes compared with non-Hispanic whites. African Americans, Asian-Pacific Americans, Hispanic Americans, Native Americans and other minorities who do own homes tend to have lower home values.

- High-income African American, Native American and Native Hawaiian or other Pacific Islander households applying for conventional home mortgages in the New Orleans metropolitan area were more likely than high-income non-Hispanic whites to have their applications denied.

[50]Fair Housing Action Center, Inc. 1996. "Greater New Orleans Rental Audit".

[51] Greater New Orleans Fair Housing Action Center. 2015. "Where Opportunity Knocks The Doors are Locked".

[52] Card. 1980. "Women, Housing Access, and Mortgage Credit."

[53] Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review*. 72: 166-170.

- African American, Asian American and Hispanic American households receiving refinance loans were more likely to obtain subprime loans than non-Hispanic white households.

Any discrimination against minority groups in the home purchase and home mortgage markets can negatively affect the formation of firms by minorities in the New Orleans marketplace and the success and growth of those companies.

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 New Orleans 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;[54]
- Limited access to capital has affected the size of African American-owned businesses;[55, 56] 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.[57]

Bank loans are one of the largest sources of debt capital for small businesses.[58] 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.

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[54] 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."

[55] 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.

[56] Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

[57] 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.

[58] 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.*

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. Keen Independent applied sample weights to provide representative estimates of loan denial and interest rates.

The SSBF records the geographic location of businesses by Census Division, not by city, county, or state. The West South Central Division ("WSC region" throughout this report) includes Arkansas, Louisiana, Oklahoma and Texas). The WSC region is the level of geographic detail of SSBF data most specific to New Orleans, and 2003 is the most recent information available from the SSBF as the survey was discontinued after that year.

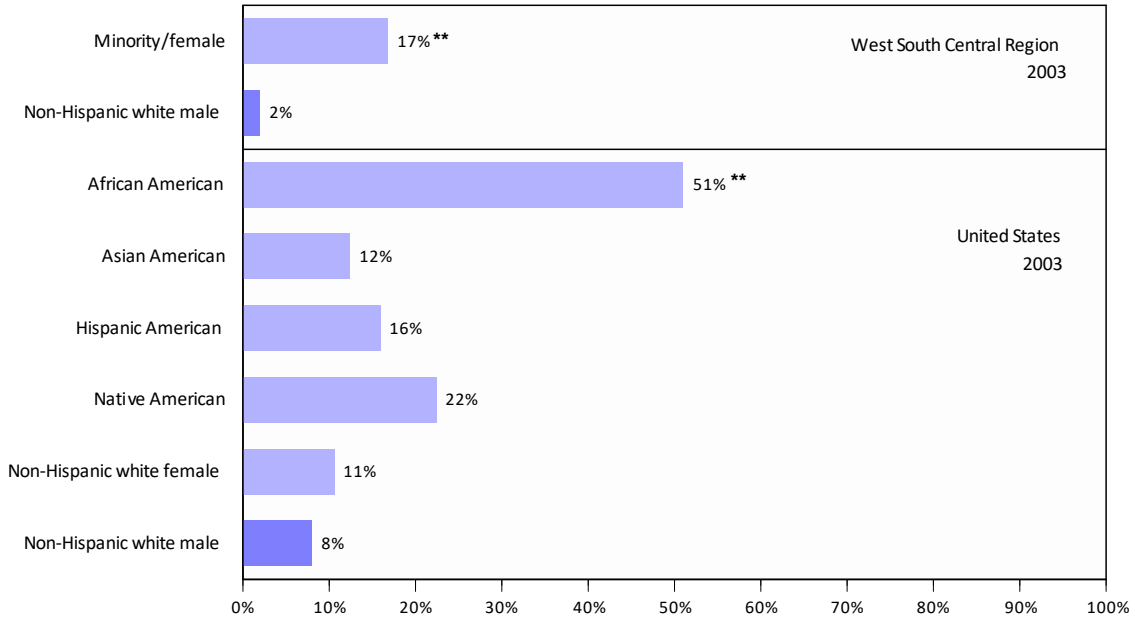
Loan denial rates. Figure G-6 presents loan denial rates from the 2003 SSBF for the WSC region and for the United States.[59] In the region, loan denial rate for MBE/WBEs in 2003 (17%) was eight times that for non-minority male-owned companies (2%).

National SSBF data for 2003 reveal that the loan denial rate for African American-owned businesses (51%) in the United States was higher than for non-Hispanic white male-owned businesses (8%), a statistically significant difference. Denial rates were also higher and statistically significant for other minority groups and non-Hispanic white females.

As shown in Figure G-6, about 17 percent of minority- and women-owned businesses in the WSC region reported being denied loans in 2003, which is nine times the percentage of non-Hispanic white male-owned businesses that reported being denied loans (2%). The difference is statistically significant. (Loan denial statistics on individual minority groups in the WSC region are not reported in Figure G-6 due to relatively small sample sizes.)

[59] 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.

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.

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.[60]
- 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.[61]
- 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.[62]

[60] 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.

[61] 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.

[62] Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

- 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.[63]

- 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.[64]

- Women-owned businesses are no less likely to apply or to be approved for loans in comparison to male-owned businesses.[65]

- A recent study using Kauffman Firm Survey data found that black/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.[66]

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).[67]

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[63] Cavalluzzo, Ken and John Wolken. 2002. "Small Business Turndowns, Personal Wealth and Discrimination." *FEDS Working Paper No. 2002-35.*

[64] 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.

[65] Coleman. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances."

[66] Robb, Alicia. 2012. "Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms." U.S. Small Business Administration.

[67] 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.*

After excluding observations where loan denial was imputed the 2003 national sample included 1,734 businesses that had applied for a loan during the three years preceding the 2003 SSBF.

Given the relatively small sample size for the WSC region (408 businesses) and the large number of variables in the model, Keen Independent included all U.S. businesses in the model and estimated any WSC region effects by including regional control variables — an approach commonly used in other studies that analyze SSBF data.[68] The regional variables include an indicator variable for businesses located in the WSC region and interaction variables that represent businesses owned by minorities or women that are located in the WSC region.[69]

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:

- Location in an MSA; and
- Being in the transportation, communications and utilities industry.

The following characteristics were associated with a *lower* probably of loan denial:

- Being an inherited businesses or older businesses;
- Having an existing line of credit or savings account; and
- Firm bankruptcy in the past seven years.
- Firms in the West South Central region.

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 interaction terms for WSC 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 Pacific region is not significantly different from the U.S. as a whole after accounting for other factors.

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[68] 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.*

[69] Keen Independent also considered an interaction variable to represent firms that are both minority and female but the term was not significant.

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	0.149	*	D&B credit score = moderate risk	-0.010		Partnership	-0.007	
Asian American	-0.012		D&B credit score = average risk	0.031		S corporation	0.025	
Hispanic American	-0.009		D&B credit score = significant risk	0.013		C corporation	0.036	
Native American	0.016		D&B credit score = high risk	0.048		Construction industry	0.033	
Other minority	0.037		Total employees	0.000		Manufacturing industry	0.015	
Female	0.004		Percent of business owned by principal	0.000		Transportation, communications and utilities industry	0.207	**
WSC region	-0.036	**	Family-owned business	-0.024		Finance, insurance and real estate industries	0.012	
Minority in West South Central region	0.128		Firm purchased	0.002		Engineering industry	0.000	
Female in West South Central region	0.107		Firm inherited	-0.035	**	Other industry	0.002	
			Firm age	-0.001	*	Herfindahl index = 0.10 to 0.18	0.003	
Owner's characteristics, credit and resources			Firm has checking account	-0.134		Herfindahl index = 0.18 or above	0.029	
Age	-0.001		Firm has savings account	-0.019	**	Located in MSA	0.025	**
Owner experience	0.001	*	Firm has line of credit	-0.087	**	Sales market local only	0.014	
Some college	-0.010		Existing capital leases	-0.004		Loan amount	0.000	
Four-year degree	-0.004		Existing mortgage for business	0.016		Capital lease application	-0.004	
Advanced degree	-0.023	*	Existing vehicle loans	0.019		Business mortgage application	-0.032	**
Log of Home Equity	0.001		Existing equipment loans	-0.009		Vehicle loan application	-0.051	**
Bankruptcy in past 7 years	0.084		Existing loans from stockholders	0.019		Equipment loan application	-0.019	
Judgement against in past 3 years	0.019		Other existing loans	0.026		Loan for other purposes	-0.024	**
Log of net worth excluding home	0.000		Firm used trade credit in past year	-0.001				
			Log of total sales in prior year	-0.010				
			Log of cost of doing business in prior year	-0.004				
			Log of total assets	0.002				
			Log of total equity	-0.001				
			Negative equity	0.001				
			Firm bankruptcy in past 7 years	-0.028	**			
			Firm delinquency in business transactions	0.018				

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 sales in prior year" and "Mining industry" perfectly predicted loan outcome and dropped out of the regression; "Negative owner net worth," and "Negative assets" 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.[70]

- Used the coefficients from that model and the mean characteristics of African American-owned businesses (including the effects of a business being in the WSC 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. The disparity index of 77 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%	69.0%	77

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.

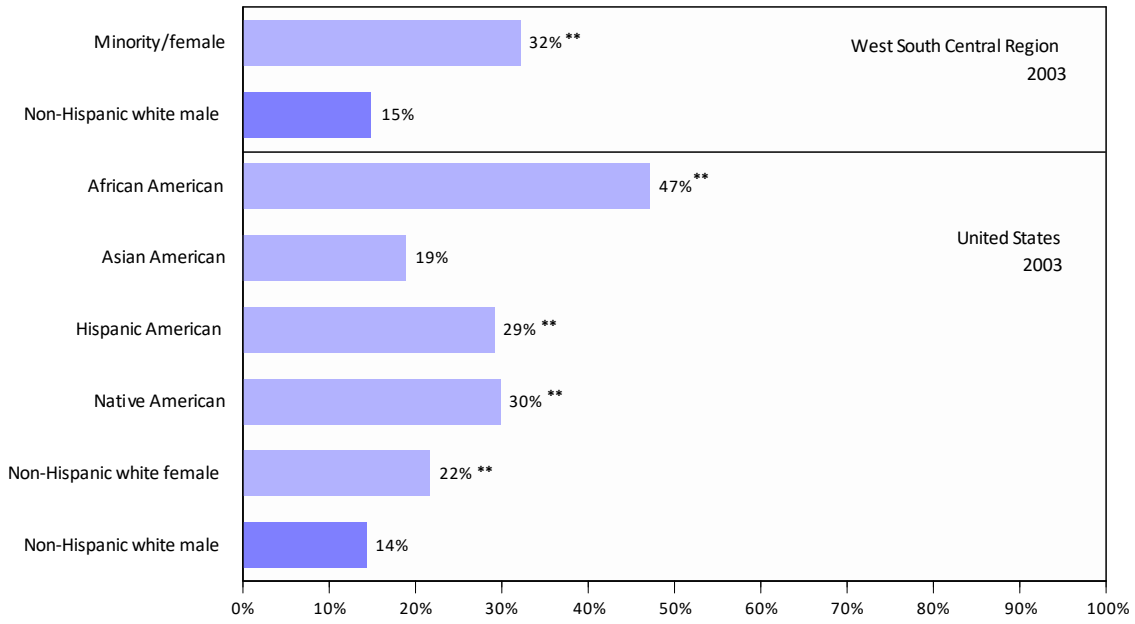
[70] That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

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 WSC region, minority- and women-owned businesses that reported needing loans were more likely than non-Hispanic white-owned firms to say that they did not apply for those loans because of fear of loan denial. This difference was statistically significant.

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.[71]

- 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.[72]

- 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.[73]

- 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.[74]

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, the 2003 national sample included 3,957 businesses. Similar to the likelihood of denial model, WSC region effects are modeled using regional control variables in the national model.[75]

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[71] Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[72] 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.

[73] Blanchflower et al., 2003. Discrimination in the Small Business Credit Market.

[74] Robb, Alicia. 2012. "Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms." U.S. Small Business Administration.

[75] Again, Keen Independent considered an interaction variable to represent firms that are both minority and female but the term was not significant.

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.

Factors that are associated with a *higher* likelihood of not applying for a loan due to fear of loan denial include:

- The business owner having had a judgment against the business in the past 3 years;
- The business owner having filed for bankruptcy in the past 7 years;
- The business having a significant or high risk credit score;
- The business having an existing mortgage, existing vehicle loans, existing loans from stockholders or other existing loans;
- 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 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 in the prior year;
- Negative sales in 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 were more likely to forgo applying for a loan due to fear of denial. Female-owned businesses were also significantly more likely to not apply for a loan out of fear of denial. Results for business in the WSC region and for minority- and women-owned businesses within the WSC 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	0.188	**	D&B credit score = moderate risk	-0.010		Partnership	0.002	
Asian American	0.057		D&B credit score = average risk	0.039		S corporation	0.012	
Hispanic American	0.066		D&B credit score = significant risk	0.045		C corporation	0.021	
Native American	0.018		D&B credit score = high risk	0.103	**	Construction industry	0.033	
Other minority	0.138		Total employees	0.000		Manufacturing industry	-0.015	
Female	0.030	*	Percent of business owned by principal	0.001	**	Transportation, communications and utilities industry	-0.049	**
WSC region	-0.007		Family-owned business	-0.011				
Minority in West South Central region	-0.046		Firm purchased	-0.010		Finance, insurance and real estate industries	0.039	
Female in West South Central region	0.058		Firm inherited	-0.034				
			Firm age	-0.003	**	Engineering industry	-0.029	
Owner's characteristics, credit and resources			Firm has checking account	0.007		Other industry	0.010	
Age	-0.002	**	Firm has savings account	0.013		Herfindahl index = 0.10 to 0.18	-0.006	
Owner experience	0.001		Firm has line of credit	-0.005		Herfindahl index = 0.18 or above	0.024	
Less than high school education	0.039		Existing capital leases	0.032		Located in MSA	0.047	**
Some college	-0.002		Existing mortgage for business	0.048	**	Sales market local only	-0.061	**
Four-year degree	-0.039	**	Existing vehicle loans	0.031	*			
Advanced degree	-0.024		Existing equipment loans	0.042				
Log of home equity	-0.005	**	Existing loans from stockholders	0.074	**			
Bankruptcy in past 7 years	0.228	**	Other existing loans	0.106	**			
Judgement against in past 3 years	0.275	**	Firm used trade credit in past year	0.018				
Log of net worth excluding home	-0.025	**	Log of total sales in prior year	-0.021	**			
			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				
			Negative equity	-0.031				
			Firm bankruptcy in past 7 years	0.199				
			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.

"Less than high school education," "Negative sales in prior year" and "Mining industry" perfectly predicted loan outcome and dropped out of the regression; "Negative owner net worth," and "Negative assets" dropped because of collinearity.

Source: Keen Independent Research analysis of 2003 SSBF data

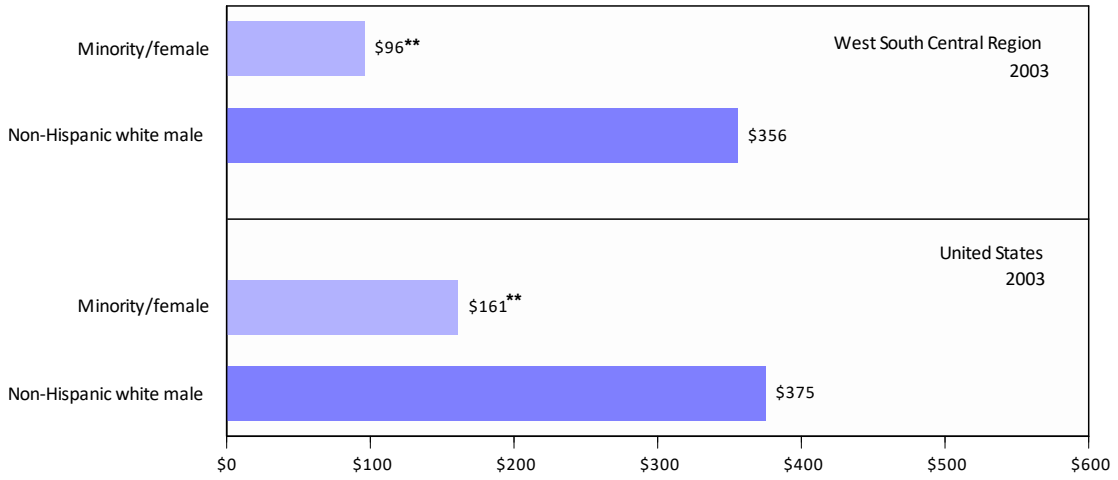
Loan values. Keen Independent also considered average loan values for businesses that received loans. Results from the 2003 SSBF for mean loan values issued to different racial/ethnic and gender groups are presented in Figure G-11.

Comparisons of loan amounts between non-Hispanic white male-owned businesses and minority- and women-owned businesses indicated the following:

- Among firms in the WSC region that obtained loans, minority- and women-owned businesses received loans that averaged about $96,000. Majority-owned firms received loans that averaged about $356,000. 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. This difference was statistically significant.

- 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: ** 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.

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.[76]

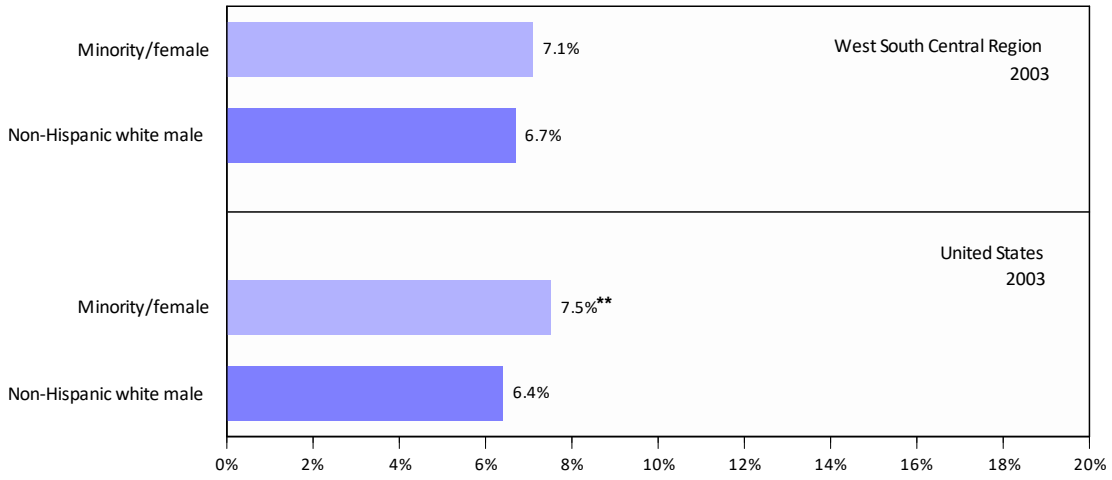
Keen Independent conducted further econometric analysis to explore the relationships between loan amounts and the race/ethnicity and gender of business owners while statistically controlling for other factors but the results were not conclusive.

[76] 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. There was no statistically significant difference in results for the West South Central region.

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 similar disparity is reflected in the WSC region data (0.4 percentage points).

Figure G-12.
Mean interest rate for business loans, 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.

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.[77]

- 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.[78]

[77] Cavalluzzo. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[78] Blanchflower. 2003. "Discrimination in the Small Business Credit Market."

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 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 1,424 businesses that received a loan in the previous three years. Again, WSC region effects were modeled using regional control variables.

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:

- High risk credit scores are associated with higher interest rates;
- Total business equity is associated with a higher interest rate;
- Being in the transportation, communications, and utilities industry is associated with higher interest rates;
- Being in a market with low market competition is associated with higher interest rates (Herfindahl Index);
- Vehicle loans and loans for purposes other than equipment, capital lease and business mortgage are associated with lower interest rates;
- Collateral requirements 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.

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	10.390	**	D&B credit score = moderate risk	0.122		Partnership	-0.436	
African American	2.258	*	D&B credit score = average risk	-0.005		S corporation	-0.217	
Asian American	0.479		D&B credit score = significant risk	0.127		C corporation	-0.143	
Hispanic American	1.030	*	D&B credit score = high risk	0.772	**	Mining industry	0.322	
Native American	-0.529		Total employees	-0.002		Construction industry	-0.527	
Other minority	-0.945		Percent of business owned by principal	0.001		Manufacturing industry	-0.077	
Female	-0.082		Family-owned business	-0.493		Transportation, communications and utilities industry	1.477	**
WSC region	0.045		Firm purchased	-0.036				
Minority in West South Central region	0.259		Firm inherited	-0.031		Finance, insurance and real estate industries	-0.031	
Female in West South Central region	-0.493		Firm age	-0.013				
			Firm has checking account	-0.004		Engineering industry	0.537	
Owner's characteristics, credit and resources			Firm has savings account	0.037		Other industry	0.467	
Age	-0.008		Firm has line of credit	-0.073		Herfindahl index = 0.10 to 0.18	0.782	
Owner experience	0.006		Existing capital leases	0.167		Herfindahl index = 0.18 or above	1.066	*
Less than high school education	0.404		Existing mortgage for business	-0.001		Located in MSA	0.169	
Some college	0.414		Existing vehicle loans	0.337		Sales market local only	-0.086	
Four-year degree	-0.228		Existing equipment loans	0.529		Approved Loan amount	0.000	
Advanced degree	-0.488		Existing loans from stockholders	0.189		Capital lease application	1.135	
Log of home equity	0.018		Other existing loans	0.441		Business mortgage application	0.543	
Bankruptcy in past 7 years	0.354		Firm used trade credit in past year	0.175		Vehicle loan application	-1.118	**
Judgement against in past 3 years	-0.176		Log of total sales in prior year	-0.145		Equipment loan application	-0.193	
Log of net worth excluding home	-0.114		Negative sales in prior year	-1.636		Loan for other purposes	-0.267	
			Log of cost of doing business in prior year	-0.114		Loan guaranteed	-0.348	
			Log of total assets	-0.179		Collateral required	-0.886	**
			Log of total equity	0.212	**	Length of loan (months)	-0.004	**
			Firm bankruptcy in past 7 years	-0.327		Fixed rate	1.150	**
			Firm delinquency in business transactions	-0.148				

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.[79] Similar analyses show commercial and industrial loans and leases of less than $1 million fell were down about 22 percent at the end of 2012 relative to second quarter of 2007.[80]

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.[81]

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.[82] 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.[83]

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.

Small business lending by race/ethnicity. In fiscal year 2013, the U.S. Small Business Administration (SBA) administered about 23 billion in loans. Loans to African American business owners represented 382 million or 1.7 percent of the total, a substantial decline from 2008, when SBA allocated about 8 percent of total loan value to African American business owners. Hispanic American business owners received 4.7 percent of the loan total in 2013, relatively unchanged from 4.5 percent of the loan total in 2009.

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[79] 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/.

[80] 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.

[81] Ibid.

[82] CIT Group, once SBA's top lender, no longer administers SBA loans. Other banks, including Bank of America, have significantly reduced SBA lending.

[83] Ruth Simon and Tom McGinty. 2014. "Loan Rebound Misses Black Businesses." *The Wall Street Journal*. 14 March 2014.

Results from Keen Independent 2017 availability interviews with firms in the New Orleans construction industry. At the close of the 2017 availability interviews conducted as part of the New Orleans disparity study, the study team asked questions regarding potential barriers or difficulties in the firm might have experienced in the New Orleans 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. Figure G-14 on the following page presents results for questions related to access to capital and bonding, combining respondents from different industries.

The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?" As shown in Figure G-14, 42 percent of MBEs and 19 percent of WBEs reported difficulties in obtaining lines of credit or loans. Only 7 percent of majority-owned firms reported similar difficulties.

Appendix H provides results for this availability survey question by industry.

Bonding

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.[84]

To research whether bonding represented a barrier for New Orleans businesses, Keen Independent asked firms completing availability interviews:

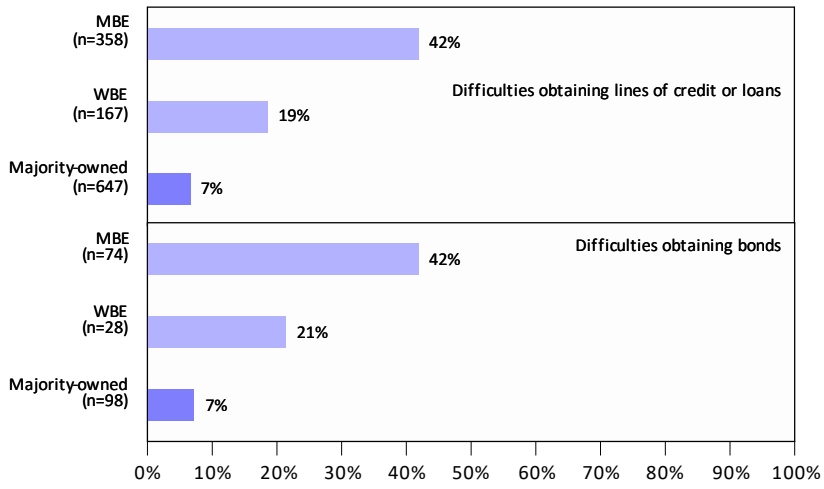
- "Has your company obtained or tried to obtain a bond for a project?"
- [and if so] "Has your company had any difficulties obtaining bonds needed for a project?"

Among firms receiving or attempting to obtain a bond, 42 percent of MBEs and 21 percent of WBEs reported experiencing difficulties obtaining bonds needed for a project. Relatively fewer majority-owned firms (7%) reported difficulties obtaining the bonding needed for a project.

Appendix H provides results for this availability survey question by industry.

[84] For example, Enchautegui, Maria E. et al. 1997. "Do Minority-Owned Businesses Get a Fair Share of Government Contracts?" *The Urban Institute:* 1-117, p. 56.

Figure G-14.
Responses to 2017 availability interview questions concerning loans and bonding,
New Orleans 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 2017 availability survey.

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 business 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.

- Fewer African Americans, Asian Americans, Hispanic Americans, Native Americans and other minorities in New Orleans own homes compared with non-Hispanic whites. African Americans, Asian-Pacific Americans, Hispanic Americans, Native Americans and other minorities who do own homes tend to have lower home values.

- High-income African American, Native American and Native Hawaiian or other Pacific Islander households applying for conventional home mortgages in New Orleans were more likely than high-income non-Hispanic whites to have their applications denied.

- African American, Asian American and Hispanic American households receiving refinance loans were more likely to obtain subprime loans than non-Hispanic white households.

- Based on 2003 Survey of Small Business Finances data for the WSC region, relatively more minority- and women-owned small businesses were denied loans than non-Hispanic white 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 77).

- Among small business owners who reported needing business loans, minority and female business owners in the WSC 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 WSC region was about one-quarter of that for non-Hispanic white male-owned firms.

- In the availability interviews conducted as part of this study, minority- and women-owned firms in the New Orleans metropolitan area were much more likely to report experiencing difficulties in obtaining lines of credit or loans relative to majority-owned firms.

- Minority- and women-owned firms were much more likely than majority-owned firms to report difficulties obtaining bonding.

APPENDIX H.
Success of Businesses in the New Orleans Construction, Professional Services, Goods and Other Services Industries
(draft, 01052018, not for public distribution)

Keen Independent examined the success of minority- and women-owned business enterprises (MBE/WBEs) in the New Orleans-Metairie MSA construction, professional services, goods and other services industries. The study team assessed whether business outcomes for MBE/WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).

The study team examined outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

Business Closures, Expansions and Contractions

The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions and contractions — for minority-owned businesses in Louisiana and in the nation as a whole. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for all businesses. Data are only available for states and business changes from 2002 to 2006 is the most recent analysis available. Note that these data for Louisiana during that time period could be affected by Hurricane Katrina.

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

Overall rates of business closures in Louisiana. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau's 1989–2006 Business Information Tracking Series, the SBA reported on business closure rates between 2002 and 2006 across different sectors of the economy.[1, 2] The SBA report examined patterns in each state but not in individual metropolitan areas. Figure H-1 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses.

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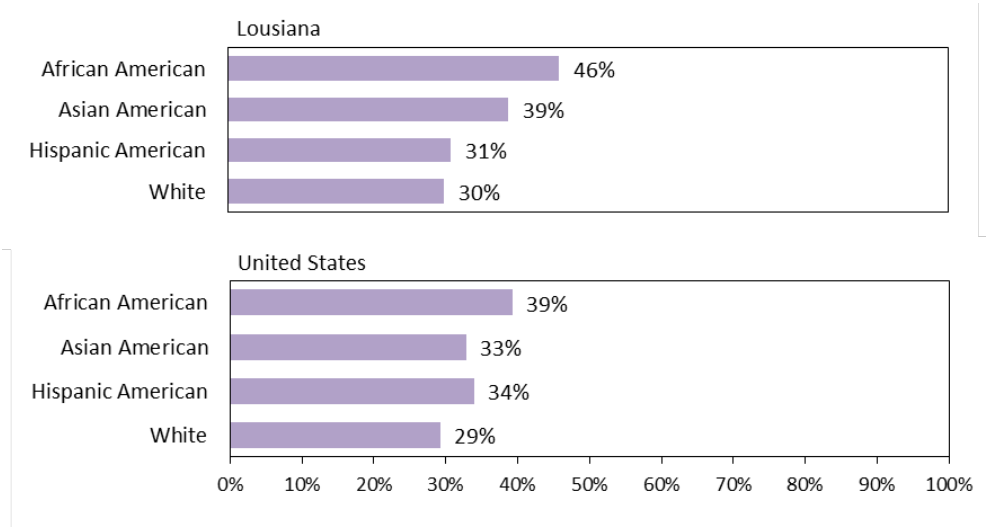
[1] Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

[2] Businesses classifiable by race/ethnicity exclude publicly traded companies. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

As shown in Figure H-1, 46 percent of Hispanic American-owned businesses operating in Louisiana in 2002 had closed by the end of 2006, a higher rate than that of all other groups. African American- and Asian American-owned firms also had closure rates higher than for non-minority-owned businesses during this time period. Disparities in closure rates for minority-owned firms compared to white-owned firms appear to have been similar in Louisiana and in the United States during the same time period.

Figure H-1.
Rates of business closure, 2002 through 2006, Louisiana and the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

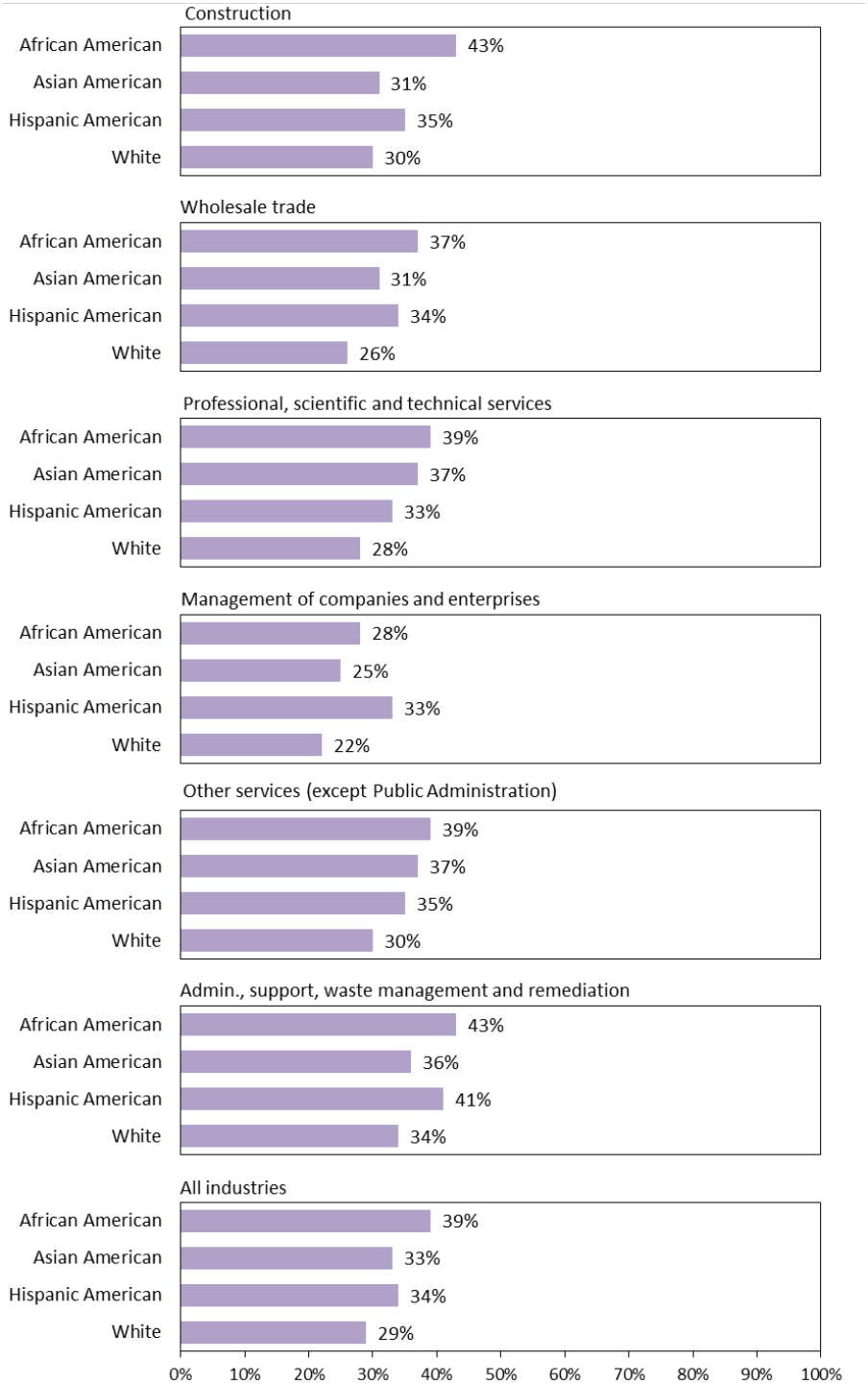
Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Rates of business closures by industry. The SBA report also examined business closure rates by race/ethnicity for 21 different industry classifications. Figure H-2 compares national rates of firm closure for construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation. Figure H-2 also presents closure rates for all industries by race/ethnicity.

Minority-owned businesses that were operating in the United States in 2002 had the higher rate of closure by 2006 in all study industries and all industries relative to white-owned businesses. African American-owned businesses that were operating in the United States in 2002 had the highest rate of closure by 2006 among all racial/ethnic groups — including white-owned businesses — in all industries (39%) and all relevant study industries with the exception of management of companies and enterprises.

Hispanic American-owned company and enterprise management businesses that were operating in 2002 had the highest rate of closure in 2006 (33%). The study team could not examine whether those differences also existed in the New Orleans-Metairie metropolitan study area or in the State of Louisiana as a whole because the SBA analysis by industry was not available for individual states or metropolitan areas.

Figure H-2.
Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

Unsuccessful closures. Not all business closures can be interpreted as "unsuccessful closures." Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent "successful closures." The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.[3] The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, "Which item below describes the status of this business at the time the decision was made to cease operations?" Only the responses "successful" and "unsuccessful" were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Figure H-3 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction, wholesale trade, services and all industries.[4, 5, 6]

According to CBO data, African American-owned businesses were the most likely to report being "unsuccessful" at the time at which their businesses closed. About 77 percent of African American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by other minority groups (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

In the construction and wholesale trade industries, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses (58% and 59%, respectively). Those trends were similar in the services industry with one exception — women-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

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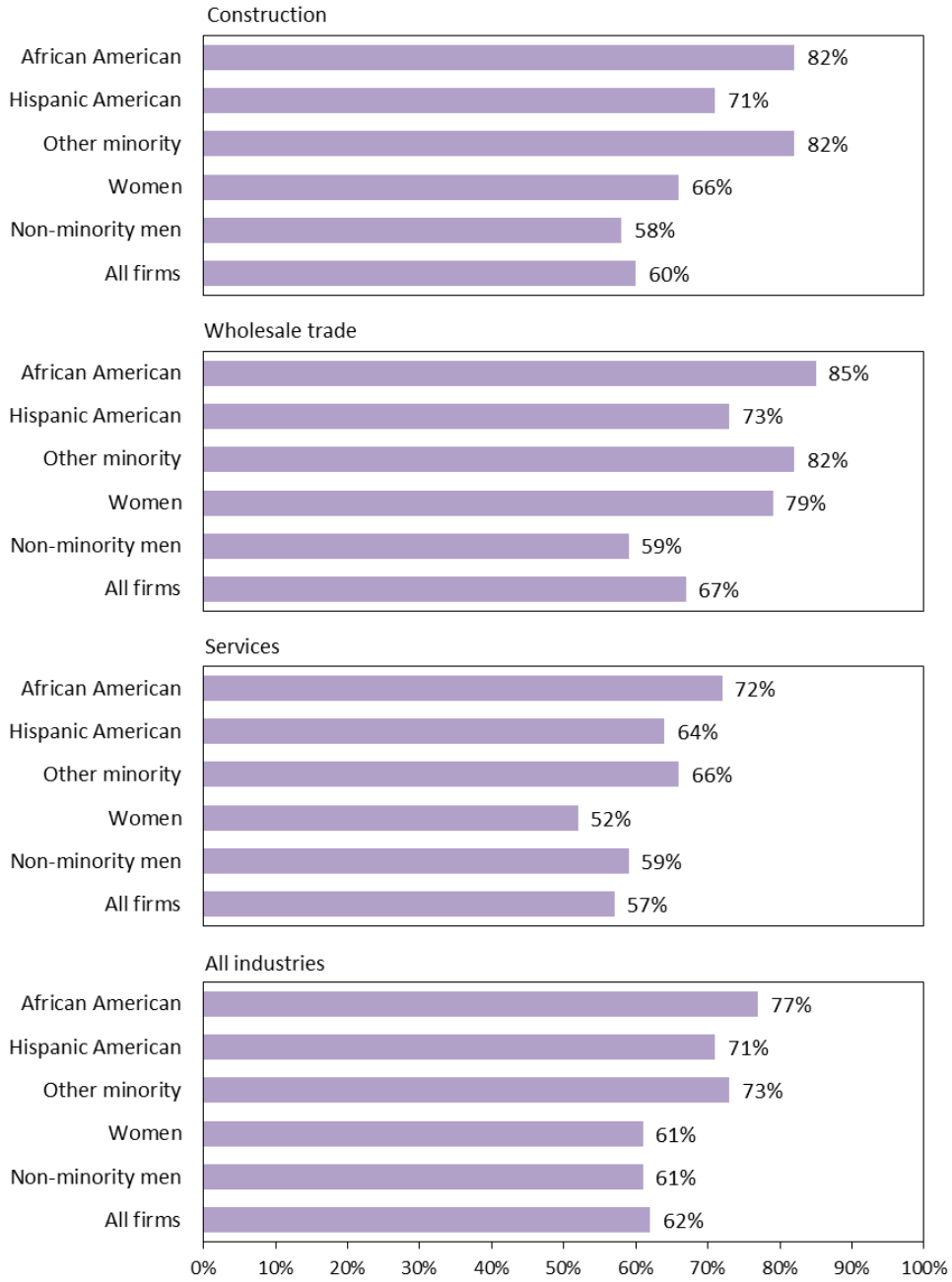
[3] CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

[4] All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, Thomas J. and James Schmitz. 1996. "Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey." *Journal of Business & Economic Statistics*. 14(2): 231-241. This report does not include CBO data on overall business closure rates, because businesses not responding to the survey were found to be much more likely to have closed than ones that did.

[5] 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.

[6] Data for firms operating in the management of companies and enterprises and administrative, support, waste management and remediation industries were not available in the CBO survey.

Figure H-3.
Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S.



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

Reasons for differences in unsuccessful closure rates. Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Unsuccessful business failures of minority-owned businesses are largely due to barriers in access to capital. Regression analyses have identified initial capitalization as a significant factor in determining firm viability. Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more liable to fail. Difficulty in accessing capital is found to be particularly acute for minority-owned businesses in the construction industry.[7]

- 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.[8] Similar research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.[9]

- 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.[10]

- 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.[11]

- The possession of greater initial capital and generally higher levels of education among Asian Americans are related to the relatively high rate of survival of Asian American-owned businesses compared to other minority-owned businesses.[12]

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, and none is available for the New Orleans-Metairie MSA.

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[7] 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.

[8] 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.

[9] Fairlie, R. and A. Robb. 2009. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." University of California, Santa Cruz.

[10] *Ibid.* 24.

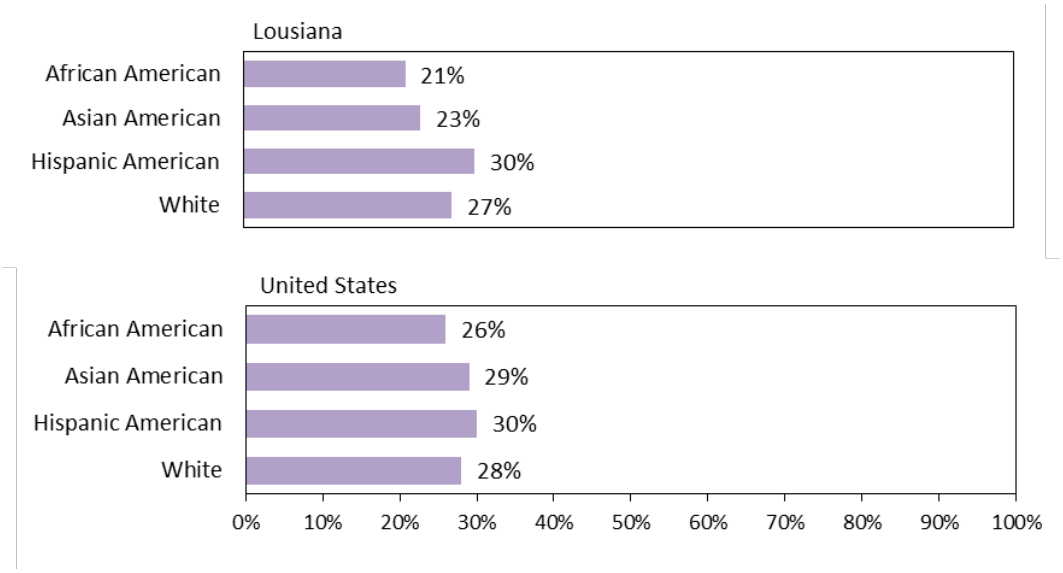
[11] Bates, Timothy. 2002. "Analysis of Young Small Businesses That Have Closed: Delineating Successful from Unsuccessful Closures." Center for Economic Studies, U.S. Census Bureau.

[12] Bates, Timothy. 1993. "Determinants of Survival and Profitability Among Asian Immigrant-Owned Small Businesses." Center for Economic Studies, U.S. Census Bureau.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of non-publicly-held Louisiana businesses that expanded and contracted between 2002 and 2006. Figure H-4 presents the percentage of all businesses, by race/ethnicity of ownership that increased their total employment between 2002 and 2006. Those data are presented for Louisiana and for the nation as a whole.

Approximately 27 percent of white-owned Louisiana businesses expanded between 2002 and 2006, compared to 21 percent of African American-owned businesses, 23 percent of Asian American-owned businesses and 30 percent of Hispanic American-owned businesses. Expansion results were similar for the nation as a whole.

Figure H-4.
Percentage of businesses that expanded, 2002 through 2006, Louisiana and the U.S.

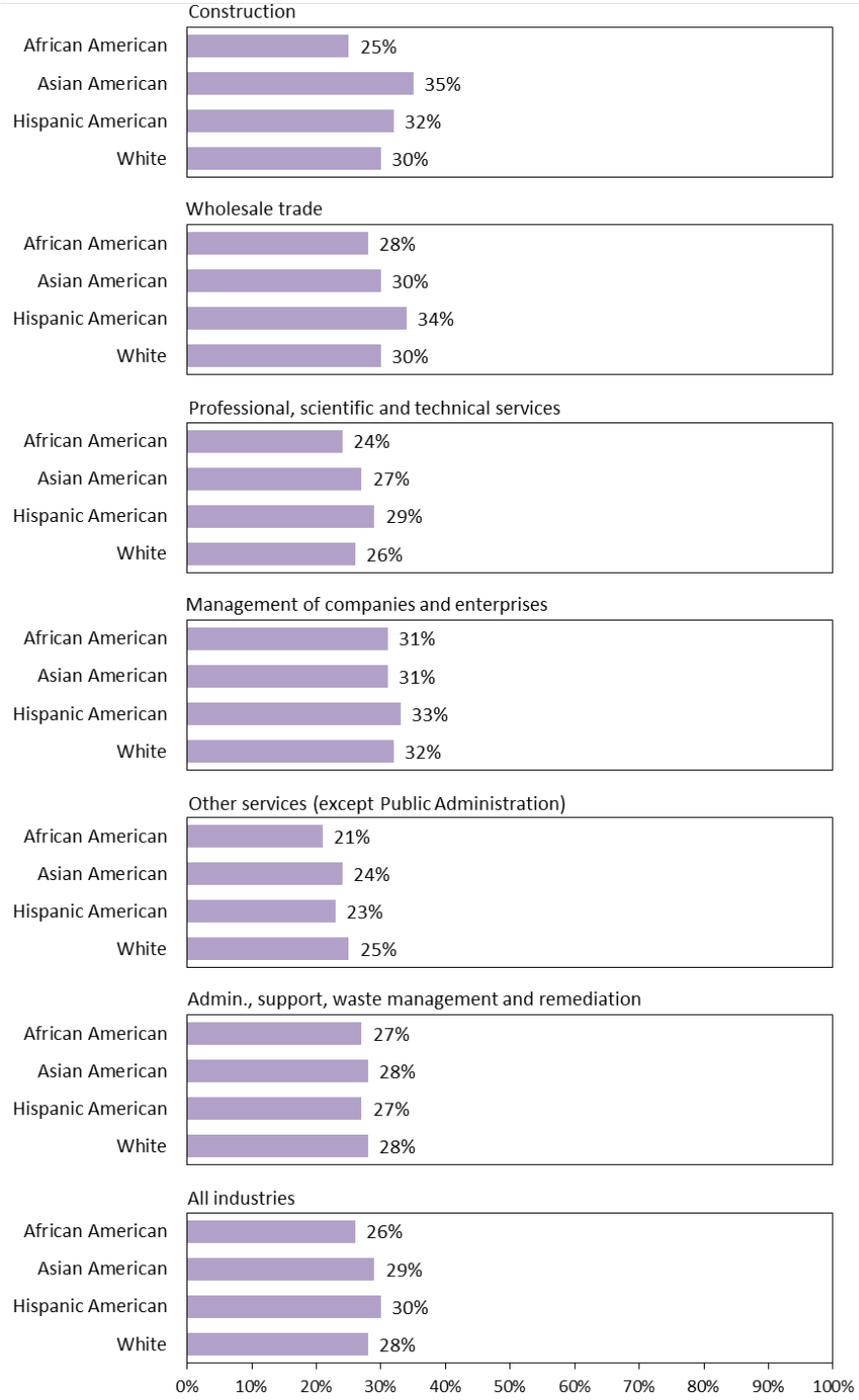


Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

Figure H-5 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation and in all industries in the United States. The SBA study did not report results for businesses in individual industries at the state level.

Figure H-5.
Percentage of businesses that expanded, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

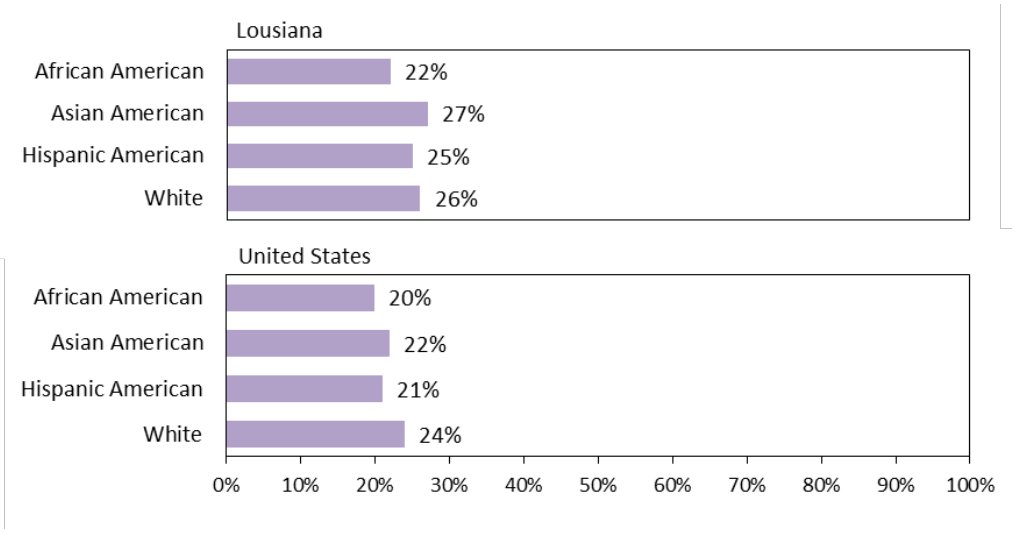
Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

At the national level, the patterns evident for study industries were similar to those observed for all industries:

- African American-owned businesses in study industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Asian American-owned businesses in the management of companies and enterprises and other services industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Hispanic American-owned companies in the construction; wholesale trade; professional, scientific and technical services, and management of companies and enterprises industries were more likely than white-owned businesses to have expanded between 2002 and 2006.

Contraction. Figure H-6 shows the percentage of non-publicly held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Louisiana and in the nation as a whole. In both Louisiana and the United States as a whole, African American- and Hispanic American-owned businesses were less likely to have contracted in 2002 through 2006 than white-owned businesses. In Louisiana, Asian American-owned businesses were more likely to have contracted than white-owned businesses.

Figure H-6.
Percentage of businesses that contracted, 2002 through 2006, Louisiana and the U.S.

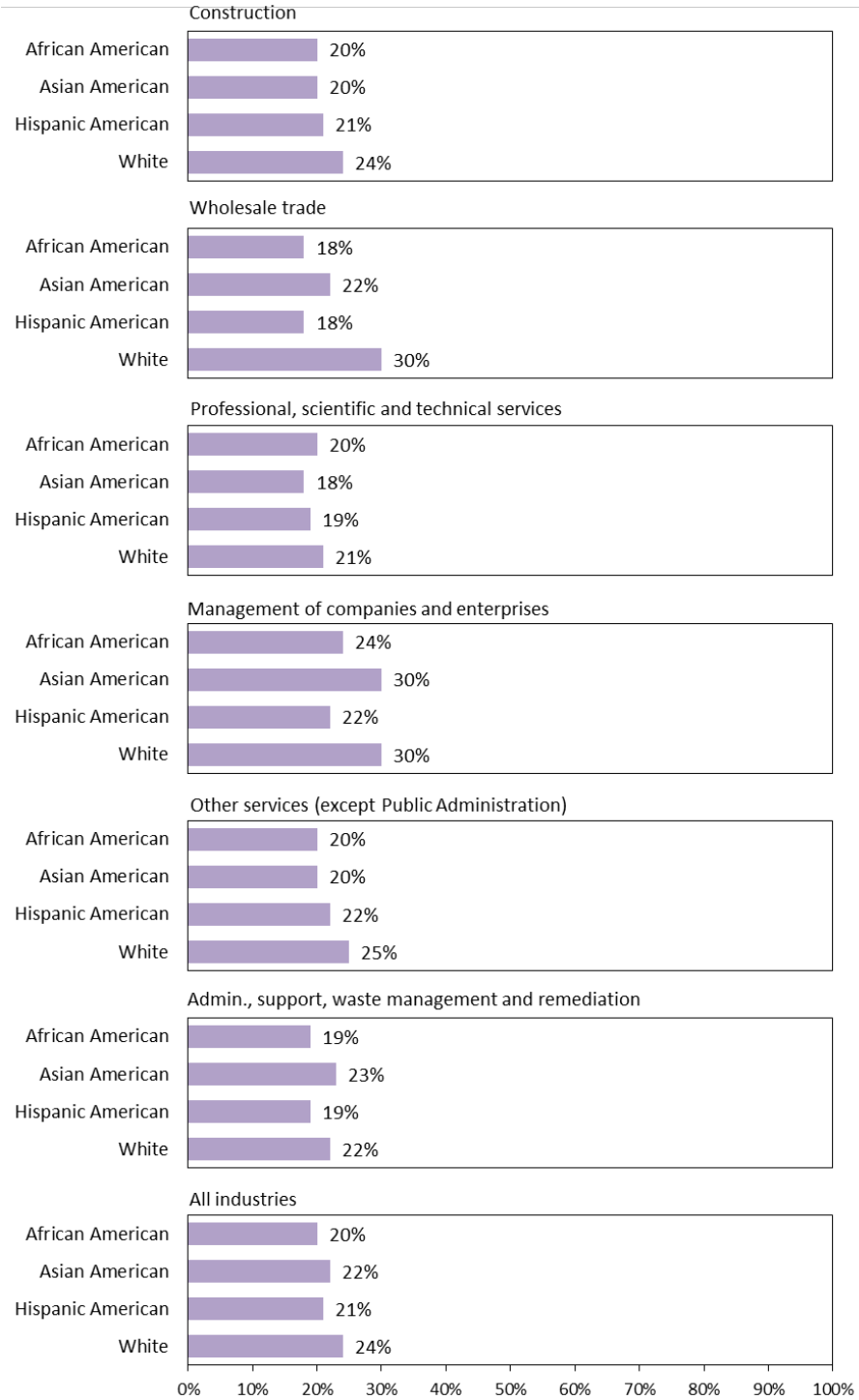


Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-7 shows the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of minority-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.

Figure H-7.
Percentage of businesses that contracted, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners (SBO);
- Business earnings data for business owners from the 2011–2015 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the New Orleans-Metairie MSA that the study team collected as part of availability interviews.

Business receipts. The study team examined receipts for businesses in the New Orleans metropolitan area (New Orleans-Metairie MSA) and the United States using data from the 2012 SBO, conducted by the U.S. Census Bureau.[13] The study team also analyzed receipts for businesses in individual industries. The SBO reports business receipts separately for employer businesses (i.e., those with paid employees other than the business owner and family members) and for all businesses.[14]

Receipts for all businesses. Figure H-8 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender. Racial categories in the New Orleans-Metairie MSA are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans. The SBO data for businesses across all industries in the New Orleans-Metairie MSA indicate that average receipts for minority- and women-owned businesses were much lower than that for non-Hispanic-owned, white-owned or male-owned businesses, with some groups faring worse than others. Using the SBO groupings of minority-owned businesses:

- Average receipts of African American-owned businesses ($36,000) were only 7 percent of white-owned businesses ($540,000).
- Average receipts of Asian American-owned businesses ($207,000) were less than one-half of white-owned businesses.
- Hispanic-owned businesses ($127,000) exhibited revenues that were 33 percent of non-Hispanic-owned businesses ($400,000).
- Average receipts of American Indian, Alaska Native and Native Hawaiian-owned businesses ($117,000) were 23 percent of white-owned businesses.

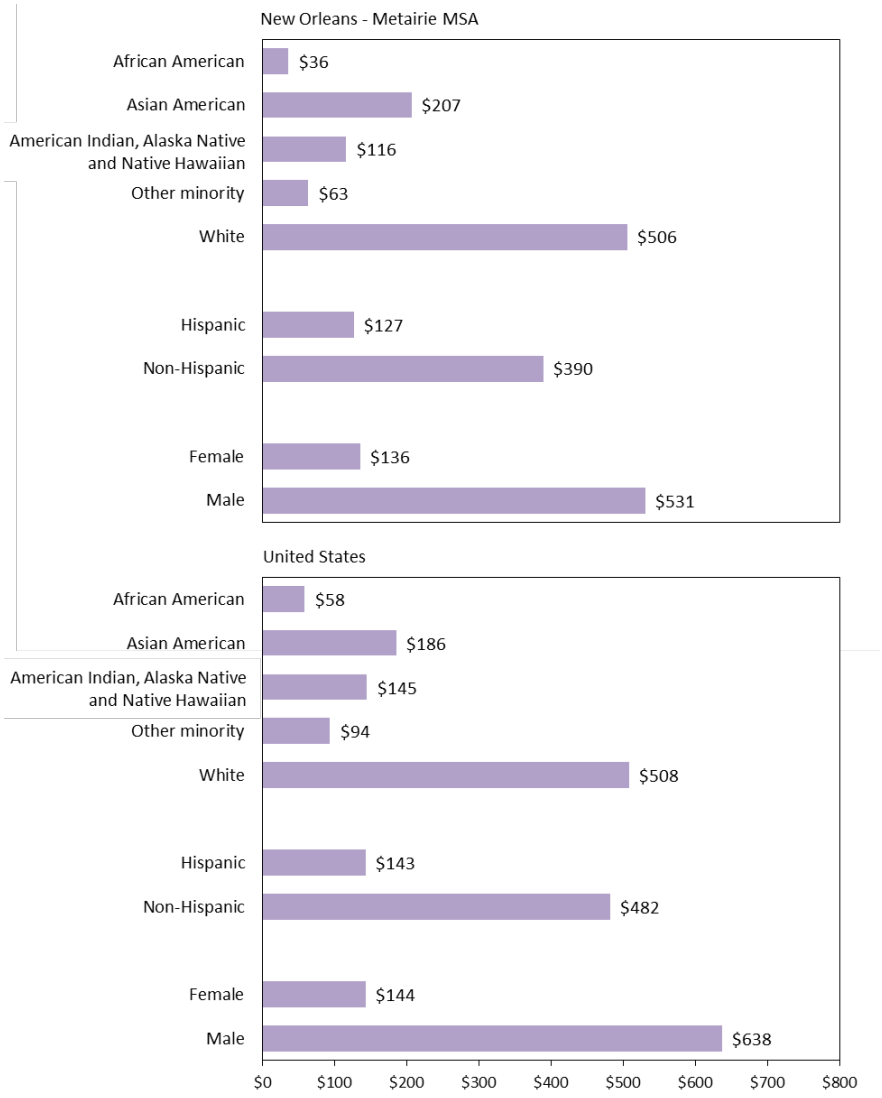
[13] Unlike the geographic regions of Census and ACS data, which must be approximated due to suppression of geographic identification, the geography underlying the 2012 SBO data can be identified exactly.

[14] We use "all businesses" to denote SBO data used in this analysis. The data include incorporated and unincorporated businesses, but not publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for American Indian and Alaska Natives, Asians, Black or African Americans, Native Hawaiian and Other Pacific Islanders, other races and whites.

- Average receipts for women-owned businesses ($136,000) were about one-quarter of the average for male-owned businesses ($531,000).

Disparities in business receipts for minority- and women-owned businesses compared to non-Hispanic white- and male-owned businesses in the New Orleans metropolitan area are consistent with those seen in the United States as a whole. A 2007 SBA study identified differences similar to those presented in Figure H-8 when examining businesses in all industries across the U.S.[15]

Figure H-8.
Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2012



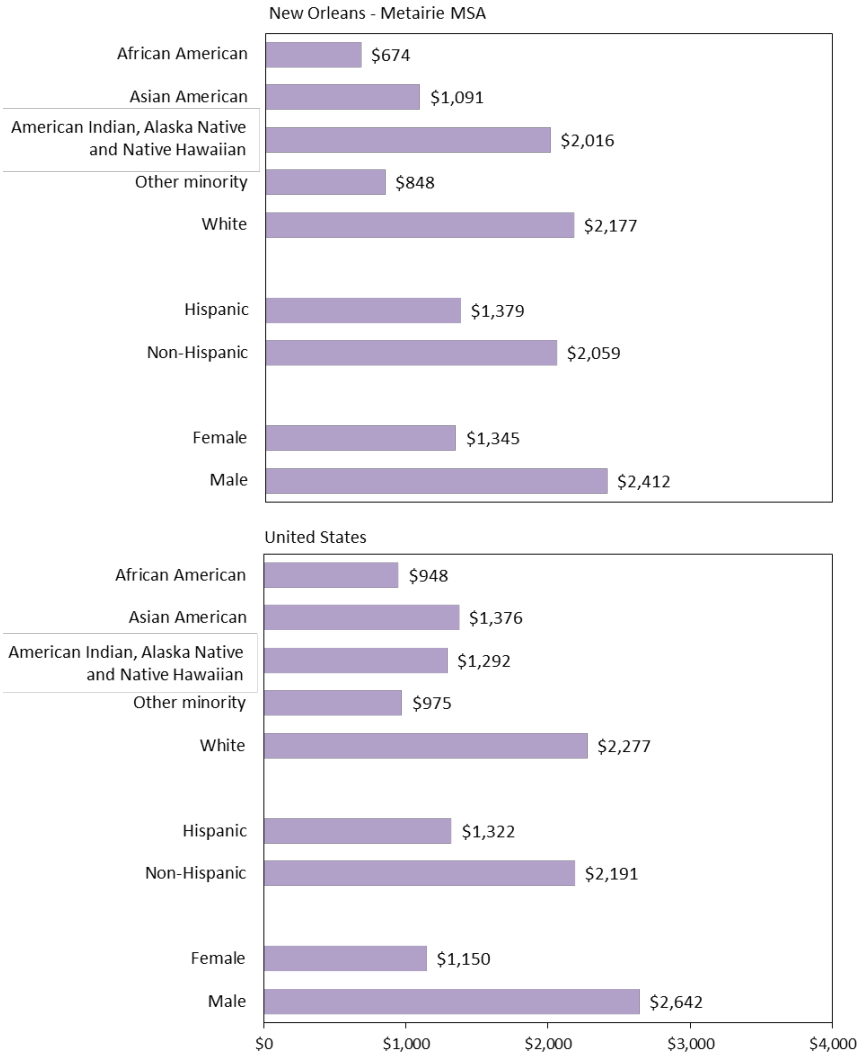
Note: Includes employer and non-employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

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

[15] Lowrey, Ying. 2007. *Minorities in Business: A Demographic Review of Minority Business Ownership*. Office of Economic Research, Office of Advocacy, U.S. Small Business Administration.

The disparities identified for all firms persist when only examining those with paid employees. Figure H-9 presents average annual receipts in 2012 for employer businesses in the New Orleans metropolitan area and in the United States. There were large disparities for each minority group except for American Indians. Average receipts for women-owned businesses with paid employees ($1.3 million) were also well below the average for male-owned companies ($2.4 million).

Figure H-9.
Mean annual receipts (thousands) for employer businesses, by race/ethnicity and gender of owners, 2012



Note: Includes only employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

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

Receipts by industry. The study team also separately analyzed SBO receipts data for businesses in the relevant study industries. Figure H-10 and H-11 present mean annual receipts in 2012 for all businesses and just for just employer businesses, by racial, ethnic and gender group. Results are presented for the New Orleans-Metairie MSA and for the nation as a whole.

Figure H-10.
Mean annual receipts (thousands) for all firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

	All industries together	Construction	Wholesale trade	Management	Admininstrative and other services	Professional, scientific and technical services	Other services
New Orleans - Metairie MSA							
Race							
African American	$ 36	$ 27	N/A	N/A	$ 31	$ 67	$ 15
Asian American	207	71	$ 4,169	N/A	212	224	31
American Indian, Alaska Native and Native Hawaiian	116	63	N/A	N/A	18	15	15
Other minority	63	76	N/A	N/A	12	N/A	19
White	506	474	4,090	$ 1,155	209	332	145
Ethnicity							
Hispanic	$ 127	$ 36	$ 4,490	N/A	$ 52	$ 263	$ 29
Non-Hispanic	390	421	3,830	$ 1,155	150	293	71
Gender							
Female	$ 136	$ 188	$ 1,644	N/A	$ 63	$ 95	$ 29
Male	531	349	4,659	$ 1,702	204	403	80
United States							
Race							
African American	$ 58	$ 81	$ 529	$ 2,312	$ 42	$ 76	$ 17
Asian American	186	172	1,456	3,105	102	147	36
American Indian, Alaska Native and Native Hawaiian	145	239	896	2,096	81	125	39
Other minority	94	86	852	1,438	39	105	30
White	508	455	4,422	3,668	221	235	94
Ethnicity							
Hispanic	$ 143	$ 117	$ 1,502	$ 4,556	$ 50	$ 121	$ 37
Non-Hispanic	482	467	4,289	3,594	221	235	80
Gender							
Female	$ 144	$ 350	$ 1,778	$ 2,574	$ 74	$ 104	$ 32
Male	638	415	5,060	4,014	280	301	111

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

In the New Orleans-Metairie MSA, the overall pattern of lower mean annual receipts for minority- and women-owned firms was also evident when analyzing industry-specific data. Within the study industries, where data was available for specific minority groups and females, those groups generally earned less than non-Hispanic, white-owned companies and male-owned businesses. Figure H-10 shows results for combined employer and non-employer firms. Across study industries:

- Average receipts of African American-owned businesses were between 6 and 20 percent that of white-owned businesses;
- Average receipts of Asian American-owned businesses were between 15 and 102 percent that of white-owned businesses;
- Average receipts of American Indian, Alaska Native and Native Hawaiian-owned businesses were between 4 and 13 percent that of white-owned businesses;
- Hispanic-owned businesses exhibited revenues that varied between 8 and 117 percent that of the average of non-Hispanic-owned businesses; and
- Average receipts for women-owned businesses varied between 24 and 54 percent that of the average of male-owned businesses.

Focusing on SBO data for firms with paid employees (Figure H-11), there were still disparities for minority- and women-owned firms for most groups in most study industries. Results across all study industries for employer firms indicate that:

- Average receipts of African American-owned businesses were between 14 and 87 percent that of white-owned businesses;
- Average receipts of Asian American-owned businesses were below white-owned businesses in three of the five industries for which data were reported;
- Hispanic-owned businesses exhibited average revenues below that of non-Hispanic-owned businesses in two of the four industries for which data were reported;
- Native American-owned firms had lower revenue than white-owned companies in the construction industry (the only study industry for which data were reported); and
- Average receipts for women-owned businesses varied between 47 and 70 percent that of the average for male-owned businesses.

Figure H-11.
Mean annual receipts (thousands) for employer firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

	All industries together	Construction	Wholesale trade	Management	Admininstrative and other services	Professional, scientific and technical services	Other services
New Orleans - Metairie MSA							
Race							
African American	$ 674	$ 311	N/A	N/A	$ 1,196	$ 638	$ 356
Asian American	1,091	959	$ 50,989	N/A	3,737	904	140
American Indian, Alaska Native and Native Hawaiian	2,016	N/A	N/A	N/A	N/A	N/A	N/A
Other minority	848	710	N/A	N/A	N/A	N/A	N/A
White	2,177	2,159	7,627	$ 1,155	1,379	1,250	900
Ethnicity							
Hispanic	$ 1,379	N/A	$ 16,485	N/A	$ 778	$ 1,770	$ 193
Non-Hispanic	2,059	$ 2,101	7,766	$ 1,155	1,382	1,193	815
Gender							
Female	$ 1,345	$ 1,527	$ 4,600	N/A	$ 1,136	$ 657	$ 412
Male	2,412	2,171	8,824	$ 1,702	1,642	1,405	758
United States							
Race							
African American	$ 948	$ 1,096	$ 5,134	$ 2,312	$ 856	$ 816	$ 321
Asian American	1,376	1,572	6,107	3,105	1,259	1,080	200
American Indian, Alaska Native and Native Hawaiian	1,292	1,499	5,972	2,096	1,141	939	459
Other minority	975	839	3,764	1,438	587	1,139	326
White	2,277	1,730	9,774	3,668	1,219	983	564
Ethnicity							
Hispanic	$ 1,322	$ 1,005	$ 5,431	$ 4,556	$ $720	$ 865	$ 383
Non-Hispanic	2,191	1,749	9,367	3,594	$1,238	999	528
Gender							
Female	$ 1,150	$ 1,561	$ 6,471	$ 2,574	$ $962	$ 620	$ 293
Male	2,642	1,842	10,421	4,014	$1,378	1,167	636

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

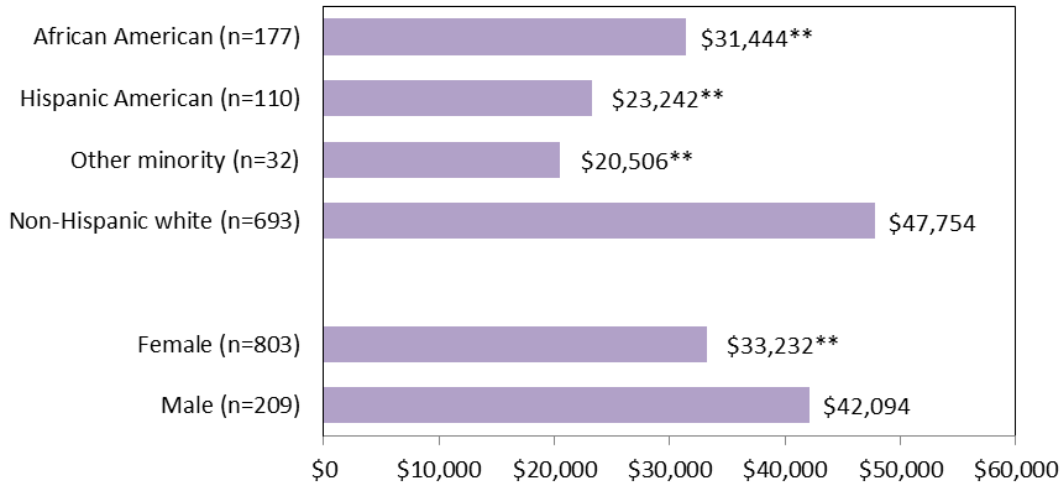
Business earnings. Additional earnings data for minority and female business owners in the relevant study industries come from Public Use Microdata Series (PUMS) data from the 2011–2015 ACS. The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings.

Business owner earnings, 2011–2015. Figure H-12 shows earnings in 2011 through 2015 for business owners in all study industries in the New Orleans-Metairie MSA. The study team analyzed earnings for African Americans, Hispanic Americans, other minorities and non-Hispanic whites.[16]

- On average, African American, Hispanic American and other minority business owners in the New Orleans-Metairie MSA earned less in 2011–2015 than non-Hispanic white business owners. Each difference was statistically significant.

- Female business owners ($33,232) earned less on average than male business owners ($42,094) in the New Orleans metropolitan area from 2011–2015, also a statistically significant difference.

Figure H-12.
Mean annual business owner earnings among all study industries, 2011 through 2015, New Orleans-Metairie MSA



Note: ** Denotes statistically significant differences between groups at the 95% confidence level, respectively.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.

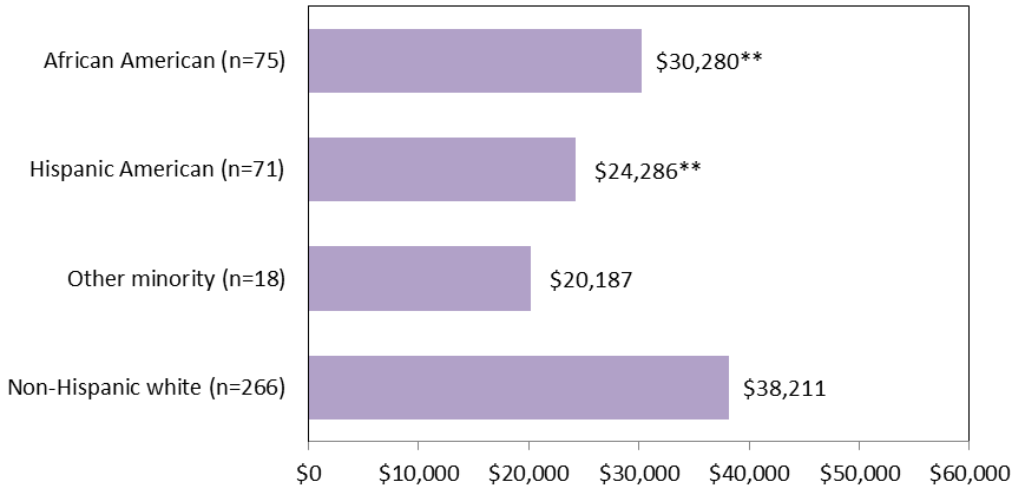
Source: Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[16] Respondents in the ACS were asked to report total pre-tax business earnings accrued during the 12 months immediately preceding the month of the survey. Accordingly, earnings corresponding to the 2011–2015 ACS timeframe consist of 60 individual reference periods spanning 2010-2015. For example, if a business owner completed the survey on January 2011, the figures for the previous 12 months would reference January 2010 to December 2010. Similarly, a business owner completing the survey in March 2013 would reference amounts between March 2012 and February 2013.

Construction business owner earnings, 2011–2015. Figure H-13 shows earnings in 2011 through 2015 for business owners in the construction industry. On average, African American and Hispanic American construction business owners in the New Orleans metropolitan area earned less than non-Hispanic white business owners. These differences were statistically significant.

There were too few female business owners in the ACS data to examine results based on gender.

Figure H-13.
Mean annual business owner earnings in the construction industry, 2011 through 2015, New Orleans-Metairie MSA



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.

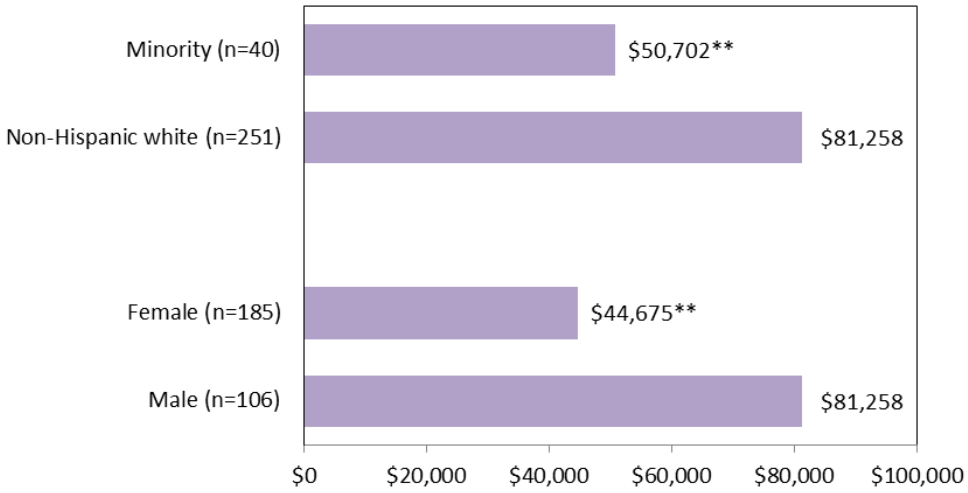
Source: Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Professional services business owner earnings, 2011–2015. Due to small sample sizes for business owners in the professional services industry in the New Orleans metropolitan area, all minority business owners were combined into a single category. Figure H-14 compares 2011–2015 earnings by group.

- On average, earnings of minority business owners ($50,702) was than non-Hispanic white business owners ($81,258) in the professional services industry, a statistically significant difference.

- Average earnings for female professional services business owners ($44,675) were significantly less than the earnings for male business owners ($81,258) in the New Orleans metropolitan area.

Figure H-14.
Mean annual business owner earnings in the professional services industry, 2011 through 2015, New Orleans-Metairie MSA



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.

Source: Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Goods business owner earnings, 2011–2015. Sample sizes for goods business owners in the New Orleans metropolitan area were too small to make comparisons.

Other services business owner earnings, 2011–2015. As with earnings data for the previously reported industries, earnings for other services business owners that were reported in the 2011–2015 ACS data were for the time period between 2010 and 2015. All dollar amounts are presented in 2015 dollars. Again, due to small sample sizes, all minority business owners were combined into a single category. Those results are displayed in Figure H-15.

- Average earnings for minority business owners in the other services industry ($23,576) were lower than non-Hispanic white business owners ($39,182).
- Average earnings for female business owners in the other services industry ($22,871) were lower than male business owners ($34,985) in the New Orleans-Metairie MSA in 2011 through 2015.
- Both of the above differences were statistically significant.

Figure H-15.
Mean annual business owner earnings in the other services industry, 2011 through 2015, New Orleans-Metairie MSA

Note: ** Denotes statistically significant differences between groups at the 95% confidence level, respectively.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.

Source: BBC Research & Consulting from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Regression analyses of business earnings. Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created statistical models through "regression analysis" to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after controlling for certain race- and gender-neutral factors. Data came from the ACS for the New Orleans-Metairie MSA for 2011–2015.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies. The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race/ethnicity and gender of business owners, the model also included available measures from the data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

The study team developed models for business owner earnings in 2011 through 2015 for the New Orleans-Metairie MSA in the following industries:

- A model for business owner earnings in the construction industry that included 430 observations;
- A model for business owner earnings in the professional services industry that included 291 observations;

- A model for business owner earnings in the goods industry that included 43 observations; and

- A model for business owner earnings in the other services industry that included 248 observations.

Construction industry regression results, 2011 through 2015. Figure H-16 illustrates the results of the regression model for 2011 through 2015 earnings in the construction industry in the New Orleans metropolitan area. The model indicated that race- and gender-neutral factors significantly predicted earnings of business owners in the construction industry in the New Orleans-metropolitan area:

- Married business owners tended to have greater business earnings than unmarried business owners;

- Business owners with disabilities tended to have lower business earnings than other business owners; and

- Not being able to speak English well was associated with lower business earnings.

After accounting for race- and gender neutral factors, the model suggested that there was a statistically significant negative effect on business earnings for being a minority business owner.

Figure H-16.
New Orleans-Metairie MSA construction business owner earnings model, 2011–2015

Note:

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	8.080 **
Age	0.070
Age-squared	-0.001
Married	0.364 **
Disabled	-1.067 **
Speaks English well	0.464 *
Less than high school	-0.259
Some college	-0.108
Four-year degree	-0.478
Advanced degree	-0.322
Minority	-2.960 *
Female	0.136

Professional services industry regression results, 2011 through 2015. Figure H-17 presents the results of the regression model of business owner earnings specific to the New Orleans-Metairie MSA professional services industry for 2011 through 2015. The model indicated that several race- and gender-neutral factors predicted earnings of business owners in the professional services industry in the New Orleans-Metairie MSA and were statistically significant[17]:

- Older business owners tended to have greater business earnings than younger business owners;
- Married business owners tended to have greater business earnings than unmarried business owners;
- Business owners with disabilities tended to have lower business earnings than other business owners;
- Educational attainment impacted business earnings; having less than high school or an advanced degree was associated with higher business earnings.

After accounting for neutral factors, the model indicated a statistically significant disparity in earnings for female business owners in the professional services industry. Being a minority was associated with somewhat lower business earnings, however the effect was not statistically significant.

Figure H-17.
New Orleans-Metairie MSA professional services business owner earnings model, 2011–2015

Variable	Coefficient
Constant	6.943 **
Age	0.112 **
Age-squared	-0.001 **
Married	0.466 **
Disabled	-1.136 **
Less than high school	2.361 **
Some college	0.371
Four-year degree	0.819
Advanced degree	1.250 **
Minority	-0.092
Female	-0.728 **

Note:
*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:
Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

[17] Speaking English well was excluded from the professional services industry model because nearly every individual in the dataset spoke English well.

Goods industry regression results, 2011 through 2015. Figure H-18 presents the results of the regression model of business owner earnings specific to the New Orleans-Metairie MSA goods industry for 2011 through 2015. The model indicated that some race- and gender-neutral factors significantly predicted earnings of business owners in the goods industry in the New Orleans-metropolitan area[18]:

- Having a four year degree was associated with higher business earnings.

After accounting for neutral factors, there were no statistically significant results for women. Being a minority business owner may have a negative effect on earnings, but the result was not statistically significant.

Figure H-18.
New Orleans-Metairie MSA goods business owner earnings model, 2011–2015

Variable	Coefficient
Constant	8.625 **
Age	0.050
Age-squared	-0.001
Married	0.405
Disabled	0.498
Less than high school	0.262
Some college	0.238
Four-year degree	1.309 **
Advanced degree	0.958
Minority	-0.807
Female	0.254

Note:
*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:
Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Other services industry regression results, 2011 through 2015. Figure H-19 presents the results of the regression model of business owner earnings specific to the New Orleans other services industry for 2011 through 2015.

[18] Speaking English well was excluded from the goods industry model because nearly every individual in the dataset spoke English well.

The model indicated that some race- and gender-neutral factors significantly predicted earnings of business owners in the other services industry in the New Orleans MSA[19]:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had slightly lower earnings;
- Married business owners tended to have greater business earnings than unmarried business owners;
- Having less than a high school education was associated with lower earnings, and having some college was associated with higher business earnings.

After accounting for neutral factors, there was no statistically significant effect for being female or for being a minority.

Figure H-19.
New Orleans-Metairie MSA other services business owner earnings model, 2011–2015

Note:
*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:
Keen Independent Research from 2011–2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient	
Constant	2.801	**
Age	**0.273**	****
Age-squared	-0.003	**
Married	**0.482**	*
Disabled	-0.603	*
Less than high school	**-0.735**	*
Some college	0.543	**
Four-year degree	**-0.344**	
Advanced degree	0.685	
Minority	**0.148**	
Female	-0.131	

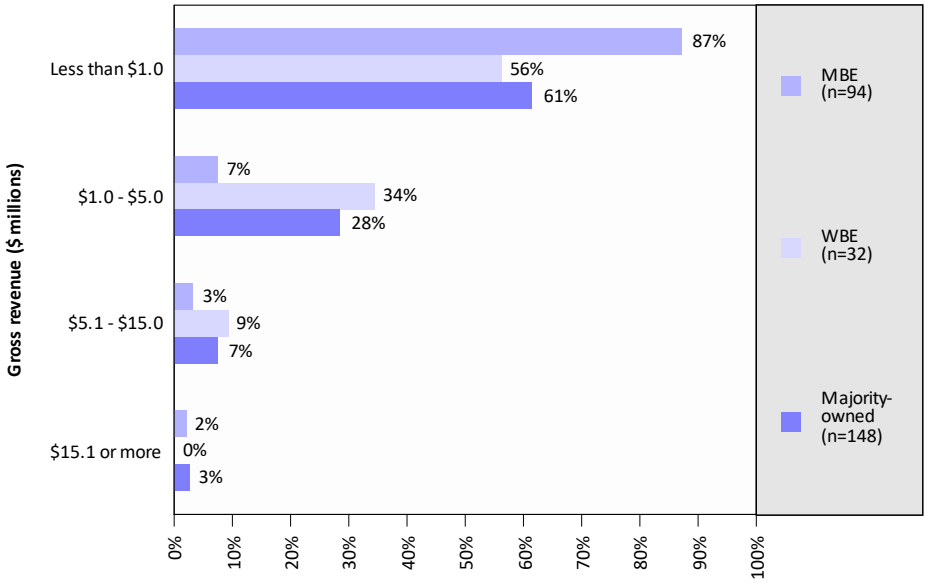
Gross revenue of firms from availability interviews. As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability telephone surveys that Keen Independent conducted (discussed in Appendix D), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous three years: from 2014 through 2016. Only firms with locations within New Orleans metropolitan were included in the availability survey.

[19] Speaking English well was excluded from the other services industry model because nearly every individual in the dataset spoke English well.

Construction. Figure H-20 presents the reported annual revenue for MBE, WBE and majority-owned construction businesses in the availability survey.

- About 87 percent of MBEs reported average revenue of less than $1 million per year compared to 56 percent of WBEs and 61 percent of majority-owned firms.
- WBEs (34%) were more likely than MBEs and majority-owned firms to report average revenue between $5 million and $15 million per year.
- After combining the highest revenue categories, relatively few firms reported average revenue of more than $15 million per year. No WBEs reported revenue in this range.

Figure H-20.
Average annual gross revenue of company over previous three years, New Orleans metropolitan area construction industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

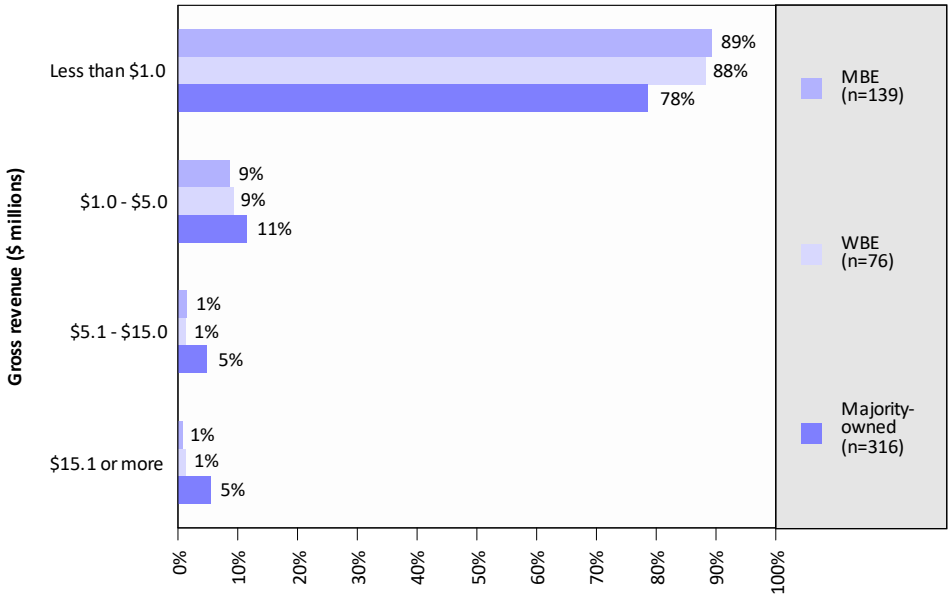
Source: Keen Independent Research from 2017 availability survey.

Professional services. Figure H-21 presents the reported annual revenue for MBEs, WBEs and majority-owned professional services businesses in the New Orleans metropolitan area. MBEs and WBEs were more likely to report lower annual revenues compared to majority-owned businesses.

- A higher percentage of MBEs (89%) and WBEs (88%) than majority-owned professional services businesses (78%) reported average revenue of less than $1 million per year.

- Relatively few MBE firms (1%) and WBE firms (1%) reported average revenue of more than $15 million per year compared with majority-owned businesses (5%).

Figure H-21.
Average annual gross revenue of company over previous three years, New Orleans metropolitan area services industry



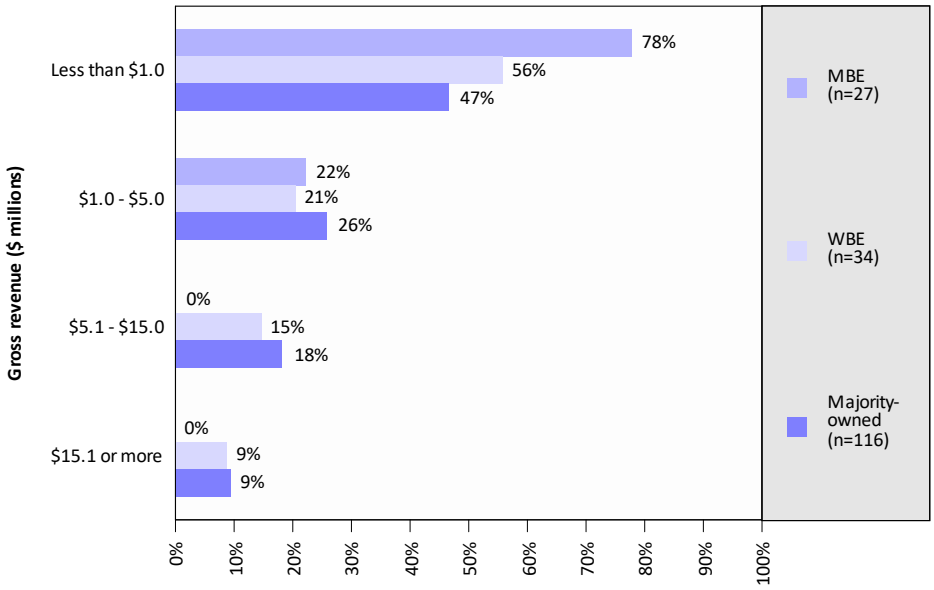
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

Goods. Majority-owned goods firms were more likely to report high average annual revenues relative to MBE/WBE goods firms in the New Orleans metropolitan area.

- About 78 percent of MBE goods firms and 56 percent of WBE goods businesses reported average revenue of less than $1 million per year compared to 47 percent of majority-owned firms.
- Majority firms (18%) were more likely than MBEs and WBE firms to report average revenue between $5 million and $15 million per year.
- No MBE goods firms surveyed reported average revenue of more than $15 million per year. About 9 percent of WBEs and majority-owned businesses indicated annual review of more than $15 million.

Figure H-22.
Average annual gross revenue of company over previous three years, New Orleans metropolitan area goods industry



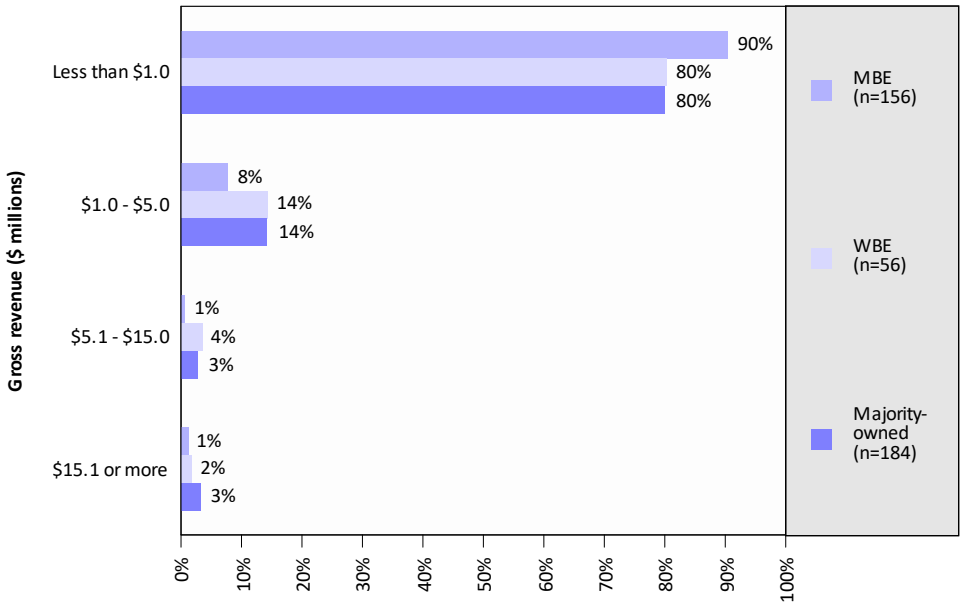
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

Other services. Although most New Orleans metropolitan area other services firms reported income of less than $1 million per year, this was even more evidence for minority-owned companies.

- Relatively more other services firms that were MBEs (90%) reported average revenue of less than $1 million per year compared to WBEs and majority-owned firms (80%).
- After combining the highest revenue categories, about 1 percent of MBEs indicated average revenue of more than $15 million per year compared with 3 percent of majority-owned other services businesses.

Figure H-23.
Average annual gross revenue of company over previous three years, New Orleans metropolitan area other services industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the "relative capacity" of businesses included in an availability analysis.[20] Keen Independent directly measured bid capacity in its availability analysis.[21]

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.

[20] 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).*

[21] See Appendix C for details about the availability interview process.

Data. The availability analysis produced a database of construction, professional services and other services businesses for which bid capacity could be examined. (Keen Independent does not examine largest bids for goods as these contracts are often bid as indefinite quantity contracts with unit prices.)

"Relative bid capacity" for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the six years preceding when Keen Independent interviewed it.

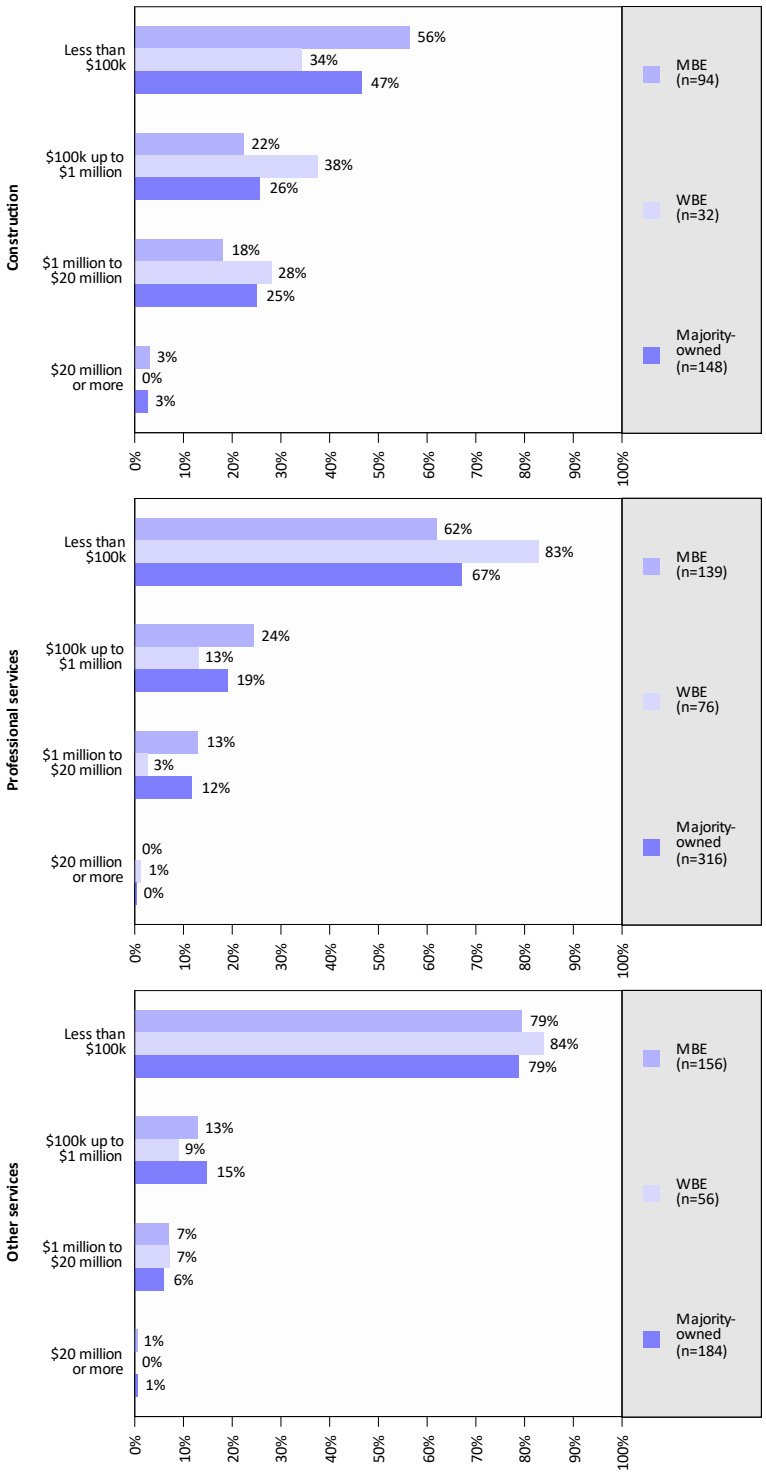
Results. As shown in Figure H-24, relatively few firms reported performing or bidding on contracts of $20 million or more. Most companies indicated that their largest contract was less than $100,000.

For example, in construction, 56 percent of MBEs, 34 percent of WBEs and 47 percent of majority-owned firms indicated that the largest contract they had bid on or been awarded was less than $100,000. WBE construction firms were somewhat more likely to report bidding on contracts between $100,000 and $1 million than other groups, and about the same percentage of MBE and majority-owned construction firms indicated bidding on contracts of $1 million or more.

Results of the bid capacity analysis were similar when examining the largest contracts or bids by other services firms (shown in the bottom portion of Figure H-24).

For professional services firms, results for MBEs and majority-owned firms were similar. A smaller portion of WBEs reported bidding on or being awarded contracts over $100,000. The center portion of Figure H-24 provides bid capacity results for WBEs.

Figure H-24.
Largest contract bid on or awarded (bid capacity) by industry for construction, professional services and other services firms in New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

Above median bid capacity. Keen Independent further explored bid capacity on a subindustry level. Subindustries such as construction management and development tend to involve relatively large projects. Other subindustries, such as landscape contracting and maintenance, typically involve smaller contracts. Figure H-25 reports the median relative bid capacity among New Orleans metropolitan area businesses in 36 subindustries. Results categorized companies according to their primary line of business.

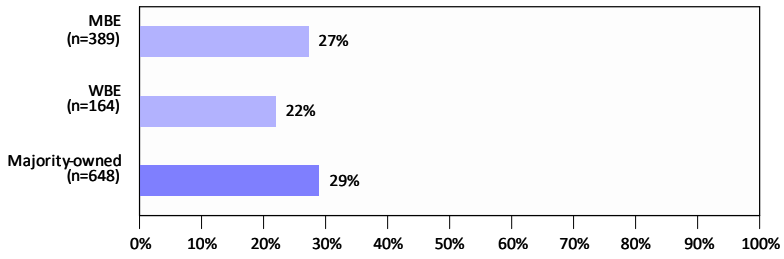
Figure H-25.
Median relative capacity of New Orleans metropolitan area businesses by subindustry

Subindustry	Median bid capacity
Construction	
Demolition and remediation	$1 million to $2 million
Sewer and other underground utilities work	$500,000 to $1 million
Multifamily housing construction	$500,000
Paving and other street work	$500,000
Office and public building construction	$100,000 to $500,000
Sports and recreational facility construction	$100,000 to $500,000
Electrical work	$100,000 to $500,000
Landscape contracting	$100,000
Plumbing, heating and air conditioning	$100,000 or less
Excavation, site prep, grading and drainage	$100,000 or less
Other - construction	$100,000 to $500,000
Professional services	
Architecture and engineering	$100,000 to $500,000
Surveying and mapping	$100,000 to $500,000
Environmental consulting	$100,000 or less
Accounting	$100,000 or less
Business research and consulting	$100,000 or less
Advertising, marketing, graphic design and public relations	$100,000 or less
Legal services	$100,000 or less
IT and data services	$100,000 or less
Other - professional services	$100,000 or less
Other services	
Waste disposal	$100,000 or less
Staffing services	$100,000 or less
Property management	$100,000 or less
Guards and security services	$100,000 or less
Janitorial services	$100,000 or less
Vehicle maintenance	$100,000 or less
Landscape maintenance	$100,000 or less
Trucking	$100,000 or less
Other - services	$100,000 or less

Source: Keen Independent Research from 2017 availability survey.

Comparison of above median bid capacity for MBEs, WBEs and majority-owned firms. Based on the median bid capacity figures identified in Figure H-26, Keen Independent classified firms into "above median bid capacity," "at median bid capacity" and "below median bid capacity" for their subindustry. About 27 percent of MBEs had above median bid capacity for their subindustry compared with 23 percent of WBEs and 29 percent of majority-owned firms.

Figure H-26.
Percent of firms above median bid capacity for their subindustry, New Orleans metropolitan area, 2017



Source:
Keen Independent Research from 2017 availability survey.

Regression analyses found that disparities in bid capacity for WBEs persisted after controlling for length of time in business (in addition to subindustry). Keen Independent developed a probit regression model of whether a firm had above median bid capacity for its subindustry that included as independent variables African Americans, WBE status and age of firm. The differences for WBE status were statistically significant at the 90 percent confidence level.

Availability Interview Results Concerning Potential Barriers

As part of the availability interviews conducted with New Orleans metropolitan area businesses, Keen Independent asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix D explains the survey process and provides the survey questions.

Results for interview questions are discussed within the context of the relevant study industry, as some questions were industry-specific and not asked of all available businesses. The analysis is grouped into three or four sets of survey questions for each study industry.

Construction. In the availability survey, construction firms were asked about obtaining financing and bonding, being prequalified for work, insurance requirements and whether project size was a barrier to bidding. Figure H-27 shows results.

- About 41 percent of MBE construction firms and 45 percent of WBE construction firms surveyed reported difficulties associated with obtaining lines of credit or loans compared with only 9 percent of majority-owned firms.

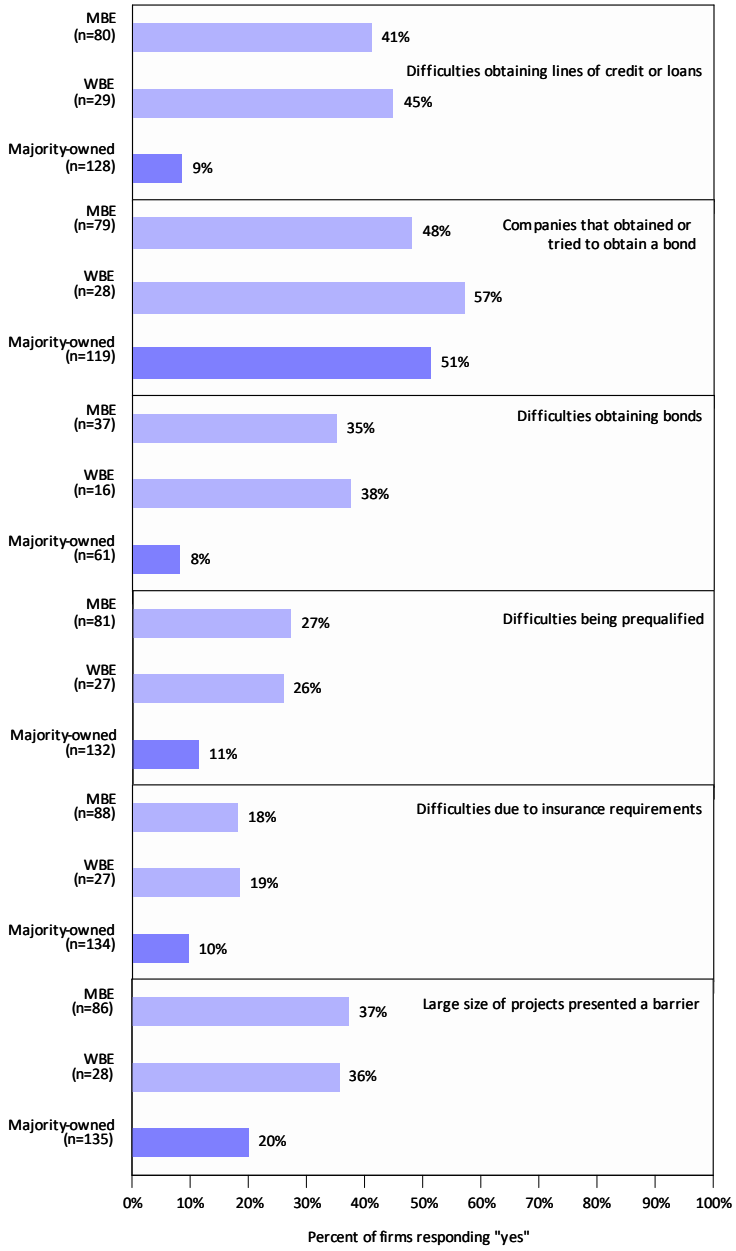
- Less than one-half of survey respondents had obtained or tried to obtain bonds. Among those firms, MBEs (35%) and WBEs (38%) were much more likely than majority-owned firms (8%) to indicate difficulties obtaining bonds.

- About 27 percent of MBEs and 26 percent of WBEs reported difficulties being prequalified for work compared with 11 percent of majority-owned firms.

- A larger percentage of MBEs (18%) and WBEs (19%) than majority-owned firms (10%) reported that insurance requirements on contracts were a barrier to bidding.

- Almost twice as many MBEs (37%) and WBEs (36%) than majority-owned firms (20%) indicated that large contract size presented a barrier to bidding.

Figure H-27.
Responses to availability interview questions concerning loans, bonding and insurance, prequalification and size of projects, MBE, WBE and majority-owned construction firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

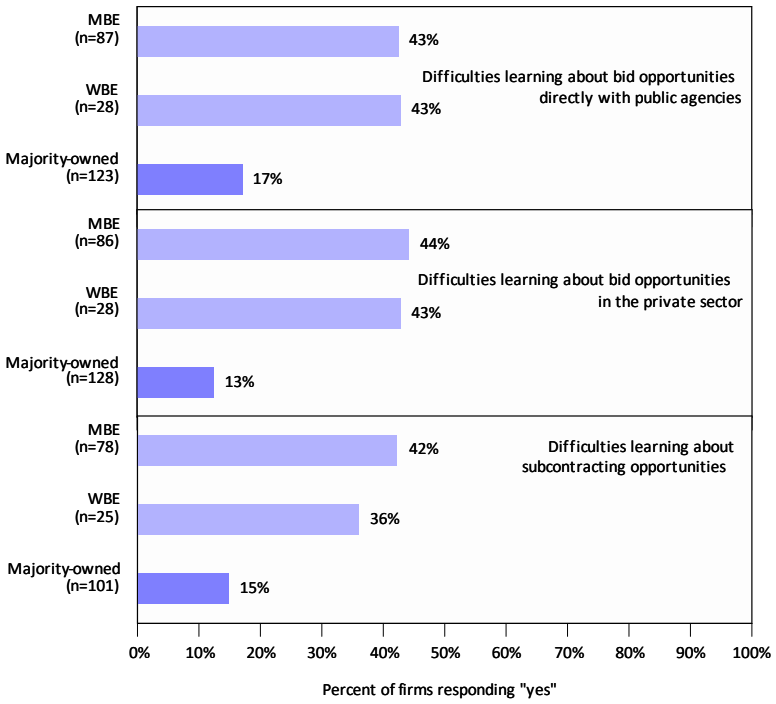
Source: Keen Independent Research from 2017 availability survey.

The survey also asked construction firms about any difficulties learning about bid opportunities.

- Relatively more MBEs than majority-owned firms indicated difficulties learning about public and private sector bid opportunities and learning about subcontracting opportunities in the New Orleans area, as shown in Figure H-28. More than 40 percent of MBE construction firms indicated such difficulties compared with 13 to 17 percent of majority-owned construction firms, depending on the question.

- Results were similar for WBE construction firms: more white women-owned firms than majority-owned firms indicated difficulties learning about bid opportunities.

Figure H-28.
Responses to availability interview questions concerning learning about work,
MBE, WBE and majority-owned construction firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

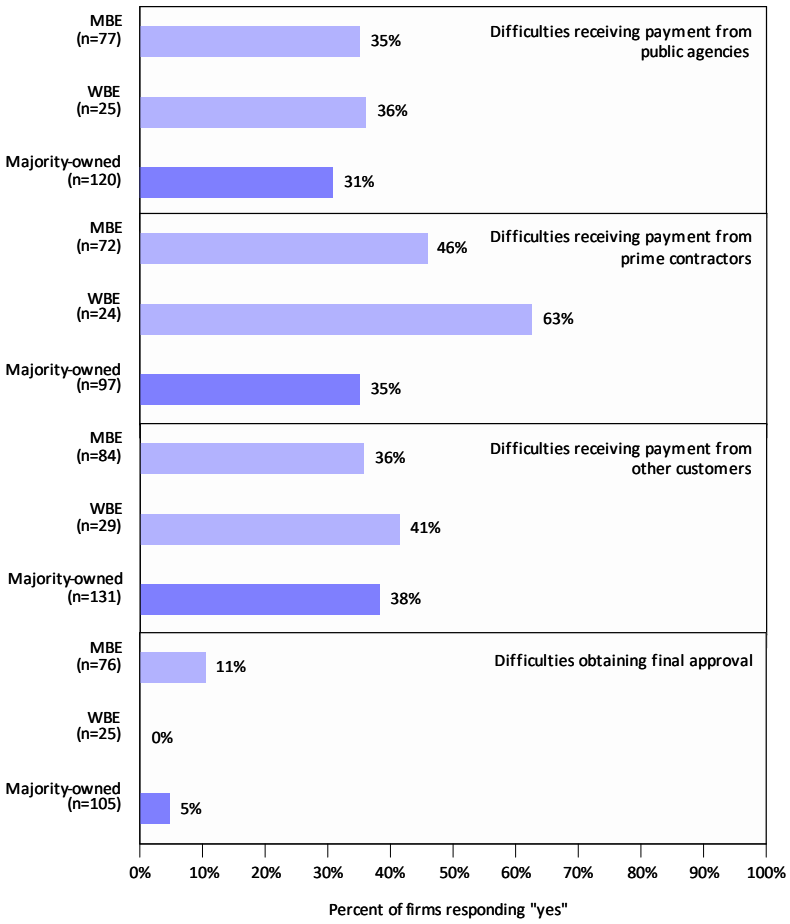
Source: Keen Independent Research from 2017 availability survey.

Keen Independent also examined the proportion of firms reporting difficulty receiving payments, as shown in Figure H-29.

- About one-third of MBEs, WBEs and majority-owned firms reported difficulties receiving payment from public agencies, prime contractors and other customers. However, WBEs were more likely than MBEs and majority-owned companies to indicate difficulties receiving payment from prime contractors.

- Relatively few MBE/WBEs and majority-owned firms reported difficulties obtaining final approval on contracts.

Figure H-29.
Responses to availability interview questions concerning receipt of payments and approval of work, MBE, WBE and majority-owned construction firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

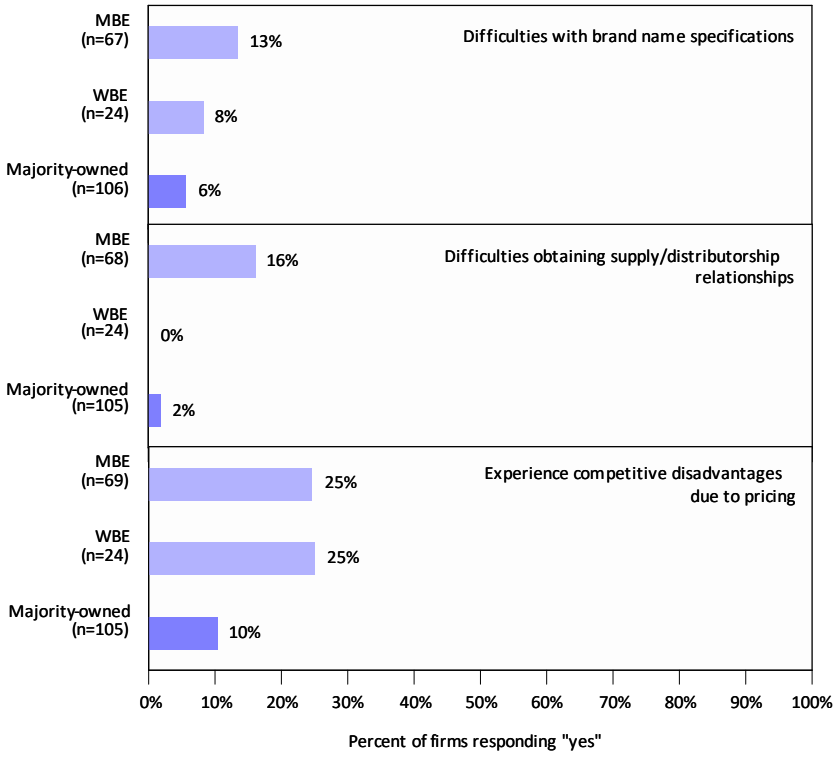
Additionally, the survey asked construction firms if they experienced difficulties with brand name specifications on contracts as well as distributorship relationships, as shown in Figure H-30.

- Relatively more MBE construction businesses (13%) indicated difficulties with brand name specifications than majority-owned firms (6%). About 8 percent of WBEs reported this difficulty.

- MBE construction firms (16%) were more likely to report difficulties obtaining supply or distributorship relationships compared with majority-owned firms (2%).

- MBE and WBE construction firms were twice as likely to indicate they experienced competitive disadvantages due to the pricing they receive from their suppliers.

Figure H-30.
Responses to availability interview questions concerning brand name specifications and distributorship relationships, MBE, WBE and majority-owned construction firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

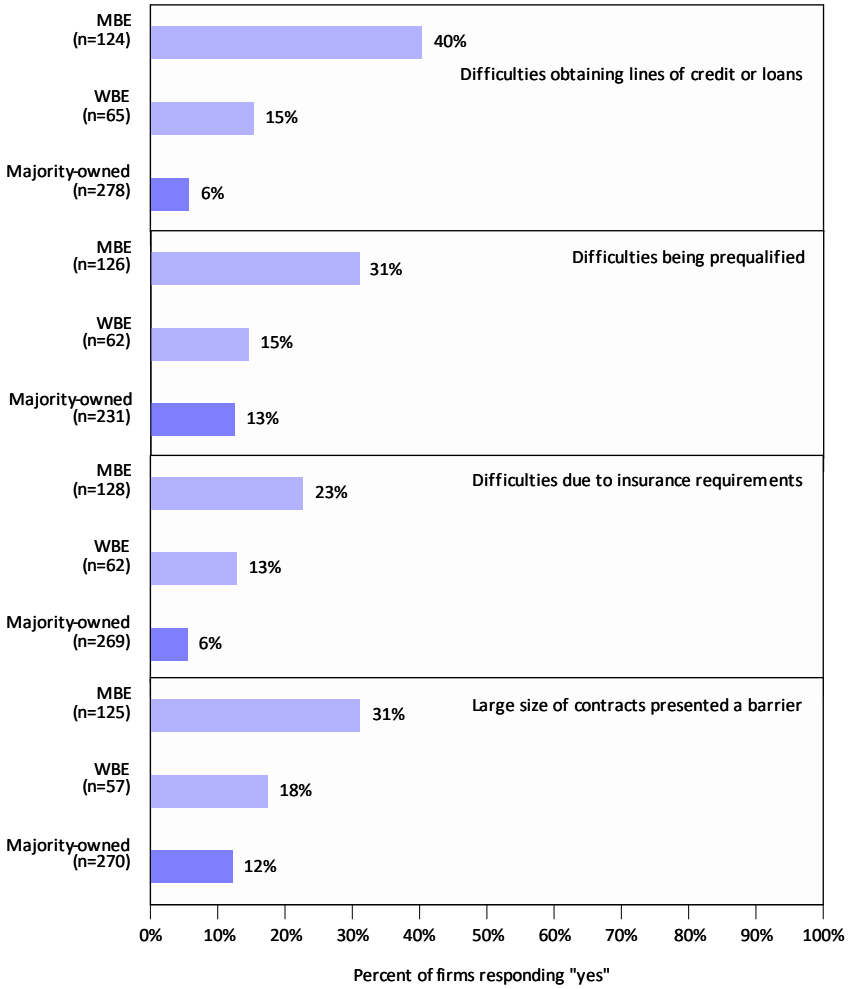
Source: Keen Independent Research from 2017 availability survey.

Professional services. The study team asked similar questions about marketplace barriers in the availability interviews with professional services firms.

- Relatively more MBEs (40%) and WBEs (15%) reported difficulties obtaining lines of credit or loans than majority-owned firms (6%). More MBEs and WBEs reported difficulties being prequalified and difficulties due to insurance requirements.

- MBEs (31%) and WBEs (18%) were more likely to report large project size as a barrier compared with majority-owned professional services firms (12%).

Figure H-31.
Responses to availability interview questions concerning loans, prequalification, insurance and size of projects, MBE, WBE and majority-owned professional services firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

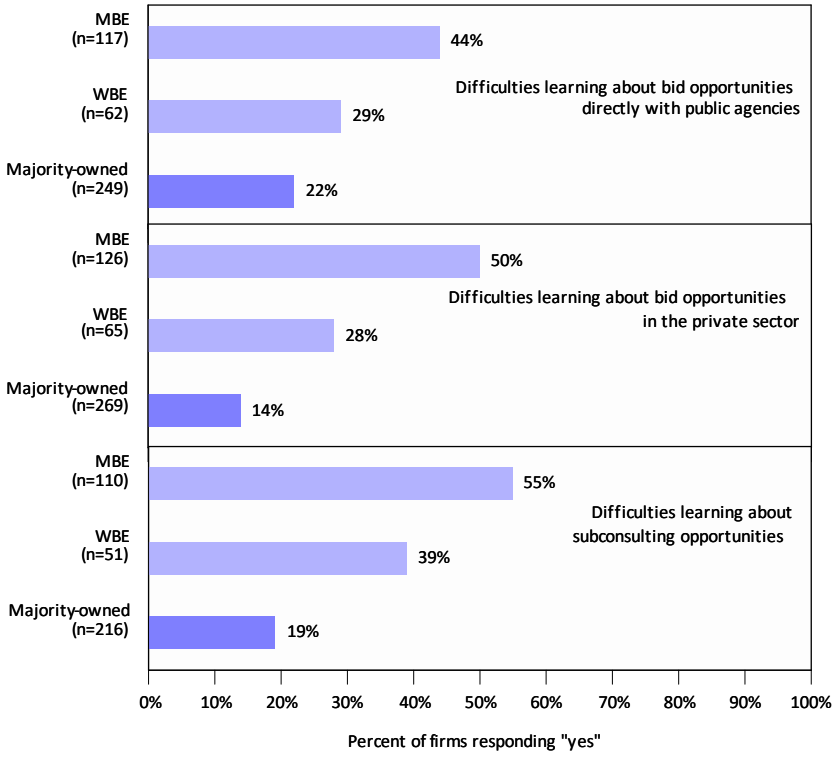
Compared with majority-owned firms, a larger proportion of MBE and WBE professional services companies reported difficulties learning about bid opportunities with public agencies, prime contractors and with private sector customers.

- For example, 44 percent of MBEs and 29 percent of WBEs indicated difficulties learning about bid opportunities directly with public agencies compared with 22 percent of majority-owned firms.

- As shown in Figure H-32, differences in responses between MBE/WBEs and majority-owned firms were even larger when asked about learning about difficulties learning about opportunities in the private sector.

- Compared with majority-owned firms, MBE and WBE professional services firms were much more likely to report difficulties learning about subconsulting opportunities.

Figure H-32.
Responses to availability interview questions concerning learning about work, MBE, WBE and majority-owned professional services firms in the New Orleans metropolitan area

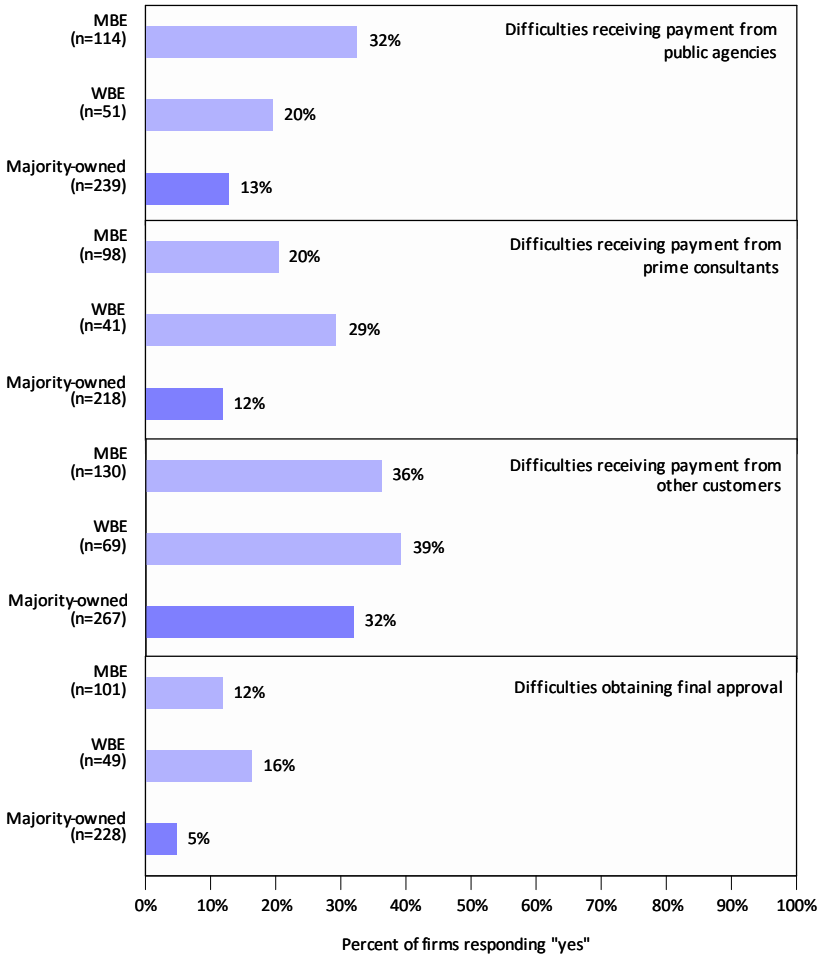


Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

More than one-third of MBE professional firms reported difficulties receiving payment from public agencies, a higher percentage than found for WBEs (20%) and majority-owned firms (13%). About 12 percent of MBEs said that they had difficulty obtaining final approvals on work, also higher than majority-owned professional services firms (5%).

Figure H-33.
Responses to availability interview questions concerning receipt of payments and approval of work, MBE, WBE and majority-owned professional services firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

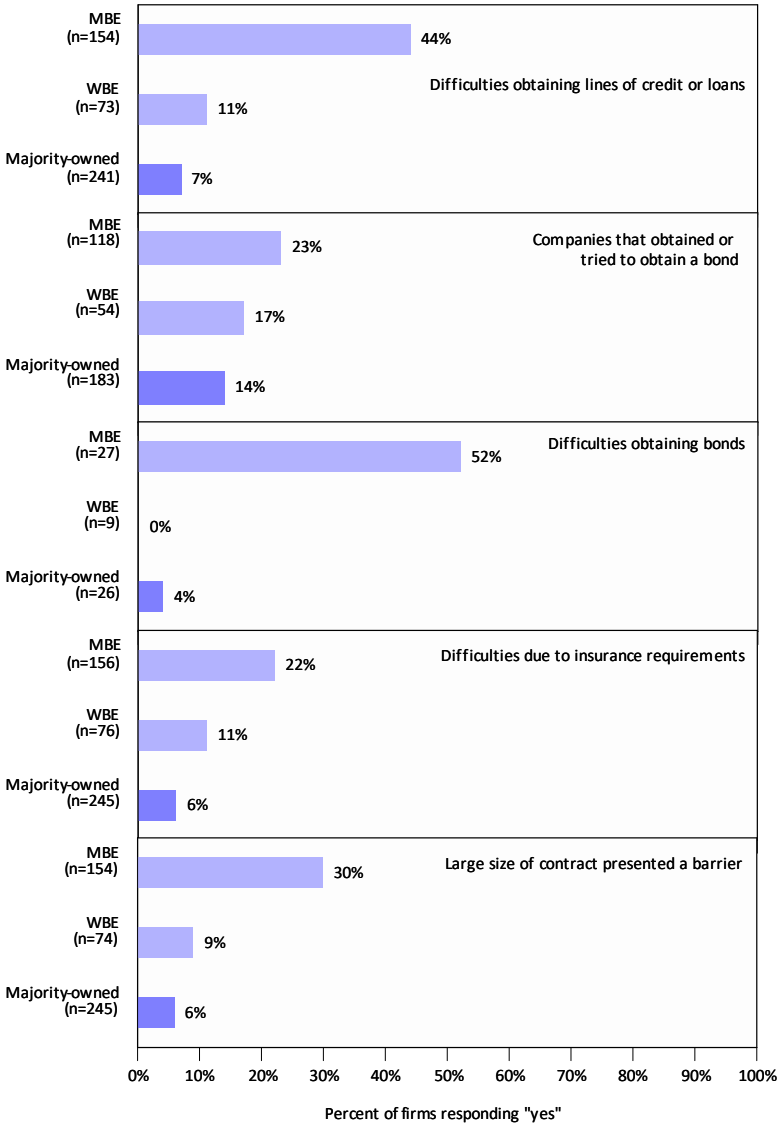
Goods and other services. Because goods and other services firms were asked similar questions about marketplace barriers in the availability interview, and due to a limited number of responses for MBEs for these industries, Keen Independent combined results for goods and other services firms in the following graphs. Keen Independent first examined any difficulties in obtaining lines of credit or loans for goods and other services firms. Figure H-34 provides these results.

- Relatively more MBEs (44%) reported difficulties obtaining lines of credit or loans than WBE (11%) and majority-owned goods and services firms (7%).

- MBEs (52%) were more likely than majority owned firms (4%) to report difficulties in obtaining a bond.

- More MBEs (22%) than WBEs (11%) and majority-owned firms (6%) reported difficulties due to insurance requirements. MBEs (30%) were more likely to report large contract size as a barrier compared with WBEs (9%) and majority-owned firms (6%).

Figure H-34.
Responses to availability interview questions concerning loans, bonding, insurance and size of projects, MBE, WBE and majority-owned goods and other services firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

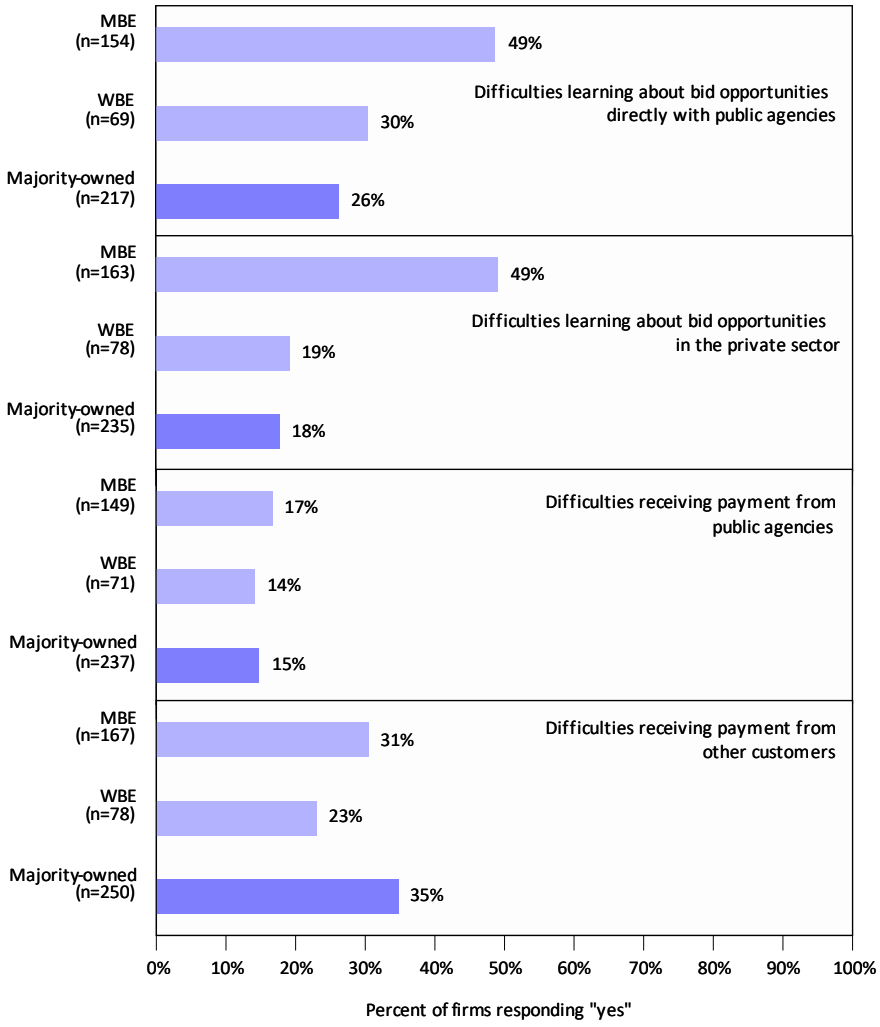
Source: Keen Independent Research from 2017 availability survey.

As in other industries, goods and other services firms were also asked about any difficulties learning about bid opportunities and receiving payment. Figure H-35 presents these results.

- As found for construction and professional services firms, a larger proportion of MBE goods and other services firms reported difficulties learning about bid opportunities with public agencies.

- When asked about difficulties receiving payment from public agencies, relatively few goods and other services firms reported problems.

Figure H-35.
Responses to availability interview questions concerning learning about work and barriers to bidding, MBE, WBE and majority-owned goods and other services firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

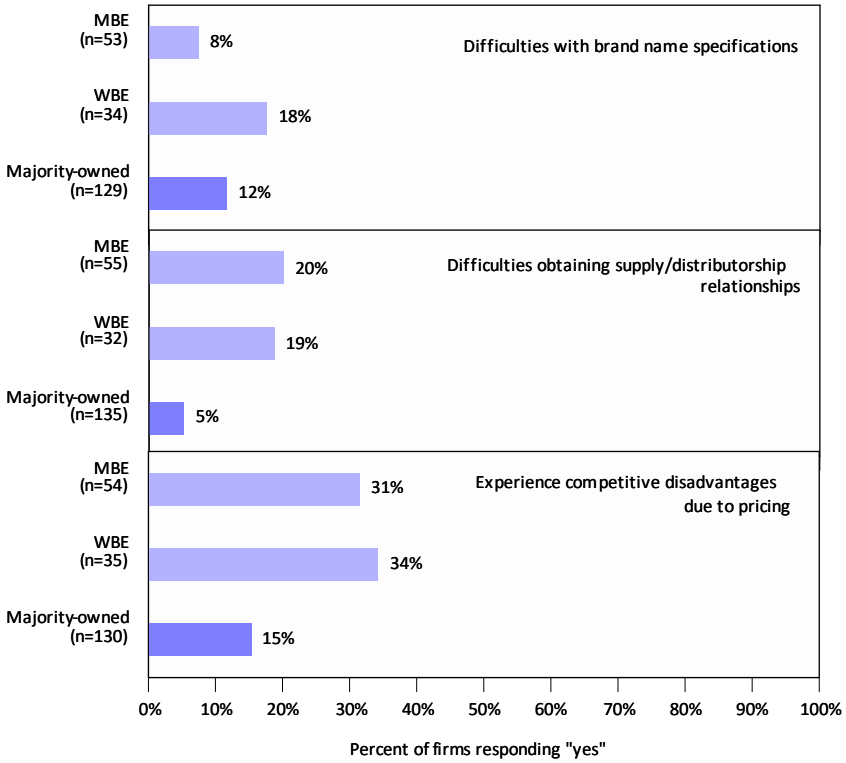
Goods firms were further asked about brand name specifications, obtaining supply relationships and experiencing disadvantages related to pricing.

- Few MBEs and majority-owned goods companies reported experiencing difficulties regarding brand name specifications or obtaining supply relationships. Eighteen percent of WBE goods firms indicated difficulties with brand name specifications.

- About 20 percent of MBEs and WBEs reported difficulties obtaining supply or distributorship relationship compared with only 5 percent of majority-owned companies.

- One-third of MBEs and WBEs reported experiencing competitive disadvantages due to supplier pricing. About 15 percent of majority owned firms reported such difficulties.

Figure H-36.
Responses to availability interview questions concerning brand name specifications and distributorship relationships, MBE, WBE and majority-owned goods firms in the New Orleans metropolitan area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability survey.

Summary

Analysis of information from different sources yields a pattern of results suggesting that outcomes differ for minority and female business owners compared with non-minority and male business owners.

Small Business Administration data for Louisiana showed that African American and Asian American-owned firms were the most likely to close and less likely to expand than non-minority-owned companies from 2002 to 2006.

The study team examined several different datasets to analyze business receipts and earnings for minority- and female-owned businesses.

- Analysis of 2012 Survey of Small Business Owners data for the New Orleans metropolitan area showed that average receipts for African American-, Asian American-, Hispanic American- and Native American-owned firms were lower than non-minority-owned companies. Women-owned businesses also had lower revenue, on average, than male-owned firms.

- Data for the New Orleans metropolitan area from the 2011–2015 American Community Survey indicated that African Americans, Hispanic Americans and other people of color who owned businesses had considerably lower earnings than non-minorities. Also, female business owners had lower earnings than men. Each difference was large and statistically significant.

- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were negative effects of race and gender on business earnings, after statistically controlling for certain gender-neutral factors:

  - Being a minority business owner was associated with lower business earnings in the New Orleans construction industry in 2011–2015; and

  - Being female was associated with lower business earnings in the New Orleans professional services industry in 2011–2015.

- Data from the 2017 availability surveys conducted for this study showed that MBEs were more likely to be low-revenue companies compared with majority-owned firms across study industries. This was also evident for WBEs in the professional services and goods industries.

There was some evidence that WBEs have somewhat lower bid capacity than other firms after controlling for subindustry.

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

- Obtaining lines of credit or loans;
- Obtaining bonds;
- Being prequalified for work;
- Insurance requirements;
- Large project sizes (construction);
- Learning about bid opportunities in the public and private sectors and learning about subcontracting opportunities;
- Obtaining supply/distributorship relationships; and
- Competitive disadvantages due to pricing from suppliers.

In summary, analysis of many different data sources and measures indicates evidence of disparities in marketplace outcomes and barriers for minority- and women-owned businesses in the New Orleans metropolitan area.

APPENDIX I.
Description of Data Sources for Marketplace Analyses
(draft, 01032018, not for public distribution)

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2011–2015 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;
- Federal Reserve Board's 2003 Survey of Small Business Finances (SSBF);
- The 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix D for a description of the availability survey.)

U.S. Census Bureau PUMS Data

Focusing on the construction, professional services, goods and other services industries, the study team used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.[1] For the analyses contained in this report, the study team used the 2011–2015 five-year ACS sample.

[1] Ruggles, S., Genadek, K., Goeken, R., Grover J., & Sobek, M. Integrated Public Use Microdata Series: Version 6.0 [Machine-readable database]. Minneapolis: University of Minnesota, 2015.

2011–2015 ACS. The study team examined 2011–2015 ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long form.[2] Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. (along with the District of Columbia and Puerto Rico). Currently, these surveys cover roughly 1 percent of the population per year. The 2011–2015 ACS five-year estimates represent average characteristics over the five-year period of time, and correspond to roughly 5 percent of the population. For the New Orleans-Metairie MSA, the 2011–2015 ACS dataset includes 35,380 observations which — according to person-level weights — represent 1,249,131 individuals.

Categorizing individual race/ethnicity. To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into one of seven groups:

- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Hispanic American;
- Native American;
- Other minority (unspecified); and
- Non-Hispanic white.

An individual was considered "non-Hispanic white" if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual's race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. The study team used a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified multiple races was placed in the reported race category with the highest ranking in the study team's ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified himself or herself as "Korean," that person was placed in the Asian-Pacific American category. If the individual identified himself or herself as "Korean" in combination with "Black," the individual was considered African American.

- The Asian-Pacific American category included the following race/ethnicity groups: Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Native Hawaiian, Samoan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.

[2] U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing, 2009. Available at https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs_design_methodology.pdf.

- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani and Sri Lankan. Individuals who identified themselves as "Asian," but who were not clearly categorized as Subcontinent Asian, were placed in the Asian-Pacific American group.
- American Indian, Alaska Native and Latin American Indian groups were considered Native American.
- If an individual was identified with any of the above groups and an "other race" group, the individual was categorized into the known category. Individuals identified as "other race" or "white and other race" were categorized as "other minority."

Education variables. The study team used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into six categories: less than high school, high school diploma (or equivalent), some college but not degree, bachelor's degree, and advanced degree.[3]

Home ownership and home value. Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of household living in dwellings owned free and clear and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2011–2015 ACS, home value is a continuous variable (rounded to the nearest $1,000) and median estimation is straightforward.

Definition of workers. Analyses involving worker class, industry and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation or class include both employed persons and those who are unemployed but seeking work.

Business ownership. The study team used the Census-detailed "class of worker" variable (CLASSWKRD) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

[3] In the 1940-1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.

Figure I-1.
Class of worker variable code in the 2011–2015 ACS

Source:

Keen Independent Research from the IPUMS program: http://usa.ipums.org/usa/.

Description	2011–2015 ACS CLASSWKRD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at nonprofit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

Business earnings. The study team used the Census "business earnings" variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners aged 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on four industries: construction, professional services, goods and other services. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Figure I-2.
2011–2015 Census industry codes used for construction, professional services, goods and other services

Study industry	2011–2015 ACS IND codes	Description
Construction	0770	Construction industry
Professional services	7270, 7280,7290, 7390, 7470, 7460, 7380, 6695, 7490	Legal services; Accounting tax preparation, bookkeeping, and payroll services; Architectural, engineering and related services; Management, scientific and technical consulting services; Advertising, public relations and related services; Scientific research and development services; Computer systems design and related services; Data processing, hosting and related services; Other professional, scientific and technical services.
Goods	0470, 2570, 4070-4590, 4870, 4880, 5480, 5680	Nonmetallic mineral mining and quarrying; Cement, concrete, lime, and gypsum product manufacturing, Wholesale trade; Retail trade: building material and supplies dealers, hardware stores, office supplies and stationery and fuel dealers.
Other services	7580, 7590, 7680, 7690, 7770, 7780, 7790, 8770, 6170	Employment services; Business support services; Investigation and security services; Services to buildings and dwellings; Landscaping services; Other administrative and other support services; Waste management and remediation services; Automotive repair and maintenance; Truck transportation.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2011–2015 ACS OCC codes used in the study team's analyses.

Figure I-3.
2011–2015 ACS occupation codes used to examine workers in construction

2011–2015 ACS occupational title and code	Job description
Construction managers 2011–15 Code: 220	Plan, direct, coordinate or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate and supervise the construction process.
First-line supervisors of construction trades and extraction workers 2011–15 Code: 6200	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, blockmasons and stonemasons 2011–15 Code: 6220	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block and terra-cotta block. Construct or repair walls, partitions, arches, sewers and other structures. Build stone structures, such as piers, walls and abutments, and lay walks, curbstones or special types of masonry for vats, tanks and floors.
Carpenters 2011–15 Code: 6230	Construct, erect, install or repair structures and fixtures made of wood, such as concrete forms, building frameworks, including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.
Carpet, floor, and tile installers and finishers 2011–15 Code: 6240	Apply shock-absorbing, sound-deadening or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings and roof decks.
Cement masons, concrete finishers and terrazzo workers 2011–15 Code: 6250	Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways and cabinet fixtures.
Construction laborers 2011–15 Code: 6260	Perform tasks involving physical labor at building, highway and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades."
Paving, surfacing and tamping equipment operators 2011–15 Code: 6300	Operate equipment used for applying concrete, asphalt or other materials to road beds, parking lots or airport runways and taxiways, or equipment used for tamping gravel, dirt or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators and stone spreader operators.

Figure I-3. (continued)
2011–2015 ACS occupation codes used to examine workers in construction

2011–2015 ACS occupational title and code	Job description
Miscellaneous construction equipment operators, including pile-driver operators 2011–15 Code: 6320	Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors or front-end loaders to excavate, move and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads or locomotive cranes to drive pilings for retaining walls, bulkheads and foundations of structures, such as buildings, bridges and piers.
Drywall installers, ceiling tile installers and tapers 2011–15 Code: 6330	Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.
Electricians 2011–15 Code: 6355	Install, maintain and repair electrical wiring, equipment and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems or electrical control systems. Exclude "Security and Fire Alarm Systems Installers."
Glaziers 2011–15 Code: 6360	Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings and tabletops.
Painters, construction and maintenance 2011–15 Code: 6420	Paint walls, equipment, buildings, bridges and other structural surfaces, using brushes, rollers and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.
Pipelayers, plumbers, pipefitters and steamfitters 2011–15 Code: 6440	Lay pipe for storm or sanitation sewers, drains and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe or seal joints. Excludes "Welders, Cutters, Solderers and Brazers." Assemble, install, alter and repair pipelines or pipe systems that carry water, steam, air or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.
Plasterers and stucco masons 2011–15 Code: 6460	Apply interior or exterior plaster, cement, stucco or similar materials and set ornamental plaster.
Roofers 2011–15 Code: 6515	Cover roofs of structures with shingles, slate, asphalt, aluminum and wood. Spray roofs, sidings and walls with material to bind, seal, insulate or soundproof sections of structures.
Iron and steel workers, including reinforcing iron and rebar workers 2011–15 Code: 6530	*Iron and steel workers* raise, place and unite iron or steel girders, columns and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. *Reinforcing iron and rebar workers* position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches and hand tools. Include rod busters.
Helpers, construction trades 2011–15 Code: 6600	All construction trades helpers not listed separately.

Figure I-3. (continued)
2011–2015 ACS occupation codes used to examine workers in construction

2011–2015 ACS occupational title and code	Job description
Driver/sales workers and truck drivers 2011–15 Code: 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."
Crane and tower operators 2011–15 Code: 9510	Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines or products in many directions. Exclude "Excavating and Loading Machine and Dragline Operators."
Sheet metal workers 2011–15 Code: 6520	Fabricate, assemble, install, and repair sheet metal products and equipment, such as ducts, control boxes, drainpipes, and furnace casings. Work may involve any of the following: setting up and operating fabricating machines to cut, bend, and straighten sheet metal; shaping metal over anvils, blocks, or forms using hammer; operating soldering and welding equipment to join sheet metal parts; or inspecting, assembling, and smoothing seams and joints of burred surfaces. Includes sheet metal duct installers who install prefabricated sheet metal ducts used for heating, air conditioning, or other purposes.
Dredge, excavating and loading machine operators 2011–15 Code: 9520	*Dredge operators* operate dredge to remove sand, gravel or other materials from lakes, rivers or streams; and to excavate and maintain navigable channels in waterways. *Excavating and loading machine and dragline operators* operate or tend machinery equipped with scoops, shovels or buckets to excavate and load loose materials. *Loading machine operators, underground mining* operate underground loading machines to load coal, ore or rock into shuttles or mine cars or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scrapers or scoops, or machines equipped with gathering arms and conveyors.

Source: Keen Independent Research from the IPUMS program: http://usa.ipums.org/usa/.

Survey of Small Business Finances (SSBF)

The study team used the SSBF to analyze the availability and characteristics of small business loans. The Federal Reserve Board conducted the SSBG every five years, 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.[4]

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:

- African American;
- Asian American;
- Hispanic American;
- Native American;
- Other (unspecified); and
- Non-Hispanic white.

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.

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).

[4] The Federal Reserve Board. *Survey of Small Business Finances, 2003*. Retrieved from http://www.federalreserve.gov/pubs.

Region variables. The SSBF divides the United States into nine Census Divisions. Along with Oklahoma, Arkansas and Texas Louisiana resides in the West South Central Census Division.

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.[5] Thus, there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. For the West South Central alone, there were 2,040 observations representing 408 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.[6] 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.

Survey of Business Owners (SBO)

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts for the New Orleans-Metairie Metropolitan Statistical Area. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, professional services, goods and other services.

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[5] For a more detailed explanation of imputation methods, see the "Technical Codebook" for the *2003 Survey of Small Business Finances.*

[6] 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.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as women-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Americans, Hispanic Americans, Native Americans or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership. Racial categories in the New Orleans – Metairie MSA are not available by both race and ethnicity, so race and ethnicity were analyzed independently. The study team reported business receipts for the following racial, ethnic and gender groups according to Census Bureau definitions at state level:

- Racial groups — African Americans, Asian Americans (including Guam, Samoa and Other Pacific Islands), Native Americans (American Indian, Alaska Native and Native Hawaiian) and whites;
- Ethnic groups — Hispanic Americans and non-Hispanics; and
- Gender groups — men and women.

Home Mortgage Disclosure Act (HMDA) Data

The study team analyzed mortgage lending in the New Orleans-Metairie MSA using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2016 HMDA data if they had assets of more than $44 million on the preceding December 31 ($36 million for 2007 and $40 million for 2011), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations (including refinancing) either (a) exceeding 10 percent of all loan originations in the past year or (b) exceeding $25 million, had a home or branch office in an MSA (or received applications for, purchase or originate five or more mortgages in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

The study team used those data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2011 and 2016. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J.
Qualitative Information from In-Depth Interviews, Surveys, Focus Groups, Public Meetings and Other Public Comments
(draft, 01112018, not for public distribution)

Appendix J presents qualitative information that Keen Independent collected as part of the disparity study. It is based on input from 492 businesses, trade association representatives and others. Appendix J includes seven parts:

A. Introduction and Methodology describes the process for gathering and analyzing the information summarized in Appendix J.

B. Background on the Firm and Industry summarizes information about how businesses, organizations and agencies become established and how companies change over time.

C. Whether there is a Level Playing Field for Minority- and Women-owned Businesses and other Small Businesses in the New Orleans Marketplace discusses challenges for MBE/WBEs.

D. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Minority- and Women-owned Businesses and other Small Businesses provides comments on whether there is a level playing field for minority-owned businesses operating in the New Orleans marketplace.

E. Working with Public Agencies and Specifically the City of New Orleans summarizes experiences businesses have while working with public agencies and the City of New Orleans.

F. Insights Regarding Business Assistance Programs and Certification includes business owners' comments on access to business assistance and any experiences related to certification.

G. Any Other Insights and Recommendations for the City of New Orleans provides interviewee insights and recommendations.

A. Introduction and Methodology

The Keen Independent study team conducted in-depth personal interviews and telephone, online and fax availability interviews from summer 2017 through winter 2017. Keen Independent held two public meetings in the afternoon and evening of October 5, 2017 (at the University of New Orleans) and asked for verbal and written comments concerning topics in the New Orleans Disparity Study.

Keen Independent collected additional public comments through the study website, mail and the designated telephone hotline and study email address.

Through in-depth personal interviews, availability interviews, public meetings and public comment process, business owners and representatives had the opportunity to discuss their experiences working in construction, professional services, goods and other services; experiences working with the City of New Orleans and others; perceptions of certification programs; and other topics important to them.

The study team conducted outreach at key junctures in the disparity study, including public outreach through more than 70 organizations and outlets. These efforts included a number of media channels, the Oversight Committee and other groups. A partial list of organizations is shown in Figure J-1 below.

The study team secured coverage on the disparity study in Louisiana Weekly, Biz News New Orleans and WBOK; outreach through New Orleans Agenda; and, targeted pitching to a dozen radio, television, print and online outlets. We also invited more than 10,000 business owners to provide input through online and telephone interviews.

Figure J-1.
Partial list of Keen Independent outreach

Outreach and media	
AGC of Louisiana	New Orleans Business Alliance
Foundation for Louisiana	New Orleans Chamber of Commerce
Good Work Network	New Orleans Regional Black Chamber of Commerce
Hispanic Chamber of Commerce of Louisiana	Small Business Administration
Hope Credit Union	The Collaborative
Idea Village	The Southern Region Minority Supplier Development Council
Latino Forum	Urban Conservancy
Life City	Urban League of New Orleans
Lift Fund	VetLaunch Business Accelerator
Louisiana DOTD	504 Ward
Louisiana SBDC	Others
Mary Queen of Vietnam CDC	

In-depth personal interviews. The study team conducted in-depth personal interviews and focus groups with 60 businesses, trade associations and others representing construction, professional services, goods and other services in the New Orleans marketplace. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local marketplace.

Interviews and focus groups were conducted by Keen Independent and local study team members:

- Dr. Silas Lee & Associates, a New Orleans-based minority-owned research firm;
- Spears Group, a New Orleans-based SLDBE-certified communications firm;
- The Villavaso Group (TVG), a New Orleans-based SLDBE-certified professional services consulting firm; and
- Lucas Díaz, an independent consultant specializing in local Latino community outreach.

Interviewees included individuals representing construction, professional services, goods and other services businesses, trade associations and representatives of public agencies in the New Orleans marketplace.

The study team identified businesses for in-depth interviews primarily from the respondents to the availability survey of companies across the New Orleans marketplace. The final question in the availability interview was whether the respondent would be willing to participate in a follow-up interview. Keen Independent grouped availability survey respondents willing to participate in those interviews by business type, location, and the race, ethnicity and gender of business owner.

The study team conducted most of the interviews with the owner, president, chief executive officer, or other executive of the business or trade association.

Interviewees were often quite specific in their comments. As a result, in many cases, the study team has reported them in more general form to minimize the chance that readers could readily identify interviewees or other individuals or businesses that were mentioned in the interviews. The study team reports whether each interviewee represents a certified business and also reports the race/ethnicity and gender of the business owner, when possible. Business interviewees are identified in Appendix J by interviewee numbers (i.e., #I-1, #I-2, #I-3, etc.). Interviews with trade associations and other organizations are identified as "TO."

Availability interviews. The study team asked firm owners and representatives to provide comments at the end of the online or telephone availability survey. Businesses were asked: "Do any other barriers come to mind about starting and expanding a business or achieving success in your industry?"

A total of 312 businesses provided comments. The study team analyzed responses to these questions and provided examples of different types of comments in Appendix J. Availability interview comments are referenced as "AI."

2017 public meetings and other input. Beginning in January 2017, Keen Independent, with the help of Spears Group, made wide-ranging efforts to publicize the Disparity Study and opportunities for public input, including distribution of the information to individuals and organizations throughout the city. Keen Independent also posted the public meeting dates/locations on the study website: noladisparitystudy.com.

On October 5, 2017, Keen Independent held two public meetings at the University of New Orleans that included late afternoon and evening start times and a remote log-in option. Attendance included 28 signed-in representatives of area businesses, trade associations and advocacy groups. (There were a number of additional public meeting participants who did not sign the register.) To encourage candid discussions, several representatives of the City introduced themselves and left both meetings prior to Keen Independent opening the floor for public comments. Keen Independent led the public meetings with assistance from our local subconsultant team: Dr. Silas Lee & Associates, Spears Group, The Villavaso Group and Independent Consultant, Lucas Díaz. Public meeting comments are referenced in Appendix J as "PMP."

2017 Focus groups. In October 2017, Keen Independent invited potential participants to four focus groups including businesses, Oversight Committee members and guests, and representatives of public agencies and other local leadership. Discussions focused on topics similar to the public meeting list above. Focus group participants are identified in aggregate by group as "FG."

Written public comments. The study team received 16 written comment submissions throughout the study period (identified as "PC" in Appendix J). Written comment requests for interviews were added to the potential interview list, and were also invited to provide input through the email address and "submit your ideas or comments" website feature.

Disparity Study hotline. The study team also maintained a Disparity Study hotline phone number for additional input. Keen Independent received four calls and responded to those callers. Phone requests for interviews were added to the potential interview list, and were also invited to provide input through the email address and website.

B. Background on the Firm and Industry

The Keen Independent study team asked business owners to report on their business history and industry. Topics included:

- Business history;
- Barriers to starting, sustaining and growing a business, and any barriers to entry;
- Geographic scope and any changes over time;
- Type of work and any changes over time;
- Business expansion and contraction;
- Size of contracts and changes over time;
- Public or private sector, or both, and preferences/experiences in each;
- Prime or subcontractor/subconsultant;
- Current economic conditions in the New Orleans marketplace;
- Business owner definition of success; and
- Keys to business success.

Business history. The Keen Independent study team asked interviewees about their business start-up history, and any barriers they faced at business launch and beyond.

Most business owners worked in the industry, or a related industry, before starting their firms. Some gained industry-related experience through family-run companies. For example:

- The African American owner of a specialty consulting firm reported that prior to opening his firm in 2014, he had over thirty years of related experience. [#I-11]

- An African American female owner of a certified (DBE/SLDBE) specialty professional services firm reported previously owning a franchise in the industry before starting her own independent firm. [#I-22]

- The African American owner of an SLDBE-certified construction firm, prior to starting his firm, indicated that he had earned a college degree in his chosen field. [#I-2]

- A Hispanic American owner of a DBE-certified professional services firm relayed that he started his firm 17 years ago after working in the industry for another similar business. [#I-20]

- The African American owner of a formerly-certified (SLDBE) specialty contracting firm indicated that his passion for his type of work precipitated his starting the firm 17 years ago. [#I-16]

- An Asian American owner of a professional services firm indicated that although his firm was only one-year-old, he has "operated as [in professional services] a lot longer." [#I-5]

- The Hispanic American female owner of an SLDBE-certified consulting firm reported that prior to starting her firm, she had considerable experience working in non-profit in a similar capacity. [#I-9]

- An African American owner of a DBE-certified specialty-contracting firm reported that he and his partner had industry education prior to starting the firm. [#I-10]

- The African American female owner of a DBE-certified professional services firm reported that her father started the firm in the 90s, with her operating the business for years. [#I-17]

- One African American co-owner of a construction-related firm reported that his father started the firm in 1982 and that he and his two brothers purchased the firm in the 2000s. [#I-28]

- An African American owner of a specialty services firm reported that much of the training that he received in the military helped him with his business. [#I-14]

Most business owners and representatives reported that their companies were in business for many years. Interviewee comments included:

- An African American female owner of a goods firm reported that her business started "organically" about ten years ago. [#I-23]
- The Hispanic American owner of a DBE-certified specialty contracting firm said that he started his firm several decades ago after working for a large publicly-traded firm in a similar industry. [#I-40]
- A white representative of a majority construction-related firm reported that the firm launched as a small contracting firm many years ago. [#I-39]
- A public meeting participant owning a professional services firm reported that his firm was in business for many years, by saying, "[Many] years, right here in New Orleans." [#PMP-1]
- An African American male owner of a formerly DBE-certified construction-related firm reported launching his firm about some years ago. [#I-26]
- A white male representative of a publicly-traded professional services firm reported that the company started many years ago and employed thousands of staff members; this firm now also operated a small Gulf Coast team. [#I-27]
- An African American male veteran-owner of a specialty services firm indicated that he was in business for nearly four decades. After a stint in the military, he restarted the same business. [#I-14]
- An African American part owner of a DBE-certified professional services firm reported that the firm was started by his African American male business partner many years ago. [#I-21]

Some business owners reported buying companies or investing in companies where they had previously worked. One reported purchasing a franchise. A few gave other reasons for starting their businesses. These interviewees included, for example:

- A majority business owner reported investing in a specialty contracting franchise and then relying on his MBA to apply good business practices. [#I-8]
- After buying her business from a partner, the Hispanic American female owner of a SLDBE-certified professional services firm operated under a new name. [#I-12]
- The Hispanic American owner of a DBE-certified professional services firm reported selling the firm and later buying it back. He added that he opened the New Orleans area branch of his firm before the 2000s. [#I-6]

Some business owners reported newer firms, or recently-opened businesses in the New Orleans area. Comments included, for example:

- One African American owner of a DBE/SLDBE-certified professional services firm reported starting his sole proprietorship as a student four years ago. [#I-24]

- An African American owner of a DBE-certified professional services firm reported to move the business to t New Orleans after "doing work for FEMA and rebuilding the city." [#I-15]

- The African American owner of a specialty consulting services firm reported opening his firm in 2014. [#I-11]

A few business owners started their firms to fill a need in the marketplace. Examples included:

- The African American female owner of a certified professional services firm stated that she built experience in the industry from her previous public-sector employment. She stated that she started her firm more than 20 years ago in response to a need for minority women to enter the industry. [#I-4]

- An African American owner of a DBE/SLDBE-certified construction-related firm indicated that post-Katrina there was an "enormous need" for his type of work within New Orleans; this prompted him to start his business. [#I-35]

- The African American part owner of a DBE/SLDBE-certified professional services firm reported starting his firm with a partner because there was a "void of minority-owned firms" in the industry. [#I-32b]

- An African American owner of a DBE/SLDBE-certified specialty-contracting firm reported that he started his firm "because of a need in the community for quality affordable [specialty-services] …." [#I-31]

- The white female representative of a business development organization and owner of a certified specialty consulting firm reported that the organization was born out of a need to assist sustainable businesses after Hurricane Katrina. [#TO-5]

Several business owners reported launching businesses for increased personal and professional independence. For instance:

- When asked how her business was established, the Asian American female owner of a DBE-certified professional services firm commented that after a career with the State of Louisiana, "[I] wanted to have the freedom of having [my] own business." [#I-38]

- The Hispanic American owner of a DBE-certified professional services firm remarked that he desired, "to go out on his own." [#I-20]

- The African American female owner of a certified (DBE/SLDBE) professional services firm reported that prior to operating her firm full-time, she worked from her home. She commented that she wanted to create her own opportunities. [#I-18]

Barriers to starting, sustaining and growing a business and any barriers to industry entry. Business owners and representatives reported on any difficulties they faced at start-up. For some firms, challenges persisted today.

Some business owners and representatives reported, at start-up, limited knowledge of basic business operations and financial management. These comments included:

- A white representative of a majority-owned construction-related firm reported deficiencies in basic business knowledge at start-up. Challenges reported included: "Institutional knowledge, understanding of the business and the industry, competition, capital, government regulations, licensing, compliance …." [#I-39]

- The representative of a majority professional services firm commented, "New business is hard …." He added, "There aren't many directions for 'what to do' and 'to go to.'" He further commented that separating business from personal issues, when "jump-starting," was also challenging. [#AI-308]

- An African American co-owner of a construction-related firm reported that "official business" knowledge was a challenge for he and his partners. [#I-28]

- An Asian American female owner of a DBE-certified professional services firm reported challenges at start-up. She stated, "Being 'new' in business, you hit a lot of hiccups … management of money … [and] all the little nuances that come with being a business owner …. I had to learn through 'trial and effort.'" [#I-38]

- A Hispanic American female owner of a professional services firm indicated that she experienced fiscal management issues by stating, "Financial management of the company [was difficult]." [#AI-121]

- An African American representative of a nonprofit financial assistance organization reported that business owner acumen, especially managerial functions caused challenges for many small business owners. He conveyed, as an analogy, "Knowing how 'to cook' and 'run a restaurant' are two different skillsets." [#TO-2]

Some business owners and representatives reported barriers to industry entry specific to race, gender and ethnicity. For example:

- A focus group participant representing a public agency reported that the New Orleans marketplace was one of the worst in the nation for "social or economic mobility." She added that there was clear evidence of inequality in the city. [#FG-1]

- The African American female representative of a business assistance organization expressed that limited "access to a level playing field" was a challenge for members entering certain industries. She commented, "They're not really 'at the table' …." [#TO-9]

- When asked about any barriers to industry entry, an African American owner of a DBE/SLDBE-certified professional services firm reported that the industry in which he works was one of the "least diverse" and "white-male-dominated" industries in the marketplace. [#I-24]

- Regarding entry to the construction industry, the white female owner of a certified (DBE/SLDBE) construction firm reported that when women enter a predominantly male industry and "sit at the table … women are not treated the same as males." [#I-13]

- An African American owning a DBE-certified specialty contracting firm reported, "We thought that ethnicity was really the problem, because we're very versatile …. we're backed by a large company…." He continued, "But, a lot of times we're not given a chance [in the industry] … I would say [it's] ethnicity." [#I-10]

Several business owners reported limited access to education and training that can impact entry and advancement. One business development representative reported even more educational barriers for "first generation" business owners. Examples included:

- An African American female representative of a business assistance organization reported, "In general, the biggest challenge is education and resources …." [#TO-9]

- One African American owner of a DBE-certified professional services firm remarked that lack of "vocational schools" in New Orleans presented barriers to entry, advancement and growth of minority-owned firms in the marketplace. [#I-15]

- When asked about challenges for small businesses, an African American male representative of a nonprofit financial assistance organization reported that limited access to education (especially financial education) and knowledge of "the lending landscape," created barriers for small businesses. [#TO-2]

- The African American female owner of a certified (DBE/SLDBE) professional services firm commented that there were not many training opportunities for those entering professional services industries. [#I-18]

- One African American female representative of a business development association reported that educational barriers existed for many small business owners. She added that many small business owners in the city were "first generation" and did not have access to adequate education or resources. She reported, "They are truly disadvantaged. They do not have access to what's really needed to pursue the 'American dream.'" [#TO-3]

A large number of business owners and representatives faced barriers securing start-up capital and financing. For some, financial barriers persisted. [e.g., #I-22, #I-24, #I-31, #I-32-b, #I-41, #AI-4, #AI-6, #AI-10, #AI-21, #AI-41, #AI-48, #AI-55, #AI-63, #AI-68, #AI-70, #AI-87, #AI-93, #AI-98, #AI-101, #AI-105, #AI-120, #AI-126, #AI-159, #AI-178, #AI-180, #AI-189, #AI-197, #AI-236, #AI-277, #AI-284, #AI-293, #PMP-1, #FG-1, #FG-2] Examples of comments included, for instance:

- An African American female representative of a minority-business advocacy group reported historically limited access to financing for African American business owners. [#I-41]

- An African American co-owner of a construction-related firm reported that access to capital was particularly difficult as a "black business." He indicated that he and his brothers "scrambled" for funding; however, when they sought financing, being "a black business" became a "stigma." [#I-28]

- The African American female representative of a business development association reported knowing of minority business members unsuccessfully securing loans and needed line of credits. [#TO-1]

- An African American part owner of a DBE-certified professional services firm commented that access to funding was "a major problem" for him at start-up. [#I-21]

- An African American female owner of a goods firm reported that limited investment funds for marketing, product and inventory were barriers at start-up. [#I-23]

- Regarding access to financing and bonding, an Asian American female owner of a goods firm commented that "getting financing and bonds" was challenging. [#AI-69]

- The African American female representative of a business assistance organization indicated that finance was a key challenge for the businesses she served." [#TO-9]

- An African American owner of a DBE-certified specialty contracting firm stated, "One of our main barriers in the beginning was finance … because we didn't have the finance[s] to look professional …." [#I-10]

- The African American female owner of a certified professional services firm reported that financing was a barrier early on. She said, "The first ten years of my business I didn't have a line of credit. The first seven months that I was in business, I got a $1 million contract, and I couldn't borrow $25,000." [#I-4]

- A female owner of a construction firm indicated that "finance issues" were an obstacle for small companies. [#AI-165]

- The African American female representative of a business development association commented that the biggest barrier to small firms was lack of access to capital. [#TO-3]

- An African American representative of a nonprofit financial assistance organization commented that access to capital was a common barrier the firms he served: "[Many companies] can't get access to capital through traditional sources such as banks and credit unions." [#TO-2]

- A white representative of a majority construction-related firm reported that securing capital was challenging at the launch of his business. [#I-39]

A number of business owners and representatives explained that barriers to financing persisted beyond start-up, making sustaining and expanding their firms difficult. For instance:

- An Asian American female owner of a professional services firm reported that she did not have access to enough sources of capital necessary for the operations of her firm. [#AI-62]

- The white owner of a construction-related firm indicated that "achieving financing for growth" continued to be a challenge for his firm. [#AI-160]

- The Hispanic American owner of a DBE-certified professional services firm reported that at start-up, "Cash flow was the biggest challenge." He went on to explain that "from time-to-time" cash flow remained problematic for his firm. [#I-20]

- The white female owner of an SLDBE- construction firm reported that financing was one of the biggest "financial binds" that she "routinely" faced. [#I-13]

- An African American owner of a formerly DBE-certified construction-related firm reported on-going challenges "avoiding debt." [#I-26]

With limited access to business financing, many business owners relied solely on personal funds (including credit cards and other resources) to support a business. Examples included:

- One African American female representative of a minority trade association remarked that minority business owners, not typically granted easy access to capital, often used "life-savings" to start and sustain their businesses. [#TO-4]

- The African American owner of an SLDBE-certified construction firm reported using personal funds to finance his business. When he attempted to deposit a large amount of cash funds to start his business, he explained, "I didn't have an employer [as I was seeking to establish self-employment] …. A black person going to the bank with cash was a 'problem' …. No bank would take my money… 'I was black, had cash, no job … which meant money laundering.'" [#I-2]

- For the African American owner of an SLDBE-certified construction firm, jumpstarting his firm meant that he "cashed out his retirement fund." [#I-2]

- The African American female owner of a DBE-certified professional services firm reported using her "personal savings" to start her firm. She added that she also performed small jobs in order to invest in her young business. [#I-3]

- An Asian American female owner of a DBE-certified professional services firm commented that access to capital was challenging. She said, "I did not have any savings … capital resources were very limited …. I had to take loans out of 'my' credit cards …." [#I-38]

- The white owner of a franchised specialty contracting firm reported that he financed his business with his military pension. [#I-8]

- One African American owner of a DBE/SLDBE-certified professional services firm reported that due to his inability to secure financing (from where he banks and other sources) the firm was entirely "self-financed." He concluded, "That pretty much continues to this day." [#I-25]

- An African American female owner of a goods firm commented that business owners in her industry were usually "self-funded" adding that "it's difficult to get investors in this type of business." [#I-23]

- Regarding limited access to financing, an African American owner of a professional services firm stated, "You have nobody to invest in 'you,' the banks won't loan you money to get started … you need capital … to build and … capture business …." [#I-30]

- An African American owner of a DBE-certified specialty contracting firm explained, "I had to use my own 'personal credit and financing' …. I used my savings and everything else that I could, to catapult us into some work." [#I-10]

- An African American female owner of a goods firm reported that she had not pursued loans for her firm, as she feared business debt. She went on to add that loans were difficult to secure in her industry, anyway. [#I-23]

Some business owners and representatives reported challenges "getting a foot in the door" to build relationships, network and grow their businesses. For example:

- An Asian American female owner of a DBE-certified professional services firm reported that developing "contacts" was challenging for her. "I was younger, I did not have the experience … to have a 'rolodex' of people … it's hard to open doors," she reported. [#I-38]

- One African American part owner of a DBE-certified professional services firm reported that finding a "market niche" was challenging as a young business. [#I-21]

- The Asian American owner of a professional services firm commented, "It was really hard to enter the industry … trying to get the clients lined up. That was the first difficulty … getting the jobs to start [was most difficult] …." [#I-5]

- An Asian American owner of a specialty services firm reported not being invited to particular events or introduced to people to get in the door to speak with the right people at the City, for example. [#AI-155]

- The Hispanic American female owner of an SLDBE-certified professional services firm commented that, at start-up, small businesses business owners lack the "track record" needed to secure work. [#I-12]

The small "size" of some businesses created barriers to securing work and breaking into the industry. Being a younger business was also a barrier for some. For example:

- A focus group participant from a public entity commented that the small size of some firms was a disadvantage when competing with the "big boys and girls" who have financial resources. [#FG-1]

- Referring to small business size as a barrier, a focus group participant representing a minority-owned business reported, "The small business environment in New Orleans is extremely difficult … small businesses here are made to bid against sizeable businesses." [#FG-2]

- One African American owner of a specialty contracting firm reported that the small size of his firm was a limiting factor in the type of work and size of contracts that he pursued. [#I-36]

- The Hispanic American female representative of a minority business association conveyed that small business size often results in business planning challenges and time deficits that limited overall opportunities and goals. [#TO-6]

- An African American female business development representative reported a myriad of size-based challenges. She stated that small businesses lack capacity or staff to perform and compete with larger firms. She commented, "For the most part, the barriers are that the [small] businesses we represent are not completely prepared to take on larger opportunities." [#TO-1]

- A representative of an African American-owned construction-related firm reported, "Prime contractors and clients say younger-owned … companies lack experience, which restricts a smaller company from being able to qualify to compete." [#AI-222]

Some business owners and representatives reported "competition" as limiting opportunities in their respective industries. [e.g., #I-30, #AI-32, #FG-2] Examples included:

- The white part owner of a DBE/SLDBE-certified professional services firm commented that at start-up, competition was a major issue in the industry. [#I-32a]

- A representative of an African American-owned construction firm said, "There is a lot of competition right now. A lot of people think they are professional and bid low." [#AI-288]

- Regarding competition, an African American male owner of a DBE/SLDBE-certified specialty contracting firm reported that "starting [a] business in New Orleans is hard because it's a small city." He added, "… you're a 'small fish is a small pond' … even shrinking down … in the black community…." [#I-31]

- The African American owner of a specialty services firm reported competition from a previous employer and being served with a "no compete" order against him in civil court; this extreme level of competition delayed the opening of his firm for one year. [#I-11]

- An African American part owner of a DBE-certified professional services business reported that there was an influx of "outside" majority firms to New Orleans. [#I-21]

  He indicated that it was very difficult to compete against them because, "… they have bigger staff … they control it … there's no such thing as set-asides for African American [businesses] …." [#I-21]

Some reported that competition from large or large majority firms put small businesses and minority- and women-owned firms at a disadvantage. Comments included:

- The African American owner of a formerly-certified (SLDBE) construction related firm commented that small businesses faced competitive challenges by saying, "It's difficult to be looking 'up' at all your competition." He remarked that small firms in New Orleans often competed with "$5 million companies." [#I-16]

- A white female representative of a non-profit business development organization reported that in the goods industry, "big box" firms created competition and threatened the viability of smaller venders. [#TO-8]

- An African American female representative of a minority-business advocacy organization reported, "We are under siege in New Orleans … black businesses don't have the capacity to compete against white businesses …." [#I-41]

- A Hispanic American female owner of a professional services firm said, "The size of the company … and being female made it hard to compete." [#AI-132]

- One Asian American female owner of a DBE-certified professional services firm remarked that in her industry, in order to secure work, a small minority-owned firm must "be low on price in order to possibly get … work." [#I-38]

Some other small businesses and minority- and women-owned firms reported advertising and marketing as barriers to business start-up and growth. Those comments included, for instance:

- An Asian American female owner of a DBE-certified professional services firm described challenges marketing her firm. She reported, "I was a little embarrassed because my business cards weren't the nicest … I felt my presentation was always not up to par with competitors … I didn't have the money to make the glossy brochures, fancy business cards … go to meetings and travel …." [#I-38]

- The Hispanic American female owner of a professional services firm indicated that "marketing in general" challenged her firm. [#AI-121]

- For an African American female owner of a professional services firm, "expanding … visibility in marketing … has taken up work time." [#AI-162]

- The owner of a majority professional services firm commented, "Advertising and marketing costs are prohibitive." [#AI-161]

- An African American male representative of a minority business development association commented that marketing was an on-going challenge because if a business "constantly does things the old way, you are going to be out of business." [#TO-7]

- The African American owner of a specialty services firm indicated that advertising and marketing was an issue. He commented that it's difficult to "[get] the word out as far as the business itself." [#AI-49]

- A representative of a Hispanic American-owned professional services firm indicated that the firm's "lack of advertising for [the] type of business" was a challenge. [#AI-235]

- A white male owner of a specialty services firm said, "I wonder if there's a certain group that gets more opportunity, [but] I don't know if that's the case. We do advertising and it seems difficult to get our company out there … [for] contracts." [#AI-256]

An African American-owned other services firm representative specifically reported that minority business ownership made marketing more difficult. He stated, "Marketing opportunities are hard … due to minority [ownership] … those companies that have a positive impact … get bypassed." [#AI-239]

For many businesses, short- and long-term challenges included finding and sustaining qualified workers. [e.g., #AI-70, #AI-72, #AI-279, #AI-281, #AI-282, #AI-298, #AI-309] Many business owners and representatives commented that small businesses confronted barriers when recruiting, training and retaining qualified employees, for instance:

- The Hispanic American owner of a DBE-certified professional services firm reported challenges being understaffed, unable to locate qualified staff and grow the firm. [#I-6]

- A focus group participant representing a minority-owned business commented, "The small businesses cannot keep their employees … because they don't have consistent business." [#FG-2]

- A Hispanic American female owner of a professional services firm indicated that "sourcing and hiring new employees" was a challenge to her firm. [#AI-121]

- The African American female owner of a professional services firm reported that "[a] lack of skilled technical labor" made hiring a challenge for her firm. [#AI-157]

- The representative of a majority construction firm indicated that it was a challenge to find good employees in the industry. [#AI-9]

- The representative of a majority-owned services firm conveyed that a lack of "dependable workers" was a barrier for the firm. [#AI-52]

- The owner of a majority professional services firm said, "There's a huge deficit of [specified industry]-type people, so that's why we don't have employees here. I have to fly in outside consultants because there's not anyone competent here." [#AI-268]

- Regarding employees and hiring, the female owner of a professional services firm reported, "I would say sometimes it's difficult to identify skilled workers in New Orleans." [#AI-85]

- The female owner of a goods firm reported difficulty finding "qualified technicians" to hire. She added, "The labor force has seen a gap in age and qualifications. Most of the qualified installers are between 40 [and] 60 [years old]." [#AI-117]

- The female owner of a services firm indicated that it was very difficult to find "qualified and skilled employees" in her industry. [#AI-167]

- The female owner of a construction firm indicated that some workers were "not skilled" at time of hire. She reported that her firm has to "take time to train them and spend money on training them" while also completing the job. [#AI-253]

One business association representative indicated that business "sustainability" was challenging for some small business owners. This African American female representative of a business development association commented that small minority- and women-owned firms faced challenges with sustainability. She expressed, "Sustainability is difficult … the one thing we can always depend on is that something [bad] is going to happen … [a] disaster … or other kind of incident …. [Small minority- and women-owned firms] don't have the wherewithal to withstand that shake …." [#TO-3]

Some business owners and representatives reported issues with the high cost of taxes. For instance:

- The Hispanic American female owner of a professional services firm said, "I am unclear on some of the related fees. I am currently being charged for taxes as if I run a brick and mortar business, and I do not. I don't sell goods out of my home. I work online providing services." [#AI-170]

- A representative of a majority professional services firm commented, "taxes are so high." [#AI-302]

- An owner of a majority goods firm reported "too much taxes" as a barrier to business success. [#AI-137]

- The white owner of a construction-related firm reported that "property taxes" are a barrier for his business. [#AI-264]

A number of business owners and representatives commented on challenges regarding licensing and permitting, or other zoning issues. [e.g., #AI-291, #AI-292] Examples included:

- The African American female representative of a minority trade association reported that, when obtaining business licenses, small businesses were disadvantaged. She indicated that the process required many time-consuming steps and extra work for new firms. [#TO-4]

- An owner of a majority other services firm indicated that "licensing and permitting" were too expensive. [#AI-100]

- The owner of a majority goods firm indicated that "licensing costs in New Orleans" were too costly. [#AI-122]

A few other business owners and representatives reported problems understanding or securing the insurance they needed to operate their businesses and bid on work. For instance:

- When asked about any challenges, an African American male owner of a specialty services firm reported that "finding out things I need as far as insurance" was particularly difficult at start-up. [#I-14]

- The white owner of a specialty contracting firm reported that obtaining worker's compensation insurance was a challenge. Although he secured workers' compensation insurance, he reported continued concerns: "That's a major issue … we feel saddled with [it]." [#I-8]

- A white male representative of a publicly-traded professional services firm reported that insurance requirements [for bidding] were especially challenging for small firms and that they should request "insurance waivers." [#I-27]

Two interviewees reported that securing health care and health insurance presented an obstacle to operating their businesses. For instance:

- The representative of an African American-owned professional services firm reported "health care" as a challenge for the firm. [#AI-278]

- An owner of a majority goods firm indicated that "health insurance" was a barrier to conducting business. [#AI-137]

Many business owners reported difficulties obtaining bonding. Comments included:

- The Native American owner of a construction firm indicated that acquiring bonding was a key challenge for his firm. [#AI-54]

- A white female owner of a DBE/SLDBE-certified construction-related firm commented that finding a bonding company that "would stay with her firm" was the "biggest challenge" the business faced. [#I-33]

- The Hispanic American owner of a construction firm indicated that acquiring bonding was a challenge for his firm. [#AI-53]

- The African American owner of a construction firm stated that "obtaining financing and bonds" was particularly difficult for his firm. [#AI-262]

- When asked about any challenges his firm faced, the African American owner of a services firm answered, "Mostly financing and bonding." [#AI-108]

Many conveyed that bonding requirements for securing jobs put small businesses at a disadvantage. Two focus group participants specifically reported that bonding requirements created opportunity for discrimination. Examples follow:

- One representative of an African American female-owned professional services firm commented that "5 percent bid bonding" was a barrier for small businesses. [#AI-6]

- The female owner of a professional services firm reported that "bonding capacity" was a barrier for small companies. [#AI-95]

- The African American owner of a construction firm said, "We are a small company. We have to worry about bid bonds for larger contracts." [#AI-141]

- A female owner of a construction firm indicated that "bond issues" were an obstacle for small companies. [#AI-165]

- A focus group participant representing a minority-owned firm commented that bonding, "is wide open for discrimination." [#FG-2]

- Another focus group participant reported that bonding was the deciding factor that limited minority-owned firms to subcontractor roles and prevented them from expanding into the prime contractor arena. [#FG-2]

One business owner commented that when using a bonding company, awareness of its rating was critical for small firms to stay competitive. This African American owner of a formerly SLDBE-certified construction-related firm reported that bonding was a challenge for small businesses. He explained that for a business to be "taken seriously," it needed to secure bonding from an "A-rated" bonding company. When a small business secured bonding through a "B-rated" bonding company, that business was instantly at a disadvantage. [#I-29]

Geographic scope and any changes over time. Business owners and representatives reported where they conducted business and if they had expanded their territories over time.

Although most business owners and representatives interviewed reported working primarily in the New Orleans metro area, a few businesses also performed work outside New Orleans and/or Louisiana. For example, An African American owner of a DBE-certified professional services firm reported to perform contracts in New York and
New Orleans. He explained that professional services business owners often operated through virtual offices allowing them to work at any location on any project. [#I-15]

A few business owners reported expanding or contracting territories over time. Some have expanded to include New Orleans or have relocated to the city. For instance, comments included:

- A white representative of a publicly-traded professional services firm reported that the company, a large employer, expanded its territory to include a small Gulf Coast team. [#I-27]

- An African American owner of a DBE-certified professional services firm relocated to New Orleans after "doing work for FEMA." [#I-15]

- The Hispanic American owner of a DBE-certified professional services firm reported selling and reopening his firm over time, including the launch of a New Orleans branch. [#I-6]

- An African American owner of a specialty services firm reported that his territory expanded locally to include many different types of job sites and venues across New Orleans. [#I-14]

A few business owners reported expanded territories, because they lacked work in the City of New Orleans. For example, the African American female owner of a DBE-certified professional services firm commented, that to get work, she needed to go out of the New Orleans area as far as "Timbuktu" and to "30 degrees-below … in Fargo." [#I-3]

Type of work and changes over time. Most interviewees reported that companies with singular work types or only a few types of work product or services, for example:

- An Asian American owner of a professional services firm reported two primary services. He added that the work that the firm performed stayed constant since start-up. [#I-5]

- A Hispanic American female owner of an SLDBE-certified professional services firm reported that her firm's work was limited to two specified services. [#I-12]

- The African American female representative of a business assistance organization reported that most members were "set in their ways" and were "… timid about expanding." [#TO-9]

- An African American owner of a specialty services firm reported unchanged services in the New Orleans marketplace. [#I-11]

  He said, "… I basically stay within … what my company is used to doing … it's a lot of competition here in New Orleans and it is hard to break into the other [areas within the industry] …." [#I-11]

- The Hispanic American female owner of an SLDBE-certified consulting services firm reported that her firm continually offered specialty programs and other consulting services. [#I-9]

- An African American female owner of a DBE-certified professional services firm reported that her firm performed the same work in the public sector for more than 20 years; however, without the ability to break into commercial work. [#I-17]

Business expansion and contraction. Businesses discussed any changes in company size, staffing or capacity over time.

Many business owners and representatives interviewed reported having expanded their businesses over time. Comments included:

- The Asian American owner of a professional services firm reported that his firm consisted of two employees, he and one other person. He reported that the firm was expanding in size: "I hired [a] new employee [about] a month ago." [#I-5]

- An African American owner of a previously SLDBE-certified construction-related firm reported that his parents started in trucking. He added that after a start-up phase, he applied for several new industry licenses for expansion. [#I-29]

- A white female owner of an SLDBE/SBE-certified construction-related firm reported that her firm experienced "slow growth" over the last fifteen years. [#I-33]

- The Hispanic American female owner of an SLDBE-certified professional services firm reported that the firm had plans to expand the firm by hiring more employees. [#I-12]

- An Asian American female owner of a DBE-certified firm reported, "We're growing each year … having more capital resources now … and more client base … [we're] able to expand more and offer additional services." [#I-38]

- The African American owner of a formerly-certified (SLDBE) construction related firm commented that he planned to expand his firm by slowly "grow[ing] it smart." [#I-16]

- An African American owner of a DBE/SLDBE-certified construction-related firm commented that he grew his firm by purchasing more equipment to expand the services he offered to customers. [#I-35]

- The African American owner of an SLDBE-certified construction firm indicated that he started as a small company, but eventually built his business capacity to expand. [#I-2]

A number of business owners reported expansion and contraction of staffing based on work load. Examples included:

- One African American owner of a DBE-certified professional services firm reported that his firm-size varied over time; it employed 15 people when it was "fully operational." [#I-15]

- An African American female owner of a DBE-certified professional services firm reported that the firm "steadily" employed a staff of 23 and at other times staffing needs "waxed and waned." [#I-17]

- The African American owner of a DBE/SLDBE-certified construction-related firm commented that he usually worked alone, but hired additional temporary staff based on project size. [#I-35]

- An African American female owner of a DBE/SLDBE-certified professional services firm remarked that her firm's size "ebbs and flows" depending on project load. [#I-18]

- The African American female owner of a certified professional services firm reported that staffing depended on the needs of the contract. [#I-4]

- The white female owner of a certified (DBE/SLDBE) construction firm reported that the firm hired temps to assist on larger projects. [#I-13]

A few business owners and representatives reported stable staff size, or reduced firm size over time. For example:

- An African American owner of a DBE-certified specialty contracting firm commented that firm size was constant over time. He explained that his staff all "wear two or three hats." [#I-10]

- One African American business owner of a specialty services firm reported that his firm reduced staff over the years from 165 employees to ten. [#I-14]

- An African American female owner of a certified (DBE/SLDBE) specialty services firm reported downsizing due to her contracts being "wrongfully snatched away by the City." [#I-22]

Although a number of business owners reported wanting to expand their firms, they had little success. For example:

- A female owner of a construction-related firm indicated challenges "getting the bids out" and "trying to expand." [#AI-67]

- A representative of a majority-owned firm reported that there was a lack of "business development opportunities" in the industry to expand. [#AI-238]

Size of contracts and changes over time. Business owners reported on whether their firms' contract sizes varied, stayed the same or had grown or decreased in size over time.

Some firms interviewed conducted a wide range of project sizes. For instance:

- The white female owner of a certified (DBE/SLDBE) construction firm reported that the firm did not turn down any contracts based on size. Instead, she staffed up or down accordingly. [#I-13]

- An African American male owner of a DBE-certified professional services firm commented that his firm had bonding capacity for projects as high as $35 million. [#I-15]

- The African American female owner of a DBE-certified professional services firm reported that she worked on both small and large projects. [#I-17]

- One African American female representative of a business development association indicated that members included businesses earning $500 to many millions, with varied project capacities. [#TO-3]

Several reported consistently working on relatively small contracts, or having no projects in the queue, at the time of their interview. These businesses included:

- An African American female representative of a business assistance organization commented that the firms she served typically limited their contract sizes. She explained, "… we don't want them to go out and do something that they can't really fulfill …." Instead, the organization encouraged project sizes based on each firm's "capacity." [#TO-9]

- The African American owner of a specialty services firm reported that his firm was experiencing difficulties and did not have any current contracts. He added that his former employer "blackballed" him in the marketplace; so, lately, he was unable to get any contracts. [#I-11]

- An African American owner of a specialty services firm commented that although his firm had only one $4,000 contract, his expectations were to increase his work to multiple contracts. [#I-14]

Some business owners secured work through service agreements. Examples included, the African American male owner of a DBE/SLDBE-certified construction-related firm. The company's work was secured through "service agreements." [#I-35]

Public or private sector, or both, and preferences/experiences in each. Some business owners and representatives reported conducting work in both public and private sectors. Only some reported exclusively working in public sector or exclusively in the private sector, by choice.

A number of business owners and representatives interviewed reported working in both sectors. Examples included:

- The Hispanic American female owner of an SLDBE-certified professional services firm reported that her firm worked in both sectors as a prime and subconsultant. [#I-12]

- An African American owner of a DBE-certified professional services firm reported that although his firm has not worked for the City of New Orleans, it performed in both sectors. He added that his public-sector opportunities were "developed through relationships." [#I-15]

- A white male representative of a publicly-traded professional services firm reported working in both sectors on construction-related work. [#I-27]

Some business owners and representatives interviewed reported working mostly in the public sector. For instance, a female public meeting participant reported that in her specialty services industry, private sector opportunities were limited for minority-owned firms. She conveyed, "We would love to do business in the private sector, but that has never happened … our only outlet is to … do business with city government, state government or federal government." [#PMP-2]

A common theme included business owners and representatives that reported working primarily in the private sector, but wanting to break into the public sector. Often times these firms reported wanting to work in the public sector, but not being able to crack that market. Some others felt stuck in the residential market. Comments included:

- When asked if his firm performed both public and private sector work, the Asian American male owner of a professional services firm answered, "[Up] until now, I do not get any public sector … it's all … private sector." He added that "30 percent of my projects are commercial" with the rest being residential work. [#I-5]

- An African American owner of a DBE-certified specialty contracting firm reported no city, state or federal contracts, although he "bid on several" of them. He continued, "I haven't gotten any … contracting [with private companies, either]. I do residential [work], mostly." [#I-10]

- A male public meeting participant commented that his professional services firm performed mainly in the private sector. He stated, "Our frustration is that government can do a lot to help its citizens, [but it's not helping us] …." [#PMP-2]

Prime or subcontractor/subconsultant. The study team asked business owners and representatives whether they worked as a subcontractor/subconsultant, as a prime or as both.

Some business owners worked primarily as a prime. For example:

- The Asian American owner of a professional services firm indicated that he only worked as a prime contractor and hired subcontractors for work tasks that he did not do himself. [#I-5]

- An African American female owner of a certified professional services firm reported that her firm always worked as a prime. [#I-4]

- Working in both public and private sectors, an African American male owner of a specialty services firm reported that he only worked as a prime contractor because he "[did not] like to sub [to] from anyone." [#I-14]

- The Hispanic American owner of a DBE-certified professional services firm reported that he worked as a prime for "quasi-public entities." [#I-20]

For a variety of reasons, a number of business owners worked as both a subcontractor/subconsultant and as a prime. These comments included:

- The African American male owner of a DBE/SLDBE-certified professional services firm reported that he usually worked as a prime, but has worked for a large corporation as a subconsultant. [#I-37]

- An African American female owner of a DBE-certified professional services firm reported that she worked as a prime on federal projects with small business set-asides. When working on larger projects, however, she indicated that she preferred working as a subcontractor to a larger prime. [#I-17]

- A white male representative of a publicly-traded professional services firm reported that the firm operated as primes, subcontractors and subconsultants with expertise in many areas. [#I-27]

- The African American owner of an SLDBE-certified construction firm indicated that he started as a small subcontractor, but eventually built his business capacity with a small bond, and expanded into larger subcontracting projects as well as small prime jobs. [#I-2]

- A Hispanic American female owner of an SLDBE-certified professional services firm reported successes in both in the private and public sector. [#I-12]

Several business owners and representatives commented on barriers they faced regarding as a sub or a prime. For example:

- A public meeting participant owning a professional services firm indicated that on City contracts, "… subconsciously we're encouraged to always go as a 'sub' … they fear collaboration …." [#PMP-1]

- A public meeting participant reported that a negative perception of prime-sub relationships existed in the marketplace. He indicated, "… we know who these bad actors are, but they … still get rewarded by the City with contract after contract …." [#PMP-1]

- A female public comment participant reported by email, "I would like to get more information … some prime contractors stick to the same certified subs." [#PC-4]

Current economic conditions in the New Orleans marketplace. Interviewees reported on the economic conditions in the local marketplace, including public and private sector arenas. Some were positive, others were not.

Some business owners and representatives reported mostly good or improving economic conditions. [e.g., #I-6, #I-10] For instance:

- The Asian American owner of a professional services firm reported that the current economic conditions in his industry were good. He reported, "The City of New Orleans [owns] a lot of buildings that [will need improvements over time]." [#I-5]

- An African American owner of a DBE/SLDBE-certified construction-related firm said, "It's a great marketplace." He added, "New Orleans is currently experiencing a boom in building … other services go hand-in-hand …." [#I-35]

- The white female owner of an SLDBE-certified construction firm reported that there was continual work for the firm. She commented that municipal and public works are always in demand and that she did not see that stopping any time soon. [#I-13]

- A Hispanic American female representative of a minority business association said, "I think it depends on the [industry] area. Contractors and builders, they are doing great. And some of the smaller … markets are doing well." She added that "small tech companies" are also receiving enough business. [#TO-6]

  She went on to report, however, "I think the ones that are suffering over everybody else [are] the small grocery stores and the small restaurants and things like that. I think it's a lot of competition, and it's difficult [for them]." [#TO-6]

- An African American owner of a specialty services firm reported that the current economic conditions were good in his industry in New Orleans because "… it's not like two or four hours [of work], it's really twenty-four-hour service." [#I-14]

- A white representative of a publicly-traded professional services firm indicated that the economic conditions are good in the New Orleans marketplace with one exception. He reported, "There's a radical lack of public funding for infrastructure, but there's no lack of infrastructure that needs improvement." [#I-27]

On the other hand, most other business owners and representatives were not as positive or had mixed feelings about the economy. [e.g., #AI-13, #AI-66, #AI-92, #AI-119, #AI-125, #AI-130, #AI-189, #AI-255] Many interviewees reported poor or worsening economic conditions:

- A white female owner of a DBE/SLDBE-certified construction-related firm commented, "We're really hungry! We need work." [#I-33]

- An African American female owner of a goods firm said, "Aside from people who come … with disposable income … the economic climate is very tough." [#I-23]

- Regarding members seeking work in the New Orleans marketplace, the African American female representative of a minority business assistance organization commented, "I would say they're not [getting work]." [#TO-9]

- The African American female representative of a business development association commented, "The economic climate … is still pretty tight … it is better than it was even four or five years ago, but it still hasn't improved to the degree where enough [certified] subs are working, because work is not available." [#TO-1]

  She indicated that New Orleans is rated "Number 1" in the country for the number of self-employed African Americans, with more than one-third of the businesses being African American-owned. She reported, however, "We [African Americans] only account for 2 percent of the receipts." She concluded, "That gap is huge!" [#TO-1]

- A Hispanic American owner of a DBE-certified professional services firm reported an aging client base that limited his opportunities to secure work. He added that in his industry, marketplace conditions are "extremely competitive." [#I-20]

- An African American owner of a DBE/SLDBE-certified specialty contracting firm reported that the current economic conditions were better for white firms than minority-owned firms. He reported, "We do see a great deal of disparity between [minority-owned firms and] some of the white companies … bigger white companies … we see other firms that look like us struggling to stay afloat …." [#I-31]

- When reporting on the current economic conditions, the African American female owner of a DBE-certified professional services firm commented, "Well it hasn't worked at all for me." This business owner reported not being able to secure local work. [#I-3]

- The African American part owner of a DBE/SLDBE-certified professional services firm commented, "[Although] it seems like it's fairly stable … it has slowed down recently … it's probably going to slow down next year." [#I-32a]

- Regarding the current marketplace conditions in New Orleans, the African American female owner of a DBE-certified professional services firm commented, "If not for the FEMA funding … I don't understand how New Orleans would keep going …." [#I-17]

- The African American female owner of a services firm indicated that current marketplace conditions in her industry were poor. She said, "This community is slow developing. The slow development makes it difficult. People don't want to live in this area." [#AI-81]

Business owner definition of success. Many business owners defined what it meant to be successful. For some financial success was important, for others success was about "giving back."

A number of business owners defined success as equal opportunity. For example:

- An African American owner of a DBE/SLDBE-certified specialty-contracting firm defined success as "opportunity." [#I-31]

- An African American part owner of a professional services firm commented that experience combined with "race- and gender-friendly" contracting opportunities defined his success. [#I-1]

Some business owners defined business success by a strong economy, access to credit, financial stability and steady business growth. Comments included:

- The African American female owner of a DBE/SLDBE-certified professional services firm remarked that success meant a good economic outlook for the industry. [#I-18]

- A female business representative commenting via email reported access to credit as important for business success: "In order to better operate [a] business, [the] biggest need is having access to lines of credit." [#PC-2]

- An African American owner of a DBE/SLDBE-certified construction-related firm remarked, "Just the fact that I have a business that is thriving and is able to sustain me and my family … that's a success." [#I-35]

- The Asian American owner of a professional services firm commented that he considers a business successful if its "annual revenue every year increases." [#I-5]

- An African American co-owner of a construction-related firm reported that the ability to maintain steady growth defined success. [#I-28]

- An African American female owner of a goods firm defined success as "income" and "awareness of my company and my brand." [#I-23]

- A Hispanic American owner of a DBE/SBE-certified professional services firm commented that a profitable business was a sign of success. [#I-6]

- The African American female owner of a DBE-certified professional services firm remarked that she defined success by "making money … and growing my company." [#I-17]

- When asked about the meaning of success, an African American owner of a specialty contracting firm responded, "My company is surviving, we're able to pay our employees and pay our bills … in my opinion [it] is a successful business." [#I-36]

- The white female owner of an SLDBE-certified construction firm reported that success was defined as people keeping their jobs, being paid and getting a "little Christmas bonus." She added, "And the company can do it again next year." She said that success was when 'everyone' in the company was successful. [#I-13]

- An African American female representative of a minority business assistance organization reported that "getting a contract, increasing capacity, being able to hire more employees" defined business success. [#TO-9]

"Giving back to the community" distinguished how some business owners defined success. Comments included the following:

- Considering his firm "getting a rolling start," an African owning a DBE-certified specialty contracting firm said, "I define success [as] when I'm able to give back to the community [by] hiring people and giving jobs …." [#I-10]

- The African American female owner of a DBE-certified professional services firm remarked that her industry was "white male-dominated" and that success would mean bringing people "that look like me" into the industry. [#I-17]

- A white representative of a publicly-traded professional services firm reported that success means "helping small businesses grow and learn …." [#I-27]

- The African American part owner of a professional services firm stated that he defined success as having a positive impact on his community. He stated, "If we can empower impoverished individuals, [who in turn] empower their family and their neighborhood, and turn it into a community, to where we can now have more business-owning entrepreneurs, that is what I consider a success …. Anybody can make money, but to have other people's interests equivalent to your interests, I think that would make a difference in society." [#I-1]

One female business owner reported the need to "believe" in yourself to achieve success. This African American female owner of a DBE-certified professional services firm reported that "the strongest factor for success is 'self-esteem' … believing that you can do it, believing that you deserve it …." [#I-3]

Keys to business success. The study team asked interviewees to describe the specific factors that contributed to their and others' business success.

Many business owners and representatives agreed that success was achieved through networking, relationship building and securing repeat customers. [e.g., #AI-198, #AI-306, #I-1, #I-3, #I-13, #I-14, #I-16, #I-17, #I-19, #I-27, #I-28, #I-32a, #I-32b, #I-36, #TO-7] For example:

- The Asian American owner of a professional services firm reported that networking and "having connections" was "extremely important" in his industry. [#I-5]

- A focus group participant representing a public agency declared, "It's all networking." [#FG-1]

- An Asian American owner of a professional services firm commented that relationships were "the most important factor for a [professional services] firm because the [professional] is basically the mind of the client …." [#I-5]

- The Hispanic American female representative of a minority business association indicated that keys to business success included having the ability to network and build relationships with other businesses. [#TO-6]

- An African American owner of a DBE-certified professional services firm commented that relationships, connections and networks contributed to a firm's success. [#I-15]

- One African American male owner of a DBE/SLDBE-certified construction-related firm reported on the importance of relationship building saying, "Contractors have to know who you are … your business has to be visible." To expand relationships and firm visibility, he reported attending "as many meetings as possible" and networking events held by the Urban League and The Black Chamber of Commerce. [#I-35]

- A white male representative of a majority-owned construction-related firm reported as success, "… pride in ourselves … keeping our promises … [and] great relationships with the customers …." [#I-39]

- The Hispanic American female owner of an SLDBE-certified professional services firm commented that satisfied, "repeat clients" was the key to success. [#I-12]

Several business owners reported that strong, directed marketing was a key contributor to business success. These comments included:

- The Hispanic American female owner of an SLDBE-certified consulting services firm remarked that increased marketing was the key to business success. [#I-9]

- A white male owner of a specialty contracting firm commented that "creating a robust internet presence" led to success. [#I-8]

- An African American female representative of a business development association remarked that "market access" was a key to being competitive and successful. She indicated, "If there's a black-owned business and a white-owned business that are doing the very same thing, the white-owned business probably has a nice website … the black-owned business probably either doesn't have a website, or has a very limited website." [#TO-1]

- An African American part owner of a DBE-certified professional services firm reported that "good marketing" and "connections" give one firm an advantage over another firm in the marketplace. [#I-21]

Many reported keys to business success as "know how," hard work, reputation, good customer service and quality work. [e.g., #I-1, #I-11, #I-16, #I-18, #I-31, #I-32b, #I-35, #I-36] Interviewees comments included:

- An African American owner of a DBE/SLDBE-certified professional services firm reported that "know-how" gave him an advantage in the industry. [#I-37]

- The Hispanic American female owner of an SLDBE-certified consulting services firm indicated that her team developed a strong "20 year" reputation including being adept at the knowledge needed to succeed. [#I-9]

- A white male owner of a specialty contracting firm reported, "The first thing you need is an unwavering drive to see it through to the end …." He added, "I think professionalism is a huge factor." [#I-8]

- An African American female owner of a DBE-certified professional services firm reported that responding "quickly and nimbly," (especially in an emergency) to a client's needs was his key to success. [#I-17]

- The white female representative of a non-profit business development organization commented that "good customer service … returning phone calls … really makes a difference" to a firm's success. [#TO-8]

- A white representative of a publicly-traded professional services firm indicated that the key components of success were "happy clients and delivery of projects that are good for the community …." [#I-27]

One Hispanic American female representative of a minority business association stated that preparedness distinguished a successful business from a less successful firm. This representative, when asked what drives success, responded, "I think if you're getting a contract, that's because you're a well-organized business [and] you know what your limitations are …. You might want that contract, but your company may not be ready for [it]. You have to be realistic." [#TO-6]

She continued, "If you do your homework and you prepare yourself, and you go through the process correctly, then … hopefully it's a 'fair system' where you're going to be rewarded." [#TO-6]

Many business owners reported that financing, access to capital and a healthy cash flow determined a company's ability to secure opportunities. [e.g., #I-4, #I-13, #I-14, #I-19, #I-31, #TO-7, #TO-9] Businesses reported access to capital as an advantage and limited capital as a disadvantage, when seeking work. For example, an African American male owner of a DBE-certified professional services firm indicated, "White companies have financial capital power … they can negotiate work … negotiate the corners that [minority-owned firms] are trying to get around." [#I-15]

For more on financing, refer to the discussions on financing and access to capital, earlier and later in Appendix J (i.e., Parts B and F respectively).

Access to bonding (when necessary), impacted whether a business successfully secured some contracts. Bonding requirements, for some, drove what jobs they could and could not bid. For example, an African American male owner of a DBE-certified professional services firm explained, "Your access to bonding determines how you can grow your company …." [#I-15]

The same business owner reported that bonding requirements are often waived for "experienced firms." He commented, "This [waiver] is the way of disenfranchising the opportunities for small business … the bond gives you the power to go after your billings quickly." [#I-15]

For more on bonding, refer to Part B of this appendix.

Having the ability to secure proper insurance was key, for some. Despite the high price of insurance, the comfort of having the right insurance was a necessary evil for some. For instance:

- The Asian American owner of a professional services firm reported that insurance was "expensive," but considered it vital to the success of his business. [#I-5]

- An African American male part owner of a DBE/SLDBE-certified professional services firm commented on the importance of having insurance in his industry despite the cost. He declared, "We are going to get sued no matter what." [#I-32b]

Many business owners and representatives reported that hiring and retaining qualified staff contributed significantly to business success. [e.g., #I-8, #I-16, #I-17, #I-30, #I-32b, #TO-7] Examples follow:

- An African American owner of a special services firm reported that trained employees contributed to his success. [#I-14]

- The Asian American owner of a professional services firm reported on the importance of qualified staff. He said, "You need to hire the right employees … they are an extension of myself." [#I-5]

- A white representative of a majority construction-related firm reported that "the craftsmen that work on each project were the most important resource we have." [#I-39]

- The Hispanic American male owner of a DBE/SBE-certified professional services firm commented, "At the end of the day, 'I cannot do what my employees do' and 'so I have to count on them and I have to reward them' …. 'Success to me is a happy staff.'" [#I-6]

- An African American owner of a specialty services firm reported that retaining good employees who are properly dressed in clean uniforms and maintain "personal hygiene" were the keys to his firm's success. [#I-14]

However, for some, hiring was particularly difficult. Comments included:

- The African American owner of a certified (SLDBE/SDBE) construction firm commented that finding qualified employees was challenging saying, "… not all races and ethnicities are willing to work for an African American-owned firm." He added, "White workers are not readily willing to work for minority-owned companies." [#I-2]

- An African American female owner of a certified professional services firm reported that after Hurricane Katrina, the city's size decreased greatly resulting in her inability to hire qualified staff. [#I-4]

- One African American male owner of a formerly DBE -certified construction-related firm reported that at one time he had employees, but found that they caused too many "hassles." He said that he now preferred to work alone. [#I-26]

For several business owners, unions made achieving success more difficult, for others it was more about working successfully with the unions. Examples included:

- A focus group participant representing a minority-owned business reported that unions were "not independent" and were controlled by majority firms. He indicated that unions discriminated against minority contractors by prohibiting them from securing higher-paid contracts. [#FG-2]

- Regarding working with unions, the white male representative of a majority construction-related firm reported that the firm was "a union company … we have those agreements … we need to live up to and honor those agreements." [#I-39]

The importance of securing and maintaining equipment was important. For others, access to favorable pricing drove success. [e.g., #I-1, #I-13, #I-14, #I-31, #TO-7, #TO-9] For example:

- An African American owner of a formerly DBE-certified construction-related firm reported that during Hurricane Katrina his business lost $5,000 to $8,000 worth of critical equipment. He indicated that he slowly replaced the equipment over time. He explained that the equipment was vital to the company's success. [#I-26]

- An African American owner of a specialty services firm reported that his equipment required regular upkeep; and, when well-maintained, contributed to the success of his company. [#I-14]

- The Asian American owner of a professional services firm reported that software was a key to a successful business. [#I-5]

- An African American female owner of a DBE-certified professional services firm reported that she depended on expensive technical equipment, so securing "fair pricing" was important to the company's success. [#I-17]

C. Whether there was a Level Playing Field for Minority- and Women-owned Businesses and other Small Businesses in the New Orleans Marketplace

The study team asked business owners and representatives to discuss whether the "playing field" was level in the New Orleans marketplace. Some reported factors that advantaged one firm over another. Discussions indicated that:

- "Skin color" advantaged non-minority firms over others in the New Orleans marketplace; and
- An unlevel playing field, for some, in the New Orleans marketplace put minority- and women-owned businesses at a disadvantage.

"Skin color" advantaged non-minority firms over others in the New Orleans marketplace. Business owners and representatives discussed how one firm might be advantaged over another. Two African American business owners reported that "skin color" advantaged non-minority firms over minority-owned firms. Examples follow:

- An African American male owner of a DBE/SLDBE-certified professional services firm reported that "skin color [gives] one [firm] an advantage [over another]." [#I-24]

- The African American owner of a specialty services firm commented, "… I am forced out of the market that actually [had] embraced me, I am not successful at all." He concluded that what gives one firm an advantage over another: "In my industry, what gives them an advantage is 'skin color.'" [#I-11]

An unlevel playing field in the New Orleans marketplace put minority- and women-owned businesses at a disadvantage. Many business owners and representatives reported that, in the New Orleans marketplace, there was not a "level playing field" for minority- and women-owned businesses. Comments included:

- A public meeting participant remarked that minority owners of small businesses are said to "fuss" about unfair treatment. She reported, "… our 'fuss' is about … wanting equity … not letting another generation go by without standing up to what makes sense for us … and not letting another generation suffer …." [#PMP-2]

- A focus group participant commented, regarding discrimination in the New Orleans marketplace, that the conditions included centuries of egregious human rights abuses and discrimination. [#FG-1]

- One public meeting participant remarked, "It's a white business town … they call them 'connections' … we call them 'hook-ups.'" [#PMP-1]

  The same public meeting participant added, "… those very deep relationships give them access that we have never had, historically … the assumption is unfortunately that because we've had black mayors and black city councils … that it translates into economic access …. 'It has not….'" [#PMP-1]

- The African American part owner of a professional services firm reported that "if it were a 'level playing field,' it would be a whole lot easier." [#I-1]

- One African American male owner of a specialty services firm reported, "I think there is a lot of opportunity in the market here, but if you are not given an 'opportunity' to be 'in' … your company is going to fail." [#I-11]

- A Hispanic American female owner of an SLDBE-certified consulting firm reported "favoritism" in the marketplace supporting majority firms, with businesses such as hers not given the opportunity "to get [a] foot in the door." [#I-9]

- An African American female owner of a DBE/SLDBE-certified professional services firm reported a "glass ceiling" for certified firms, "everyone seems to be comfortable with that." [#I-18]

- An African American owner of a DBE-certified professional services firm stated, "Even when capital projects are awarded, it's always the white folks who are getting [jobs]… and it's irritating and tiring." [#I-15]

- The white female owner of a certified (DBE, SLDBE) construction firm commented that her small woman-owned company suffered from the "bully syndrome." She reported that she considered her firm "lucky" when she competed and won against companies with staffing numbers and experience that surpassed her firm. [#I-13]

  However, she went on to report that when winning, the larger firms retaliated by excluding her from new subcontracting opportunities. "They were not 'nice' to [her] company," she said. She described these types of experiences as a "huge disadvantage" for her small woman-owned business. [#I-13]

- An African American female representative of a minority trade association remarked that minority business owners were disadvantaged by being less likely to have access to "generational capital." She explained that minority-owned firms were less likely to be passed down from one generation to the next. She stated that minorities were often "forced" into entrepreneurship without "$1 million endowments." [#TO-4]

- The African American female owner of a certified professional services firm reported, for success, a need for equal opportunity stating that "[African Americans] … [are] not getting our share of the business in this city." [#I-4]

- One African American male owner of an SLBDE-certified construction firm reported knowledge of efforts to "grandfather in majority contractors" so they did not have to take and pass state licensing exams in his industry. He conveyed that grandfathering majority firms and not minority-owned businesses gave majority firms an unfair advantage in the New Orleans marketplace. [#I-2]

- The African American owner of an SLDBE-certified construction firm reported that although there was "activity" in the New Orleans economy, large firms were getting the business by "teaming up" with DBEs that "do not perform" on the contracts. [#I-2]

- An African American female owner of a DBE/SLDBE-certified professional services firm reported that the business culture in the New Orleans marketplace did not promote opportunities for women- and minority-owned firms. She indicated that there was not much encouragement "to go beyond the '30 percent ceiling' for minority-owned firms" when hiring certified businesses. [#I-18]

- Regarding the playing field, one African American female owner of a certified professional services firm commented that, majority firms in the New Orleans marketplace, only utilized minority- and women-owned businesses to meet a subcontracting goal. She offered, "As I tell majority companies, 'I want to be just like you. I don't want to have an alphabet behind my name for you to use me, I want you to use me because I do good work in that field.'" [#I-4]

- An African American female representative of a minority-business advocacy organization reported that in the New Orleans marketplace, "… marginalized communities are overwhelmed by barriers … and held hostage to the [political and economic] system." [#I-41]

D. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Minority- and Women-owned Businesses and other Small Businesses

Business owners and representatives reported on any experiences with or knowledge of unfair treatment in the New Orleans marketplace. Interviewees discussed:

- Any unfair treatment or disadvantages for minority- or women-owned businesses in their field when performing work in the New Orleans marketplace;
- Whether "small size" unfairly disadvantaged a company's ability to secure opportunities for work in the New Orleans marketplace;
- Issues with prompt payment;
- Restrictive bidding and contract specifications;
- Denial of opportunity to bid;
- Unfair rejection of bid;
- Submitting bids or proposals and not getting feedback;
- Bid shopping and bid manipulation;
- Stereotyping and double standards for minority- and women-owned firms when performing work, and any unfair treatment regarding approval of work for minority- and women-owned businesses;
- Any overt bias and more subtle forms of unfair treatment;
- Any knowledge of "fronts" or false reporting of good faith efforts; and
- "Good ol' boy" networks or other closed networks.

Any unfair treatment or disadvantages for minority- or women-owned businesses in their field when performing work in the New Orleans marketplace. [e.g., #AI-155, #AI-163, #AI-164, #AI-171, #AI-198, #AI-206, #AI-226, #AI-231] Comments follow:

A number of minority business owners reported unfair treatment or unfavorable work environments based specifically on race or ethnicity. For example:

- An African American owner of a specialty services firm reported that, some years ago, a federal agency terminated his large contract once an agency staff person discovered that he was a minority. He was told by the representative of the agency, "Do you really think I'm going to let a 'n-word' keep this job?" [#I-14]

- An African American female owner of a DBE/SLDBE-certified professional services firm commented that in the "Deep South" there are limited opportunities for women- and minority-owned firms to succeed in their industries. [#I-18]

- While attending a public entity DBE workshop, a Hispanic American owner of a DBE-certified professional services firm reported that tension arose between African American-owned DBEs and Hispanic American-owned DBEs. He reported hearing comments that the Hispanic American-owned firms were taking all of the available business. [#I-6]

- One African American female representative of a minority-business advocacy organization reported on the need for a level playing field. She described the phenomenon of "southern culture and the black penalty," explaining that some African American business owners "feared success," because with success came "retaliation." [#I-41]

  She added that if African American business owners attempted to challenge white business owners, the African American business owners feared that they may be penalized by majority firms. She gave likely examples of retaliation including: character assassination, legal issues or "media lynching." She expressed, "It's a shame that we must assume the worst." [#I-41]

- One Hispanic American female owner of an SLDBE-certified professional services firm commented that in her industry, her work was viewed as the "stepchildren" by others. [#I-12]

- A representative of a majority professional services firm commented, "… ethnicity causes a problem." [#AI-226]

- The African American female representative of a minority trade association reported that majority business owners did not need closed networks because they "discriminated in other ways." [#TO-4]

- An African American owner of a construction-related firm stated, "For whatever their reasons are, our [African American-owned] firms are not treated with the same respect as the others …." He continued, "Our firms [are] licensed just as they are, and in some cases, have more experience, and are even more qualified than the others. But yet [African American-owned businesses] are still having difficulty getting contracts that we know we qualify for." [#AI-231]

- When asked if he has experienced any unfair treatment based on race while performing work in New Orleans, an African American owner of a specialty services firm answered, "'Yes,' [unfair treatment based on race] has an 'extreme negative shadow' over my company and any other company that has any hopes or aspirations of doing business in there [New Orleans]. I worked in California, Florida, Maryland … [all] over the United States. To make a long story short, this [New Orleans] is the only city … 'my hometown,' [where] I have to take a backseat." [#I-11]

  He added that there was a perception that "small, local and minority businesses" did not have the capacities needed to perform in the professional services industry when responding to RFPs in "the [New Orleans] metro area." [#AI-213]

- The African American part owner of a professional services firm reported an absence of African Americans on public sector jobs, for example he conveyed, "For the airport expansion there are not many African American companies that are out [there] … they have some DBEs, but they're not African American-owned." [#I-1]

- An African American owner of a DBE/SLDBE-certified professional services firm commented that "discrimination" was prevalent in his industry. He reported that white firms cannot "fully discriminate" because it is illegal, but that they find covert ways to discriminate against minority-owned firms. [#I-24]

- One African American female owner of a DBE-certified professional services firm commented that the City of New Orleans did not prevent primes from unfairly treating minority subs. She stated, "I see a lot of things that [primes in the New Orleans marketplace] are still doing badly … [they] would rather take a fine of $1,000 per day than do business with a minority." [#I-3]

A few white business owners reported difficulty competing with minority-owned firms for certain work. [e.g., [#AI-229, #AI-241] For example:

- The owner of a majority construction firm indicated that "being white" can be a barrier in the New Orleans marketplace. [#AI-112]

- The female owner of a goods firm said, "We are precluded, often times, because we are not a minority, disadvantaged [company]." [#AI-232]

Some business owners reported unfair treatment or unfavorable work environments specifically based on gender. Several of these women also reported race- or ethnicity-based disadvantage. Some reported bullying, retaliation and not being taken seriously as a business owner. Examples included:

- The white female owner of a certified (DBE, SLDBE) construction firm reported retaliation when she was awarded work that larger firms had bid. She indicated that post award, when trying to serve as a subcontractor on subsequent jobs she was bullied and mistreated in retaliation. [#I-13]

- An African American female owner of a certified (DBE/SLDBE) specialty services firm indicated that she experienced "extortion," "racism," and "sexual harassment" by City employees. She reported, "By not following their commands … they took [a City] contract from me." [#I-22]

- The African American female owner of a DBE-certified professional services firm commented, "It's hard being a black female in a white male-dominated world … sometimes you don't get taken seriously [or] they just assume that your prices should be lower and you should be thankful for the opportunity." [#I-17]

- A white female owner of a DBE/SLDBE-certified construction-related firm reported, "Being a female … in a "man's world" is a challenge … you face … hurdles …." [#I-33]

- An African American female owner of a certified professional services firm reported, "Everyone associates [my industry] with men … but, we have women that are much more proficient [and dependable] than a lot of men …." [#I-4]

  She added, "… being an African American woman in New Orleans has never been celebrated, and being in business for 24 years, I should be [celebrated]." [#I-4]

- A Hispanic American female owner of an SLDBE-certified consulting services firm reported that her firm experienced unfair treated because it was women-owned. She stated, "We are three women. We are three Latinas. We are highly educated. We have careers. We are in competitive-salary fields." She continued, "We do really well and thought that we could start our consulting firm, because we have been asked to do so much of the work that other people [men] get paid for." She stated, "We have the same knowledge that 'the man' next to us has." She reported to have gone to the [the City of New Orleans] office to ask for feedback and was "blown off," but indicated that that would not happen to a "man." [#I-9]

- The female owner of a professional services firm said, "Being a female business owner has presented many challenges in "being taken seriously" in my industry." [#AI-164]

- The female owner of a professional services firm reported, "… as a small, women-owned [professional] services firm, we are not thought of for … 'significant' … opportunities despite having the ability and experience." [#AI-171]

A number of minority and women business owners reported inequities in how contracts were awarded and work was assigned, particularly when working in the public sector. Examples follow:

- An African American owner of a DBE/SLDBE-certified construction-related firm reported that he experienced unfair treatment when much of the construction-related work in his industry was given to out-of-state firms after Hurricane Katrina. [#I-35]

  The same business owner added that even trying to work with out-of-state firms was troublesome as he faced challenges attempting to contact them for subcontracting opportunities. [#I-35]

- A representative of a minority business assistance organization reported an African American woman business owner being told, "prior" to contract award, that the bid she submitted was "too low and that she would not get the job." [#TO-9]

- An African American owner of a DBE/SLDBE-certified professional services firm reported that, despite its certification program, the City of New Orleans gave certified firms only "minimal tasks to perform." [#I-24]

- Regarding the New Orleans marketplace, a Native American owner of a construction firm reported that undocumented workers unfairly set a ceiling on bidding in his industry. He added, "I'm frustrated. It's destroyed the price in the market for everyone, as far as pricing goes." [#AI-90]

- A public meeting participant stated that "nepotism and tokenism" exists in the New Orleans marketplace: "I see the same people get the contracts all the time." [#PMP-1]

Whether "small size" unfairly disadvantaged a company's ability to secure opportunities for work in the New Orleans marketplace. Some small business owners reported being excluded from "the pool" because of small size, or having difficulty gaining the experience they needed to compete with larger firms. These comments included:

- Regarding his small firm's struggle to achieve success, an African American owner of a professional services firm commented, "If you are just a two-man firm, you're not going to 'get in the pool' anymore." [#I-30]

- The African American part owner of a DBE/SLDBE-certified professional services firm said, "[Small businesses] get passed over just because they assume you can't handle the job. It's assumed that the 'big guy' can do it." [#I-32a]

- The African American owner of a professional services firm reported that there was a negative perception that *all* small businesses lack "the required resources and expertise" to perform good work and achieve success. [#AI-184]

- A white male representative of a publicly-traded professional services firm remarked that small firms faced challenges that large firms, like his, did not. [#I-27]

  He continued that when bidding on projects, firms typically have to demonstrate work on their previous ten projects. He added, new smaller firms, even with experience and skills, may not have ten previous projects to report on, putting them at a bidding disadvantage. [#I-27]

- A public meeting participant owning a small goods and services firm commented, "The manufacturers are not necessarily willing to make a deal or to take you on as an approved distributor … therefore, your pricing is off … you are not able to get the jobs … that's a serious barrier for someone in my industry." [#PMP-1]

- The African American representative of a minority business development association, reported that gaining experience was "a catch-22" for small firms. He explained that gaining experience was particularly difficult for the minority business members he represented. [#TO-7]

Issues with prompt payment. [e.g., #I-3, #I-4, #I-9, #I-14, #I-16, #I-23, #I-27, #I-35, #I-37, #AI-158, #AI-178, #AI-253, #AI-301, #PMP1, #TO-1] Many business owners and representatives reported problems securing timely payment.

Business owners commonly reported frequent issues with securing payments. For example:

- Regarding issues with prompt payment, the representative of a woman-owned professional services firm said, "If the City would pay people in a reasonable time frame, [it] would help." [#AI-2]

- A Hispanic American female owner of an SLDBE-certified professional services firm stated that, although the City provided her firm opportunities, it needed to pay invoices faster. [#I-12]

- An African American female owner of a DBE-certified professional services firm commented regarding untimely payments, "If you hire somebody to do a job, pay them." [#I-17]

- The African American representative of a minority business development association reported that he heard from diverse businesses transacting business with the City of New Orleans that "the City is really, really slow to pay." [#TO-7]

- The African American female representative of a minority business assistance organization commented that late payments caused barriers for the membership. Regarding the City of New Orleans, she stated, "The City was notorious for paying late." [#TO-9]

  She continued that the City of New Orleans has implemented a new payment process; however, she expressed, "Nobody's told me that it's worked." [#TO-9]

- The white female owner of a certified (SLDBE) construction firm reported that untimely payments was one of the biggest "financial binds" that she routinely faces. [#I-13]

- An African American female representative of a minority trade association reported that the City of New Orleans has historically paid their contractors in an "untimely manner." [#TO-4]

- A white female owner of a DBE/SLDBE-certified construction-related firm, regarding City of New Orleans payments to contractors, said, "They pay terrible." [#I-33]

- The Hispanic American female owner of an SLDBE-certified consulting services firm noted that while working with the City, it took a long time for payment. [#I-9]

- An African American female owner of a professional services firm reported, "The biggest problem with dealing with the City of New Orleans was timely payment. I personally was not paid for over a year on my contract." She continued, "[This made] it very difficult for an African American minority business to operate when they can't get paid timely. A lot of minority-owned businesses just can't wait that long." [#AI-188]

- An African American owner of a DBE-certified professional services firm commented, "The City has a chronic problem with not paying contractors on time." He added, "I stand clear of [working for the City of New Orleans] because they don't pay on time … that's a deterrent …." [#I-15]

- The African American female representative of a public business assistance agency reported, "I think the City of New Orleans needs to pay on time … I'm hearing … people shy away for doing business with [the City of New Orleans] because they cannot afford to float an unpaid expense for that long …." [#TO-10]

- A focus group participant representing a minority-owned firm commented that he had not been paid on two projects for three years, but the City refused to intervene. [#FG-2]

A number of businesses reported outstanding invoices for the work they conducted for the City of New Orleans. Some were for large dollar amounts that spanned from a low of 90 days to a high of 450 days outstanding. One business representative indicated having borrowed to make payroll, while "financing the City's projects." Comments included:

- The female owner of a professional services firm said payments from the City of New Orleans have become "more and more delayed" for both prime and subcontracts. She added, "Some invoices are over a year old. Some for $100,000 or more are almost a year old." [#AI-158]

- A Hispanic American owner of a DBE-certified specialty contracting firm reported that he stopped looking for work with the City of New Orleans as the City pays too slowly. He reported, "They were paying us in 120 days … 90 days …. 'How are we supposed to succeed?'" [#I-40]

- A Hispanic American female owner of an SLDBE-certified professional services firm recalled several invoices for which she has not received payment from the City. She noted that one invoice submitted to the City was 450 days past due. She referenced another five outstanding invoices also past due. She indicated that, in total, the outstanding City invoices totaled nearly $250,000. [#I-12]

- An African American owner of a formerly DBE-certified construction-related firm indicated that the City of New Orleans has a pay structure ("at least 90 days") that made it difficult for a small business owner, "Instead of growing, you're just trying to survive …." He reported a preference, instead, for working with Jefferson Parish over the City of New Orleans because Jefferson Parish paid in a timelier manner. [#I-26]

- A female owner of a professional services firm commented, "We have to borrow to make payroll and other expenses, so we are financing the City's projects. There seems to be no awareness or concern for paying professional services invoices on time. At the same time, we are threatened with penalties if we do not deliver our work on time." [#AI-158]

Restrictive bidding and contract specifications. Some business owners commented on bidding and contract specifications that restricted firms from bidding.

A number of firms reported that complex specifications made bidding particularly challenging. Comments spanned from "indemnification clauses" to "prevailing wage" requirements:

- An African American owner of a DBE/SLDBE-certified professional services firm commented that the public-sector bidding process was "more elusive" than private sector bidding processes. [#I-25]

- A white representative of a publicly-traded professional services firm commented that the City of New Orleans "has an unacceptable indemnification clause in their contract that most contractors don't want to sign, but begrudgingly will do so." He added, "It essentially completely indemnifies the City even if the contractor is not negligent … that's a challenge!" [#I-27]

- The white female owner of a DBE/SLDBE-certified construction-related firm commented that the City's prevailing wage requirements were very high and caused barriers for small firms to enter the prime contracting arena. [#I-33]

Several business owners commented that requirements for "prior experience" hindered their company's ability to secure contracts with the City of New Orleans and other public agencies. Many business owners demonstrated how difficult it was for small businesses to acquire the experience needed to bid or propose on City projects, for example:

- An African American female owner of a professional services firm said "breaking into" government work was challenging because prior experience was required. [#AI-245]

- The white owner of a majority construction firm said, regarding the need for prior experience to secure work with the City of New Orleans, "A lot of the contractors need to be in business for a certain amount of years. Over five years of experience [sometimes]." [#AI-47]

- The white owner of a professional services firm said, "If you don't have experience [the City] won't hire you." He went on to question, "If they don't hire us, how do we get experience?" [#AI-270]

One professional services business owner reported his preference for including his qualifications as part of a proposal over prequalification panels. This Asian American owner of a professional services firm explained, "Usually, the qualifications of the [specified professional service] [were] reviewed in the bid …. I would submit the historical projects that I've done, explain my experience and [include] my résumé. [Even if] the bigger firms have better opportunities to getting the job, 'at least I will still be invited to bid on the project,' and then the person reviewing the proposals would decide whether I am qualified or not." [#I-5]

Denial of opportunity to bid. Some business owners discussed access and opportunity to bid.

Business owners reported being denied opportunity to bid, in a number of ways. Examples of comments included:

- An African American owner of a DBE/SLDBE-certified construction-related firm commented that before he could offer a bid on a project, he was told that he did not have the capacity and therefore should not bid. [#I-35]

- The African American part owner of a professional services firm reported that small businesses are disadvantaged when bidding competitively. He indicated knowing that, to win projects, large firms sometimes bid an unfairly low price. He added that to complete a contract, won on that low price, post-award change orders brought the cost back up to a realistic price. This two-step process essentially denied any real bidding opportunity for the firm that bid based on the actual cost to complete the project. [#I-1]

- An African American part owner of a DBE-certified professional services firm commented that public entities had ordinances and codes that in their industry, must be "mastered." He added that challenges existed when public entities had many different codes and ordinances; thus, limiting his firm's ability to bid. [#I-21]

- The African American female owner of a certified professional services firm reported, "We don't have a seat at the table …. When it's a low-bid contract … that's the only time we get the announcement …." [#I-4]

Unfair rejection of bid. Some business owners reported having one or more bids unfairly rejected. For example, comments included the following:

- Reporting that he had provided a "really good bid" to the City of New Orleans, an African American owner of a specialty services firm indicated that the job was, instead, awarded based on connections stating, "It's who you know." He commented that it was only fair to award a bid to the "best bidder" regardless of connections. [#I-14]

- The African American female representative of a business development association reported knowledge of primes' inconsistencies when rejecting bids. She reported knowledge of bid rejections based on missing information, for some, when the same prime waived the similar omissions for others that bid. [#TO-3]

- An Asian American owner of a professional services firm remarked that he has experienced an unfair rejection of a bid in the private sector. [#I-5]

Submitting bids or proposals and not getting feedback. Business owners and representatives reported on their experiences submitting bids and proposals.

Many business owners reported submitting bids or proposals to the City of New Orleans and never hearing back. [e.g., #I-3, #I-16] For instance:

- An African American owner of a specialty contracting firm commented that after submitting bids to the City of New Orleans, "I don't know what's going on the other side …. We never get responses … we don't know what's going on afterwards." [#I-36]

- A Hispanic American female owner of an SLDBE-certified consulting firm reported that, despite proposing on a number of City contract opportunities, her firm was not awarded any of them. When she visited the City "in person" for feedback, she received no information. She declared that it was important to give feedback to firms who were not awarded contracts. [#I-9]

- The African American co-owner of a minority-owned SLDBE-certified professional services firm reported that after submitting his bids to two public agencies in the New Orleans, he never received responses. He indicated that he was not sure, but thought a firm from Colorado was awarded one of the contracts. [#I-19]

- An African American owner of a professional services firm commented that the City of New Orleans did not provide feedback to firms who lost contracts. He remarked, "[The City of New Orleans] doesn't want to just show you how you scored … that's all 'hush-hush, done behind closed doors.'" [#I-30]

  In contrast, he added that the City of Gonzales sends emails with the ranking and scores "straight up … you can see where you stand." [#I-30]

- A white female owner of a DBE/SLDBE-certified construction-related firm commented that she tried to get feedback, on occasion. She added that she thought that the City was likely too busy to provide feedback. [#I-33]

A number of business owners and representatives reported on primes not notifying potential subs about the status of their bids. For instance:

- The African American female representative of a business development association commented that small businesses faced barriers when waiting to hear from primes regarding feedback on their bid. She said, "It can be like chasing the wind …." [#TO-3]

- The white male owner of a specialty contracting firm reported that he was not usually notified when the prime was not awarded a contract. [#I-8]

Some interviewees found ways to pursue feedback from public entities. These included:

- A white representative of a publicly-traded professional services firm commented that the company typically pursued feedback from public entities, however, "sometimes you get a pretty sterile answer …." [#I-27]

- An African American owner of a DBE/SLDBE-certified professional services firm reported that, in one instance, after filing a "public record request" he was able to understand why another firm won. He commented that "knowing the reason for his rejection" was helpful to his business. [#I-24]

- A male public comment participant reported by email that he had submitted a bid to the City and did not hear back in a timely fashion. He indicated that when he pursued a response, he found that the firm awarded the contract was neither DBE-certified nor licensed in the industry. [#PC-6]

Bid shopping and bid manipulation. Business owners described experiences they had related to bid shopping and bid manipulation, for example:

- An African American part owner of a DBE-certified professional services gave evidence of bid shopping. He commented that he assisted a prime in developing its bid with the promise of a percentage of the work if the prime won the job. He continued that the prime won the contract, but his company was not included in the project. He expressed, "What the hell happened?" [#I-21]

- The Asian American owner of a professional services firm remarked that he has experienced both bid shopping and bid manipulation. [#I-5]

- A focus group participant representing a minority-owned firm reported that prime contractors often ask for a bid from a sub and submit them to the City, but then exclude that sub from the actual project. Instead the prime bid shops to find a firm offering a lower price. [#FG-2]

- The African American representative of a minority business development association commented that bid shopping exists in the New Orleans marketplace and "It absolutely is unethical." [#TO-7]

- An African American female owner of a DBE-certified professional services firm expressed, "[Other bidders] will take your proposal and slap their name on it and they're not even smart enough to take your name off of every page …." [#I-3]

  The same business owner added, "I have had people tell me in procurements … you better start putting water marks on your stuff because … they're taking your stuff and copy[ing] it and put[ting] their letterhead on the front …." [#I-3]

- An African American owner of a construction-related firm reported, "Bid shopping makes it difficult to receive contracts at market value, and forces subcontracting below market value." [#AI-166]

- The African American female owner of a construction-related firm conveyed, "Shopping bid[s] to other providers drives price down." [#AI-186]

- An African American female representative of a public agency reported that bid manipulation and shopping was a barrier in the marketplace. She stated, "I hear … people no longer want to submit bids as a subcontractor … [primes] are using their names, they're winning bids, and the [sub] whose name was used … is not getting the work, but there are [primes] claiming DBE percentages …." [#TO-10]

- An African American owner of a specialty services firm, regarding his experience with bid manipulation, indicated hearing, "I can give you this bid if you do something." [#I-14]

- The African American female representative of a minority trade association reported that the change order process in the City of New Orleans allowed large prime contractors to bid low and then change their prices during the project. She added that bid manipulation put small and minority-owned firms at a disadvantage. [#TO-4]

Stereotyping and double standards for minority- or women-owned firms when performing work, and any unfair treatment regarding approval of work for minority- and women-owned businesses. Some business owners reported evidence of minority- and women-owned firms that were held to a different standard than white male-owned firms.

Some reported stereotyping for minority- and women-owned firms. For example:

- The African American co-owner of a minority-owned SLDBE-certified professional services firm commented that minority business owners must "jump through hoops" to prove themselves, something not required of majority firm owners. [#I-19]

- An African American female owner of a certified professional services firm reported that minority-owned business owners were not judged "based on our merits." [#I-4]

- "Black people are considered to be lazy" reported an African American male owner of a formerly-certified (SLDBE) construction related firm. This business owner indicated that this misperception prevailed in the New Orleans marketplace. [#I-16]

- The African American female owner of a certified professional services firm reported, "We don't have a seat at the table." She indicated that the standard for minority contractors in the New Orleans marketplace was that they were only included when there was a low-bid need. [#I-4]

- The female owner of a construction firm reported that primes used strategies that kept certified firms "in their place." She indicated that if a DBE served as a prime, for example, the larger, more powerful companies no longer used that DBE as a sub. [#AI-165]

Others described situations where they were held to a higher standard than others. For example, the African American female representative of a minority business organization reported that double standards existed, "They [members] have to do '150 percent' … or they won't have another opportunity." She added that the expectation that minority subcontractors "have to do better," provides primes "an excuse … to not engage with that subcontractor again." [#TO-9]

Any overt bias and more subtle forms of unfair treatment. Examples of comments follow:

- An African American owner of a DBE-certified specialty contracting firm, regarding unfair treatment of minority-owned firms said, "There's a lot of [discrimination]." He reported that a potential customer, when talking with him, "… just wanted to hear whether I was black or white …." [#I-10]

- The representative of an African American female-owned construction firm said, "I feel the City of New Orleans [did] a very good job at keeping small black companies out." [#AI-39]

- An African American representative of a minority business development association reported, "There are disadvantages being in business if you're an 'ethnic minority' …. There are preconceived notions out there." [#TO-7]

- The African American female owner of a services firm said, "I am extremely tired of all of the corruption with City officials. I had contracts taken from my company due to racism, extortion, and I was sexually harassed." [#AI-5]

- A Hispanic American owner of a DBE-certified professional services firm reported that age discrimination existed in the marketplace. He reported that a stereotype existed that younger business owners were more likely to perform successfully in his industry. [#I-6]

- A focus group participant representing a public entity said, "I haven't seen [overt] discrimination by … [City] staff, but there are still enormous challenges." [#FG-1]

Any knowledge of "fronts" or false reporting of good faith efforts. Many business owners reported knowledge of false reporting of business ownership or good faith efforts, "pass-through" companies and other compliance issues, for example:

- The African American owner of an SLDBE-certified construction firm reported that in New Orleans large firms were getting the business by "teaming up" with DBEs that "do not perform" on the contracts. [#I-2]

- Regarding false DBE reporting, the Hispanic American owner of a DBE-certified professional services firm commented, "I just find it hard to believe that [a certain firm] … is still a DBE …. I know them … they do well …." [#I-20]

- The representative of an African American-owned professional services firm said, "At times [when] we bid on a project with a prime contractor, they received a contract and decreased our participation and percentage." [#AI-274]

- A focus group participant commented that primes favored "flow-through participation" of minority-owned firms rather than actually having the minority-owned firm work on the project. [#FG-2]

- A female representative of a public entity commented that it "was everyone's knowledge" that, at times, primes used DBE-certified firms as "pass-throughs" (specifying that those DBEs did not perform any work.) [#I-42]

- An African American owner of a DBE-certified specialty contracting firm commented, "… there are a lot of people who are not supposed to be DBEs that are using other people as 'frontrunners' for them; and, that's something that nobody … looks into." [#I-10]

- The female owner of a construction firm reported, "Primes that use their own DBE companies or 'pass-through' companies to achieve their DBE goals … makes it incredibly difficult for a small company to compete for work." [#AI-165]

- One focus group participant representing a minority-owned firm reported that any good faith efforts policy was "outdated" because the efforts were no longer "sincere, as intended." Therefore, he added that stricter enforcement was needed. [#FG-2]

- A white female representative of a non-profit business development organization commented that primes "… think they've done everything they can do and they haven't even begun to try." She added, "For expediency sake and for getting moving on in the process, they can feel like they're being honest when they say, 'I made a good faith effort.'" [#TO-8]

- The African American part owner of a professional services firm commented that at meetings with The Collaborative in New Orleans (a local advocacy group), some business owners have reported being contacted by prime contractors about work that was irrelevant to their firm's line of business. [#I-1]

  He reported, "Say I'm an electrician … A [so-called] 'good faith effort' is if they send me a pre-bid email for masonry work … I don't do masonry work …. A lot of times, we won't even follow up because that's not in our field of work, so a good faith effort is that they reached out to a DBE and the DBE didn't respond." [#I-1]

- A male public comment participant reported by email that "DBE agencies look the other way; they are encouraging pass-through activities and killing legitimate DBE businesses …." He offered knowledge of an instance, for example, when the City allowed utilization of a temp firm granting "32 percent" DBE participation to the prime. He added that this displaced "legitimate DBE contractors." [#PC-6]

"Good ol' boy" networks and other closed networks. Business owners reported on whether they experienced any exclusionary practices or closed networks while conducting work in the New Orleans marketplace.

A large number of business owners and representatives interviewed reported closed networks as prevalent in the New Orleans marketplace. They described an environment where "who you knew" was the key to success. These included, for example:

- A focus group participant representing a minority-owned firm commented, "In Louisiana, 'blackballing' is real." He added that when he bid on projects, contractors asked for input from the closed network by saying, "… they're calling the 'good ol' boys' to say, 'Is he in or is he out?'" [#FG-2]

- Due to a disagreement on an earlier project, an African American owner of a certified (SLDBE/SDBE) construction firm reported that his firm was "blackballed" in the New Orleans marketplace by a network of large general contractors and bonding firms. He stated, "My opportunities dried up quite a bit." [#I-2]

- A Native American owner of a services firm said, "If you're not in the 'who's who' in this town, people tend to doubt your ability." [#AI-175]

- When asked if he faced challenges in and entering his industry, an African American owner of a specialty services firm reported that opportunities are based on "who you know … not how good you are …." [#I-14]

- The Hispanic American owner of a DBE-certified professional services firm commented, "It is who you know … this [marketplace], this area … is all about who you know." He added that by the time an RFP comes out, "it's too late." [#I-6]

- The Hispanic American owner of a DBE-certified professional services firm commented that closed networks in the area were based on "race." [#I-20]

- One African American representative of a minority business development association commented, "There's definitely a 'club' there, they know each other … deals are cut on the golf course." [#TO-7]

- The representative of an African American-owned construction firm said, "They normally go with the primary contractors that they've dealt with [before]. Unless 'newcomers' have an 'inside relationship' with the firm running the project, they most likely will not be entitled." [#AI-311]

- An African American female owner of a services firm indicated there were closed networks in the New Orleans marketplace. She said, "I feel like the City is not fair. It's not about 'what you know or what you do, it's [about] who you know.' Everyone gets contracts based on who they know. It's not fair." [#AI-77]

- The owner of a majority professional services firm said, "Preexisting relationships make it hard to gain footing in the market." [#AI-78]

- An African American owner of a services firm said it's hard to "just … get a seat at the table." He added, "It's hard when they have previous relationships with other companies." [#AI-96]

- The owner of a majority goods firm indicated that there were closed networks in his industry. He reported difficulty finding work if "you don't know the right people." [#AI-258]

- The African American part owner of a DBE-certified professional services firm said, "At the end of the day … it's still a matter of who you know." [#I-21]

- An African American owner of a DBE-certified professional services firm commented, "'For sure' … 'it's who you know, not what you know,' in New Orleans." [#I-15]

- The African American owner of a specialty services firm said, "The 'good ol' boy' [network is] real here, especially in [my] industry, because that whole market is a 'good ol' boy' [network]. They don't allow anybody else to compete in that industry. [It] seems to me [maybe someone's] paying off the officials to keep us out, because I believe that's what's going on." [#I-11]

- A white owner of a specialty contracting firm reported "… The primes … have their 'good ol' boys' club … they have their relationships built and established." He added, "… whether you want to buy 'porta potties' or build a new police station, it always seems like it's the same companies, which is weird … it always seems like it's the same 'good ol' boys" club."' [#I-7]

- The African American part owner of a professional services firm commented, "If you're not in the good ol' boys …. I don't know if you have to pay, or what it is … but if you're not part of that network, you get the smile and the dog-and-pony show [at the] the pre-bids, and you hear, 'We're going to do everything we can do to help you achieve,' …. and I guess that's what they're supposed to do, is show that they're interested in you," but it never goes anywhere. Political figures and primes end up using "who they know and who they want to help out." [#I-1]

- An owner of a majority professional services firm said, "Making connections is always a challenge. There's always stuff going on that we'd like to know about, but we don't." [#AI-260]

- The representative of an African American-owned professional services firm indicated that closed networks might be the reason that "making the right contacts for getting work" was a challenge for the firm. [#AI-293]

- A white female representative of a business development organization and owner of a certified specialty services firm reported, "Absolutely … they keep the money and the power in the same pocket." [#TO-5]

- The Asian American owner of a professional services firm reported, "there are a lot of … businesses that are not being invited because they do not know the right person … a "good ol' boys" club is happening where some people know some people, and that is how they are getting the jobs, not because there is an open invitation to bid." He indicated that closed networks specifically impacted the success of small, and women- and minority-owned firms. [#I-5]

- An African American representative of a nonprofit financial assistance organization reported, "There's definitely an internal kind of support system for 'good ol' boys'" He added, "The job situation in New Orleans is pathetic, so a lot of people are starting their own businesses. If those people don't have access to [contract dollars] … they won't have the opportunity to grow …." [#TO-2]

- Regarding "good ol' boy" networks within New Orleans, a public meeting participant expressed his hope that the disparity study would "capture" the existence of closed networks. [#PMP-2]

Two business owners said that closed networks specifically excluded certified firms. For instance:

- The African American female owner of a DBE-certified professional services firm, regarding closed networks, commented that when giving jobs out, some primes avoided certified firms and gave jobs to a firm that "just happens to be in the same Mardi Gras krewe or country club as [the prime]." [#I-17]

- A white female owner of a certified (DBE/SLDBE) construction firm described closed networks that were not accepting of DBE-certified firms. She added that "favoritism" existed amongst members of the "good ol' boy network." [#I-13]

Some specifically reported race-based closed networks. Comments included:

- The African American female representative of a minority business assistance organization commented that closed networks "most certainly" existed. She said that it was called, "good ol' boy 'white' network." [#TO-9]

- Regarding the existence of closed networks in the New Orleans marketplace, a public meeting participant remarked, "We look for government to provide opportunities … in the industry that's dominated by white males that [are in] a "good ol' boy" network and who are not going to give us those opportunities …." [#PMP#2]

- An Asian American owner of a specialty services firm commented, "We've experienced difficulties getting in the 'networking setting' because of our 'race.' We're not invited to particular events or introduced to people who can help us get projects. We're a new company … not in with City Hall, it's hard." [#AI-155]

- Regarding closed networks impacting minority business' opportunities, an African American owner of a DBE/SLDBE-certified construction-related firm commented that "the white firms" have years of established relationships with project managers in the New Orleans marketplace. He said, "… these white firms tend to use the people that they know or people that look like them." [#I-35]

- An African American owner of a formerly SLDBE-certified construction-related firm reported knowledge of members of the "good ol' boy" network that chose to work exclusively with others in the network (even when they hated each other). He explained that those in a closed network would rather work with someone they "hate" than with an African American business owner. [#I-29]

- An African American owner of a professional services firm, regarding closed networks, commented, "It all started with the 'Willie Lynch syndrome,' when they had slavery and it has not stopped." [#I-30]

- One African American owner of a DBE/SLDBE-certified professional services firm commented that his industry was white male-dominated and that the closed networks caused barriers for both minority- and woman-owned firms. [#I-24]

One female business representative reported that although minority- and women-owned firms in the New Orleans marketplace were "most vulnerable," closed networks were not limited to majority firms. She explained, "… here in New Orleans … a predominantly minority town … there is also a 'good ol' boy' network of minority business owners." She continued, "… I do believe there is a group of players that get most of the business in New Orleans or have their hands in most of the business; and it does not provide a fair opportunity to others …." [#I-23]

A few business owners reported that the City of New Orleans procurement process supported pre-established relationships and closed bidding opportunities. For example:

- The African American owner of a DBE/SLDBE-certified professional services firm commented that securing work with the City of New Orleans required being part of a "'good ol' boy' network in order to get work." He explained that "on behalf of the City … a lot has to do with previous relationships." [#I-37]

- An African American female owner of a certified DBE-certified professional services firm commented that closed networks were barriers for her firm. She reported that when she attended networking events, she observed men "wearing $1,000 suits." She added that "contracts are put right in their laps." [#I-3]

- A white representative of a publicly-traded professional services firm reported that closed networks "definitely" existed in Louisiana. He commented that a "good ol' boy" network existed especially when a public agency placed an emphasis on local procurement, because it limited the number of qualified firms who could bid on a project. [#I-27]

A Hispanic American female owner of a professional services firm reported giving up on the New Orleans marketplace, because closed networks were too difficult to break. She stated, "New Orleans is generally a 'very closed' business environment. I work with clients in other markets because I can't navigate this market." [#AI-4]

However, for a few business owners, closed networks in the New Orleans marketplace did not present a problem. Comments follow:

- The Asian American owner of a professional services firm said, "I do not think anybody is isolating them out of anything, honestly." [#I-5]

- A Hispanic American female owner of a certified (SBE, SLDBE) professional services firm expressed that that there are established firms that are part of a "good ol' boy" network, but closed networks did not affect getting work in New Orleans as much as they might in other places. [#I-12]

- An African American owner of a formerly-certified (SLDBE) construction related firm remarked that although closed networks were "widespread" in New Orleans, "it's not discouraging to me … you can't block all the ways for me to get to the top of the mountain …." [#I-16]

- An African American owner of a DBE-certified specialty contracting firm remarked, "Honestly, I think most business is [based on] 'who knows who' …. It is what it is. I see it all the time …." [#I-10]

E. Working with Public Agencies and Specifically the City of New Orleans

Business owners and representatives discussed their experiences regarding opportunities for contracts with the City of New Orleans. Some reported the experiences they had when conducting work with the City or other public agencies. Discussions comments included:

- Any challenges when pursuing or performing public sector work in the New Orleans marketplace;
- Performing work for the City of New Orleans; and
- Reported unsuccessful attempts to secure work with the City of New Orleans.

Any challenges when pursuing or performing public sector work in the New Orleans marketplace. Business owners and representatives indicated barriers, such as limited opportunities and knowledge of bidding, when seeking public sector work. For example:

- An African American owner of a DBE-certified professional services firm reported, "In terms of African American businesses, because I know a lot of those (as a member of a local advocacy group), the experiences have been far and not near … really abysmal." He added, "This has always been the Achilles heel …." [#I-15]

- Regarding public sector bidding opportunities in the New Orleans marketplace, the African American female representative of a minority business assistance organization (having nearly all African American members) stated, "[African American business owners] are struggling to even 'get at the table' to have an opportunity to bid …." [#TO-9]

- The Hispanic American owner of a DBE-certified professional services firm commented that "we're not in the game." He commented, "I'm pretty sure that there's a gatekeeper." He indicated that the City contacted primes and asked, "We need a DBE, who should we get?" He stated, "… somebody's [at the City] assigning the work." [#I-20]

- An African American representative of a nonprofit financial assistance organization reported that many small business owners were limited in their knowledge of public sector bidding. He remarked that often his clients bid "very low" in order to win a contract and then lost money on the job. [#TO-2]

- A white male owner of a professional services firm stated, "It is difficult to win public [sector] work projects because … to win you need experience in a specific project type." He said that the only way to get that experience was to win those projects. [#AI-3]

  He went on to comment, "Typically, more minority- and women-owned businesses get these jobs. It's difficult for me to pursue these projects." [#AI-3]

Performing work for the City of New Orleans. Some business owners secured work with the City of New Orleans. For some, City opportunities were infrequent. For example:

- A white representative of a publicly-traded professional services firm reported that, post-Katrina, the business performed a lot of recovery work. He added that funding from FEMA was prevalent at that time in New Orleans. [#I-27]

- An African American owner of a DBE/SLDBE-certified construction-related firm reported securing an opportunity to work with a prime for a City of New Orleans contract that required minority participation. He added, "I don't get many of those …." [#I-35]

- A public meeting participant reported that his firm had not had a City of New Orleans contract in eight years although he indicated that the business "hired, trained and mentored more blacks in the [professional services] field … than any other entity in the state of Louisiana." [#PMP-1]

- While performing work with the City of New Orleans, the Hispanic American female owner of an SLDBE-certified professional services firm commented that she faced challenges and financial burden when City staff asked her to perform work outside her scope of work. "This is absolutely absurd," she stated. [#I-12]

- The African American female owner of a DBE-certified professional services business reported that she worked as a prime and a sub on more than one City of New Orleans project. [#I-17]

  The same business owner reported an experience on a City of New Orleans project where she was taken off the project, not knowing why. She reported, "The next thing you know the project is over and we haven't done any work on it." [#I-17]

- An African American owner of a DBE/SLDBE-certified professional services firm reported that he had a small prime contract with the City of New Orleans. He commented that he secured the contract after proposing on projects for years to no avail. He added that his persistence paid off, however, his experience working with the City "hasn't been great." [#I-24]

- The African American female representative of a business development association reported that she worked with many different types of businesses performing contracts with the City of New Orleans. She reported that the firms worked primarily as subcontractors, with some exceptions. [#TO-3]

  She added, for example, that she was familiar with some DBE firms that secured work with the City of New Orleans for contracts under $25,000. [#TO-3]

Reported unsuccessful attempts to secure work with the City of New Orleans. Many more businesses reported not securing work with the City of New Orleans.

Many business owners reported the barriers they faced when seeking work with the City of New Orleans. A number of interviewees reported frustration that they did not find relevant bidding opportunities with the City, or did not receive contract awards or feedback when an award was not in their favor, for example:

- A white owner of a specialty contracting firm reported having not conducted work for the City of New Orleans. He commented that the City of New Orleans did not offer as many opportunities in his industry as other public entities did." [#I-7]

- The Asian American owner of a professional services firm indicated that his firm has never had a contract with the City of New Orleans. He reported having researched City of New Orleans bidding opportunities online and concluded, "I could not find anything that I can bid on." [#I-5]

- A focus group participant representing a public entity commented, "Unless you have some 'big money' … it's hard to compete as a prime on City contracts …." [#FG-1]

- The Asian American owner of a professional services firm commented, "Big [professional services] firms are getting jobs with the City … a small [firm] like [mine] is just not getting anything." [#I-5]

- An African American female owner of a certified (DBE/SLDBE) professional services firm reported that having a limited work history she faced many barriers seeking work with the City of New Orleans. [#I-18]

- The Hispanic American female owner of an SLDBE-certified consulting services firm noted that her consulting firm has not secured work with the City. [#I-9]

- A white owner of a specialty contracting firm reported that his firm has not worked with the City of New Orleans; however, he reported bidding on City contracts as a subcontractor to no avail. [#I-8]

- An African American owner of a DBE-certified specialty contracting firm said, "Well, I haven't gotten any work from them, so [the City is] not doing that great for me." [#I-10]

- The Hispanic American owner of a DBE-certified professional services firm commented that he was told that once his firm had certification, the City of New Orleans opportunities would open up to him. He conveyed that he has yet to secure a contract with the City of New Orleans despite being certified. [#I-6]

- An African American owner of a specialty services firm commented on his frustration regarding not securing work with the City of New Orleans, although having had tried many times. He conveyed, "[I] go to City Hall … put my name in … I've done that many times." [#I-14]

- The African American female owner of a services firm stated, "I am a victim of wrongdoing by City employees …. Contracts were wrongfully taken from me which caused me to experience many difficulties growing, expanding my business." [#AI-5]

- An African American representative of a minority business development association reported, "I think a lot of firms feel the opportunities with the City [involve] favoritism. There's a feeling of … the usual suspects, the same players [getting the work] … So, it's a challenge …. But the argument is [that] some … smaller firms don't have the capacity." He posed the question, "Well, how do you grow the capacity if you're not given that opportunity?" He concluded, "I guess the short answer would be [that] there's a perception and a struggle of a lack of opportunity." [#TO-7]

- The white female representative of a non-profit business development organization, when asked if she was knowledgeable about firms seeking opportunities with the City of New Orleans responded, "There are definitely businesses looking for those opportunities … with the City." She explained, "There's a lot of confusion about the process … there's confusion and frustration about getting on the lists … getting on a preferred contractor list." She continued that "[the City of New Orleans] may not be reaching folks where they live." She expressed, "They're being shut out at the outset." [#TO-8]

A number of business owners commented that "politics" played a role in securing work opportunities with the City of New Orleans and in the local marketplace. For example:

- An African American owner of a DBE/SLDBE-certified professional services indicated that working with the City of New Orleans was "politics at play" and that the City often has certain firms in mind for City opportunities. [#I-24]

- A female owner of a professional services firm said, "I have found it difficult to get work with the City because of apparent politics." [#AI-254]

- Regarding "the makeup of … City politics" in securing opportunities, a public meeting participant reported, "I'm sure you've read [in the papers] about the 'pay-to-play' issues in the City, the patronage, and we could go on and on." [#PMP-2]

- An African American part owner of a professional services firm indicated that it would be helpful "if politics weren't involved, and [bidding was] fair to everyone … but how do you do away with politics when you have people 'paying their way' through? That's hard … but if it were a level playing field, it would be a whole lot easier for things to get done and for [the City of] New Orleans to be productive." [#I-1]

- The African American co-owner of a minority-owned SLDBE-certified professional services firm reported, "…you just cannot do good work here [New Orleans]." He added that there was too much "politicking" in the marketplace. [#I-19]

  The same business owner reported having a project with and submitting a few proposals to the City, however, he has plans to expand his business to non-City opportunities due to the political environment. [#I-19]

- An African American female owner of a DBE/SLDBE-certified professional services firm reported that "politics" was more important than experience and qualifications when seeking opportunities in the New Orleans marketplace. [#I-18]

- A representative of a majority professional services firm said "politics" was a barrier to their firm's success. [#AI-202]

- The representative of an African American-owned professional services firm indicated that the firm faces "political barriers." [#AI-223]

- An African American owner of a previously SLDBE-certified construction-related firm reported that he was not recertifying his firm due to "politics." [#I-29]

Business representatives commented on bureaucratic practices, lack of information and difficulties communicating with the City of New Orleans. For example:

- An African American owner of a professional services firm indicated that the [City of New Orleans'] procurement process was very "cumbersome." [#AI-129]

- The representative of an African American-owned professional services firm indicated that a lack of timely information about contract opportunities was a barrier to working with the City. [#AI-7]

- The African American owner of a professional services firm commented, "The Mayor of [the City of] New Orleans has impeded my company from obtaining numerous contracts and opportunities." [#AI-190]

- The owner of a majority professional services firm reported "City government" and its "problems" were a barrier to his firm's success. [#AI-116]

- A representative of a majority construction firm indicated that the business faced issues regarding protocols from "code enforcement, Sewerage and Water Board, and the Mayor's Office." [#AI-310]

- An Asian American owner of a specialty services firm reported, "Personnel in the purchasing department have made it difficult. They made it really tough for us to get a bid we had. They would get purchase orders seasonally, but we wouldn't get them until the next season." [#AI-114]

- A representative of a women-owned goods firm reported that it was "impossible to talk to City officials" as they don't return the firm's telephone calls. [#AI-219]

- The African American female representative of a minority business assistance organization commented, "A lot of members feel the different [City] departments are really not responsive to them … nobody answers the phone, or they don't return calls …. I think responsiveness should improve." [#TO-9]

Some business owners reported difficulty getting work approved by City project managers. For example, the female owner of a professional services firm reported, "When staff changes at the City occur, the new City project manager, or project reviewer at another City agency, has no regard or respect for the work that has already been completed and accepted. They routinely require professional service consultants to revise work again and again. As a result, we lose money on that work and the projects are routinely delayed over and over." [#AI-158]

She continued, "Sometimes program elements [such as] what we are designing for in a project … are changed over and over during a [specified industry] project. Decisions by agency officials and project managers are never permanent, sometimes changing after construction documents are complete. This delays projects and costs us money to revise. City project managers and other agency officials then blame professional service consultants for delays on projects …." [#AI-158]

F. Insights Regarding Business Assistance Programs and Certification

Business owners and representatives reported whether they had taken advantage of or had any knowledge of any contract goals programs or any business assistance programs in New Orleans. Topics included:

- Contract goals;
- Unbundling;
- Prompt payment requirements;
- Business assistance (including financing, bonding and mentor-protégé, others);
- Networking opportunities;
- Experience with certification and certifying entities; and
- Overall need for a streamlining and greater transparency.

Contract goals. Some discussed issues that related to enforcement of contract goals. Examples included:

- A Hispanic American owner of a DBE-certified professional services firm reported that there was no accountability for larger firms to meet goals. He indicated that goals were only considered "targets" and no penalty existed if not met. [#I-6]

- The representative of an African American female-owned professional services firm reported that the City had a "passive approach to implementing [certification] requirements for professional services" after contract award, "even if other bidders are willing to fully comply." [#AI-215]

- An African American female owner of a DBE/SLDBE-certified professional services firm reported that that there was not much encouragement "to go beyond the 'percent' ceiling for minority-owned firms" when engaging certified firms. [#I-18]

- One African American female owner of a certified professional services firm commented that majority firms only used minority- and women-owned businesses to meet subcontracting goals, indicating that there was no utilization without goals. [#I-4]

- A focus group participant representing a public entity expressed concern that contract goals "can create an incentive [for the prime] to not go beyond [the goals required by the City of New Orleans]." [#FG-1]

  He added that a point scale "that is more graduated" might provide more incentive to increase SLDBE participation. He commented that the current process was "a pass/fail system, with no incentive." [#FG-1]

- The white female representative of a business development organization and owner of a certified specialty services firm reported, "[Primes] should be encouraged by requirements of the City … if you want this contract, you got to have [a] certain percentage of your subcontractors … be woman-owned or minority-owned, so they're encouraged by the requirement." [#TO-5]

  She continued, "I'm sure the City could encourage primes to do this in other ways, like maybe [with] recognition [or a] cheaper [and] faster … processes …." [#TO-5]

- An African American representative of a nonprofit financial assistance organization reported that primes "are finding ways around it … [meeting] the [goals] may be happening on paper, but it isn't happening in reality …." [#TO-2]

- The white representative of a publicly-traded professional services firm reported having difficulty locating certified firms with which to partner. He indicated that certified firms in some industries were difficult to locate in the New Orleans marketplace. [#I-27]

  He added that although his firm always met or exceeded their goals, it was difficult, at times. He further commented that the City of New Orleans should cultivate certified firms to enter the fields that are lacking in the arena. [#I-27]

Unbundling. Some business owners and representatives reported the advantages of unbundling of contract opportunities, for example:

- The African American female owner of a DBE-certified professional services firm commented that, when implemented, unbundling helped small firms secure work: "There are ways to break out smaller … solicitations that can 'fit' the smaller businesses." [#I-17]

- An African American female representative of a minority trade association reported that unbundling made it easier for small, certified firms to participate in City of New Orleans' contracts, especially as prime contractors. She added that unbundling of contracts also helped small firms manage "cash flow." She [#TO-4]

- The owner of a majority professional services firm indicated that large contracts should be broken up so smaller firms can participate. He indicated that large contract sizes were a barrier for his small firm. [#AI-113]

- An African American owner of a professional services firm indicated that large contracts, when broken up, encouraged more participation from small businesses. He wanted "right-sized opportunities for small firms." [#AI-185]

- The representative of an African American-owned construction firm indicated that it would be helpful if jobs were broken down "to meet bond requirements" that smaller firms were able to accommodate. [#AI-297]

- A focus group participant representing a minority-owned firm commented, "We'd like to see contracts broken down where they can get smaller participation." [#FG-2]

- Another focus group participant added, "If you don't want to give me a part of the contract and be fair when I'm a sub to you, break off a piece of the contract and let me be a prime on it." [#FG-2]

One business owner commented that "increasing" contract sizes was an emerging trend in City of New Orleans projects. This African American owner of a formerly SLDBE-certified construction-related firm reported an emerging trend at the City of New Orleans is to increase the size of contracts that previously would have been unbundled. He stated, "This practice makes it more difficult for smaller contractors to bid as a prime and it makes it quite difficult for very small [certified] contractors …." [#I-29]

Prompt payment requirements. Although many business owners reported issues with receiving prompt payment, few reported any knowledge of the City's new prompt payment tools. For example, one African American female representative of a minority business assistance organization commented that the City of New Orleans implemented a new payment process; however, she expressed, "Nobody's told me that it's worked." [#TO-9]

For more on prompt payment see Part B of this appendix.

Business assistance (including financing, bonding and mentor-protégé, others). Some business owners and representatives reported any awareness of business assistance programs.

Financing assistance. Business owners and representatives discussed financing including start-up opportunities, capital-building and growth funding, for example:

- The African American female representative of a business development association reported a need for access to credit and financing for certified firms. She stated, "[A minority business owner] goes to a local bank with contract in hand, and you still are not able to get the line of credit, or you're getting much less than you need …." [#TO-1]

- On the topic financing, the African American female owner of a professional services firm indicated that there are "too few start-up funding … opportunities." [#AI-157]

- The white female owner of a certified (DBE, SLDBE) construction firm reported a need for the City to offer better funding for small companies and teach them project management. [#I-13]

- An African American female owner of a goods firm reported that in the marketplace, there are "pitch competitions" to help small businesses obtain small amounts of funding from banks and non-profit groups. [#I-23]

- An African American male representative of a nonprofit financial assistance organization commented, "Our mission is to provide credit and financial services to those who can't get access to capital through traditional sources such as banks and credit unions." [#TO-2]

- The white female representative of a business development organization and owner of a certified specialty services firm stated, "I think one thing that's great about the City of New Orleans is there's a lot of start-up support [such as] Propeller [and] The Idea Village (both 501c3s supporting innovation) …. There's a lot of start-up support infrastructure already built. [But], I wouldn't say it's equitable yet." [#TO-5]

  The same representative added, "If you're starting a company … there [is] start-up support, but I think that start-up support is not as accessible to certain populations in [New Orleans]. Now, Propeller is doing a good job of … actively making sure that they represent [the people of New Orleans]. I think other accelerators could do a better job [of that]." [#TO-5]

  She continued, "Once you get past that start-up phase … there's not as much infrastructure … to support growing businesses …. I don't think there's a lot of growth funding." [#TO-5]

Training, classes and seminars. Some reported on opportunities for learning, for example:

- An African American owning a DBE-certified specialty contracting firm stated, "I've taken a few classes to help [us] try to get contracts." [#I-10]

- The white female representative of a business development organization and owner of a WBE-certified specialty services firm commented that there were some "really great" free resources from the Louisiana Small Business Development Center; however, she added that small businesses were unaware of the resources. [#TO-5]

- The white female representative of a non-profit business development organization reported that the organization offered six-hour construction related contractors' workshops annually teaching participants about "green infrastructure." [#TO-8]

- An African American co-owner of a minority-owned SLDBE-certified professional services firm reported the need for the City of New Orleans to provide training for small firms on accounting and good business practices. [#I-19]

- One African American owner of a DBE/SLDBE-certified construction-related firm reported a need for the City of New Orleans to offer improved "hands-on" training for businesses to become familiar with the certification process. [#I-35]

- An African American owner of a formerly DBE-certified construction-related firm reported a need for training courses that introduced minority-owned firms [and other small businesses] to the workings of the City. [#I-26]

Mentor- protégé programs. A few business owners and others commented on mentor-protégé programs, for instance:

- The African American owner of an SLDBE/SDBE-certified construction firm remarked that mentor protégé programs are "few and far between." [#I-2]

- An African American female representative of a public business assistance agency reported to offer two different mentor-protégé programs: one for small businesses and an SBA8(a)-business development program. She also indicated that the agency encouraged joint ventures for small businesses to pursue larger contracts. [#TO-10]

- Regarding mentoring programs, an African American owner of a DBE/SLDBE-certified construction-related firm indicated that minority-owned firms can benefit from a wide offering of training programs. [#I-35]

- The African American female representative of a minority trade association commented that the City should establish a mentoring program to help local firms improve capabilities. [#TO-2]

- The white owner of a specialty contracting firm reported wanting, "… a situation where I could meet with somebody who comprehensibly could look at my company and say, 'Ok, here's the areas that might apply for you or might work for you … and here's who to contact, here's how to go about it …." He added that a mentoring program "would be great." [#I-8]

Bonding assistance. Many business owners reported difficulty securing bonding (see earlier comments). Some reported on bond-building measures. Comments included:

- An African American owner of a formerly DBE-certified construction-related firm commented that bonding assistance for small and minority-owned firms would be helpful to the firm's growth. [#I-26]

- A focus group participant representing a public agency reported that several minority businesses were working with the City as prime contractors. He added that the City was helping them build their bonding capacity in order to become primes. [#FG-1]

- A focus group participant representing a minority-owned business indicated that a City bonding assistance program for small and minority-owned firms would be helpful. [#FG-2]

- The African American female representative of public agency reported that the agency offered a bonding assistance program. She indicated holding seminars twice a year on how to prepare bonding applications. She further indicated that three firms attended the last seminar and one obtained a bond. [#TO-10]

Other business resources and advocacy. Based on the in-depth interviews, there is substantial assistance available for small businesses in the New Orleans area (offered by public agencies, not-for-profits and other entities).

- A Hispanic American female representative of a minority business association reported their priority was to help small business owners acquire tools [and] skills that will help … their businesses grow." [#TO-6]

- One white female representative of a non-profit business development organization reported that the entity provided support to locally-owned firms. [#TO-8]

- The African American female representative of a business development association reported that the association focused on capacity building of women- and minority-owned small firms. [#TO-3]

- An African American female representative of a public business assistance agency reported that the agency hosted workshops, offered small business programs, offered assistance with certification applications and worked with other government and non-government entities, "… to build better businesses." [#TO-10]

- The African American female representative of a business development association reported that the City of New Orleans, because of the work she does, oftentimes sent bid opportunities to her to disseminate to small businesses. [#TO-1]

- A focus group participant representing a public entity stated, "The resources are there [for SLDBE/DBEs] … they need to go out and look for them." [#FG-1]

Networking opportunities. Interviewees reported their experiences with "meet and greets" and other networking and outreach events.

Some reported on "meet-and-greet" attendance at the City of New Orleans, or having personally attended a public-sector networking event. For instance:

- A focus group participant representing a public agency remarked that "there is good attendance at [City networking] events … 'decision-makers' show up." [#FG-1]

- On the other hand, a Hispanic American male owner of a DBE-certified professional services firm recommended that firms receive a stipend to foster improved attendance at the City of New Orleans outreach events. [#I-6]

- An African American male owner of a DBE/SLDBE-certified specialty-contracting firm reported a need for the City of New Orleans to provide more outreach and networking opportunities to certified firms. [#I-31]

- With a goal of expanding relationships and firm visibility, an African American male owner of a DBE/SLDBE-certified construction-related firm reported routinely attending "as many meetings as possible," including networking events held by the Urban League of Greater New Orleans and the New Orleans Regional Black Chamber of Commerce. [#I-35]

- An African American female owner of a DBE-certified professional services firm reported that, while attending business expos and networking events, she leveraged her certifications to facilitate discussion with primes. [#I-3]

Others wanted improved ways to access public sector information beyond "meet and greets." Examples include:

- Regarding information gathering for City of New Orleans opportunities, the representative of an African American woman-owned professional services firm reported, "getting information and notices about contracts" was challenging." [#AI-234]

- An African American part owner of a DBE-certified professional services firm commented, "They [certifying agencies] don't communicate with us." [#I-21]

- The African American female owner of a DBE-certified professional services firm reported, "There has to be better processes and communication." [#I-17]

- An African American owner of a services firm reported difficulty attending the City's "meet and greets." She indicated, instead, wanting alternative ways to secure information on bidding opportunities and improved dissemination of information from the City. [#AI-88]

- An African American female owner of a DBE-certified professional services firm suggested that the City of New Orleans do a better job of "facilitating … meaningful 'matchmaking' with large primes …." [#I-17]

- A white representative of a publicly-traded professional services firm suggested that the City of New Orleans assist small firms "join together" to compete in the marketplace and, also, improve its communication with primes and subcontractors. [#I-27]

- The African American female representative of a minority-business advocacy organization expressed the need for more community-based meetings with City staff in attendance. [#I-41]

- An Asian American owner of a professional services firm wanted more web presence by the City of New Orleans with timely posting of bidding opportunities. [#I-5]

- A public meeting participant stated, "When you look at outreach … one of the major organizations … is the faith-based community … and that's where you're going to find a lot of small businesses that have been hurt through history …." [#PMP-1]

One business owner recommended communication channels that could expand public agency outreach to minority- and women-owned firms and other small businesses. This African American owner of a DBE-certified professional services firm reported that providing primes with updated databases of subcontractors could encourage prime-subcontractor communications. He also mentioned that local advocacy groups (e.g., The Collaborative) and others were channels for dissemination of bidding and other important information to minority- and women-owned firms and other small businesses. [#I-15]

One representative of a publicly-traded firm suggested that the City serve as a catalyst for connecting small businesses to make them more competitive in the New Orleans marketplace. This white representative of a publicly-traded professional services firm suggested that the City of New Orleans assist small firms "join together" to compete in the marketplace. [#I-27]

Experience with certification and certification agencies. Business owners and representatives reported on certification.

Knowledge of certification programs. Business owners and representatives were not always aware of the City's or others' certification programs, or relied on others to get the word out. Examples follow:

- The African American owner of a specialty services firm reported no knowledge of certification programs by saying, "… I do not know anything about [certification programs] and I don't even know what that means." [#I-11]

- An African American female representative of a public agency, when asked about how subcontractor/subconsultants and others learn about the City's SLDBE certification program responded, "Primes sometime tell firms, 'You need to get certified.'" [#I-43]

For some, the thought of certification was daunting, or becoming certified was difficult, time-consuming, paper intensive or challenging in other ways. Examples of comments included the following:

- For the African American owner of a specialty contracting firm, the City's certification process was "extremely detailed and tedious." [#I-36]

- An African American female owner of a DBE-certified professional services firm reported that the paperwork required for certification was "voluminous" and the process between certification programs was "redundant." [#I-17]

- The white female owner of a certified (DBE/SLDBE) construction firm reported that the paperwork for certification was challenging. [#I-13]

- Regarding certification, an African American owner of a DBE/SLDBE-certified construction-related firm remarked that his certifications were "paper-intensive." [#I-35]

- A white representative of a publicly-traded professional services firm remarked that the certification process was too lengthy for small firms. He commented that the lack of cross-certification between the City and other certifying agencies limited opportunities for small firms. [#I-27]

- The African American owner of an SLDBE/SDBE-certified construction firm reported that certification was challenging for him; however, the renewal process was easier than the original process. [#I-2]

- An African American female owner of a DBE/SLDBE-certified professional services firm reported that certification, at first, was meaningful; but now, to gather the information for recertification, complete the paperwork and provide personal information was probably not worth the "time and effort." [#I-18]

- To increase accessibility of certification, one African American female representative of a business development association encouraged a "paper certification option" in addition to the online application. [#TO-3]

For others, the certification process was not difficult to navigate. For instance:

- The African American female representative of a business development association reported that she was aware of good experiences with the City of New Orleans certification process. She stated, "I would say the responsiveness and the amount of help is phenomenal." [#TO-3]

- The Hispanic American female owner of an SLDBE-certified consulting services firm indicated that she took advantage of training for certification, so the process went smoothly. She noted attending workshops that provided a lot of information. [#I-9]

- A Hispanic American female owner of an SLDBE-certified professional services firm indicated that becoming certified with the City was not difficult (but somewhat different from the State of Louisiana's certification). [#I-12]

- An African American owner of a DBE-certified specialty contracting firm said, "[For] the DBE program, I jumped through a few of the 'hoops,' but it was worth it. No big deal." [#I-10]

A few business owners and representatives reported on the value of certification. Comments regarding value ranged from certification was "the key to business success" to certification was only marginally advantageous. Examples included:

- Regarding the advantages of certification, an African American owner of a DBE/SLDBE-certified construction-related firm remarked that his certifications were the "key to his success." [#I-35]

- An African American owner of a DBE-certified professional services firm reported mixed feelings. He indicated that certification programs were helpful; however, some minority-owned firms consider [certifications] to be, "Platitudes …. It's not going to do anything for you, but you have it anyway." [#I-15]

- A Hispanic American female owner of an SLDBE-certified professional services firm reported that certification had limited advantages, but it helped her get your "foot in the door" to sell her professional services business to big firms. [#I-12]

Some business owners and representatives reported certification as disadvantageous or not worth pursuing. Comments included:

- When asked about the advantages of certification, an African American owner of a DBE-certified specialty contracting firm said, "I thought I would get advantages, but I haven't gotten anything out of it as of yet." [#I-10]

- An African American part owner of a DBE-certified professional services firm commented, "At one point … years ago we had certified with everybody, but it didn't mean anything, so I just stopped renewing." [#I-21]

- The African American female owner of a goods firm, although aware of the DBE Program, reported lack of interest in taking advantage of certification. [#I-23]

- The Hispanic American owner of a DBE-certified specialty contracting firm commented on the disadvantages of certification. He stated that the City should "qualify the people better … there are many [certified] contractors that are not qualified and that's not an excuse …." [#I-40]

Due to the number of different certifications in the New Orleans marketplace and the state of Louisiana, there was some confusion as to which certifications were reciprocal. Although unspecified, some reported knowledge of reciprocal certifications. Others made recommendations for reciprocity among the certifying agencies in the New Orleans marketplace:

- The African American female representative of a minority business organization reported that the process was improved with "reciprocal certifications …[and] simplified applications …." [#TO-9]

- An African American female representative of a public business assistance agency remarked that her organization offered assistance with certification applications to

make the process more accessible. She added that some reciprocity existed between certification programs by saying, "Once you're certified with one [agency], you just let [the other agencies] know that you are certified and they will let you know what you need to submit so you don't have to go through as much detail … as before." [#TO-10]

- The African American representative of a minority business development association reported that the City of Houston has reciprocity with other certifying agencies in Texas. He commented, "If you use reciprocity, you're not using any additional City resources to expand your pool of qualified [firms]." He added that reciprocity gives certified firms opportunities to grow and "It just makes good business sense." [#TO-7]

- A Hispanic American owner of a DBE-certified professional services firm commented that since Louisiana has so many certifications, he recommended that reciprocity be implemented between certifying programs. [#I-20]

A few commented on how to better address certified firms with high revenue. For example:

- The African American owner of a formerly-certified (SLDBE) specialty contracting firm reported that certified companies with high annual earnings be in a "different bracket" from small, less-established SLDBE firms. [#I-16]

- A female representative of a public agency reported a need for an enforced "graduation" for certified firms. She offered that revenue and income limits be implemented, as she reported awareness of "millionaires" with certified businesses, in some cases. [#I-42]

Overall need for a streamlining and greater transparency. Some business owners reported a need for simplified procedures with greater transparency in procurements, bidding and contract compliance. Comments included:

- An African American owner of a formerly SLDBE-certified construction-related firm reported a need for the City of New Orleans to simplify and streamline the monthly contracting reporting policies and procedures for small firms. [#I-29]

- The white female owner of a DBE/SLDBE-certified construction firm reported wanting a more streamlined process. She indicated that on many occasions the paperwork for public sector contracts was "huge." [#I-18]

- When asked how the City of New Orleans can improve their procurement practices, the African American male representative of a minority business development association indicated, "To start, it should be transparent." [#TO-7]

- When asked how the City of New Orleans and other public agencies can improve their procurement practices, the Asian American owner of a professional services firm reported the need for improved transparency. He said, "What they need to do is announce those new bidding opportunities. So [for] any projects that happen, [they] need to be [publicly] announced and [the City] [should] say, 'We are looking for architects to do this; we're looking for construction [firms] to do this.' And if [it] is shown where they actually communicate it to 'everybody,' then we would have the opportunity to come in … and get the proposal and get the bids for [the] project." [#I-5]

- A white owner of a specialty contracting firm reported the need for transparency in the City of New Orleans process, "To me clarity would be awesome … we are looking for this, but you don't carry [through with] it." [#I-7]

- A male public comment participant reported by email, "Contract procurement in [the] City … could do a better job of transparency and equity in contract awards." [#PC-5]

G. Any Other Insights and Recommendations for the City of New Orleans

Interviewees provided insights regarding City procurement practices, including:

- Comments on how the City of New Orleans assisted minority- and women-owned businesses;
- Comments on how the City of New Orleans could improve utilization of minority- and women-owned businesses;
- Recommendations to increase local participation in City of New Orleans contracting;
- Desire for continued action, based on the results of the disparity study.

Comments on how the City of New Orleans assisted minority- and women-owned businesses. One business representative indicated that this disparity study was a positive step for the City to undertake. Some others reported improved SLDBE Program enforcement, better policing of good faith efforts, implementation of a prompt payment system and "cautiously optimistic" utilization of certified businesses. These examples included:

- A white female representative of a business development organization and owner of a WBE-certified specialty services firm conveyed, "You know, small businesses are the backbone of this economy …. A lot of these headquarters can get up and move anywhere, but these small businesses are really committed to this city. So, I think it's really good that the City is supporting small businesses, and I appreciate [that] the City's doing this disparity study. I think that the City … has stated that this is a goal, and [that they] are really, actively working towards it." [#TO-5]

- A female representative of a public agency reported that the monitoring and accountability of the certification program improved under the new leadership. [#I-42]

- A white female owner of a DBE/SLDBE-certified construction-related firm commented that the City improved its "policing" of good faith efforts. [#I-33]

- The Hispanic American female owner of an SLDBE-certified professional services firm stated that the City's "goal percentage" was "great," a significant number. She reported that the City also made efforts to ensure that goals were met. [#I-12]

- An African American owner of a DBE/SLDBE-certified specialty-contracting firm reported that the City of New Orleans procedures improved "by having the LCPtracker." [#I-31]

- The African American owner of an SLDBE-certified construction firm indicated that the City of New Orleans implemented B2GNow about two years ago. He reported it provided subcontractors with information regarding whether and when primes were paid. He added that although there was often a lag between when the payment was provided and when it was reported, the B2GNow system was still better than being "kept in the dark …." [#I-2]

- An African American owner of a DBE/SLDBE-certified professional services firm reported that he was "cautiously optimistic" because he knew of some certified businesses that were securing work opportunities with the City of New Orleans. [#I-24]

- One African American female representative of a business development association commented, "I really did like the [BuildNOLA] Training Program because [it] encouraged participation and the certification process." [#TO-1]

Comments on how the City of New Orleans could improve utilization of minority- and women-owned businesses. For example, some perceived the need for better tracking of the utilization of minority-and women-owned businesses and other small businesses. Others made other observations or recommendations. For instance:

- An African American female representative of a minority trade association perceived a need for the City of New Orleans to more closely track the race, ethnicity and gender of those awarded contracts to alleviate misconceptions about which groups were actually receiving contracts. [#TO-4]

- An African American owner of a DBE/SLDBE-certified construction-related firm said that "concrete numbers" should be published to show proof that primes were adhering to goals. [#I-35]

- The African American female representative of a minority-business advocacy organization expressed that minority business participation in the City of New Orleans was never effectively mandated or monitored and that the City should include more minority-owned firms on more City projects. [#I-41]

- An Asian American owner of a professional services firm commented that the City of New Orleans "Needs to do more. Their engagement is very poor." [#I-5]

- An African American female owner of a DBE/SLDBE-certified professional services firm recommended that small business set-asides should exist for minority-owned firms to build the capacity to perform "meaningful work." [#I-18]

- One African American part owner of a DBE-certified professional services firm recommended that the City of New Orleans create a set-aside program specifically for African American-owned professional services firms. [#I-21]

- The African American female owner of a DBE-certified professional services firm reported that City employees were doing a "good job" but were overworked. She stated, "The City's project managers are overburdened [and] underpaid … there's a lot of good people … that know what they're doing [and] have dedicated their lives to the City … but they have four jobs …." [#I-17]

Recommendation to increase local participation in City of New Orleans contracting. Business owners expressed a need for increased local participation on City contracts.

Many wanted increased utilization of small local businesses. Comments included:

- The African American part owner of a professional services firm suggested that the City of New Orleans mandate a percentage of subcontract dollars go to local businesses. [#I-1]

- The Hispanic American owner of a DBE-certified specialty contracting firm asked that the City monitor participation of "local … again local … contractors from New Orleans." [#I-40]

- An African American owner of a DBE/SLDBE-certified professional services firm recommended that the City of New Orleans require pre-bid conferences for all contracts, to increase local participation. [#I-24]

- A female representative of a public agency commented that the certification program was intended to help local businesses, but, instead, many out-of-state firms or firms outside of the local marketplace often reaped the benefits. [#I-42]

- The representative of a majority other services firm stated, "I find when we bid on large opportunities; the expertise falls to companies out-of-state. [The City of New Orleans] thinks the expertise can't be found locally." [#AI-225]

- The representative of an African American-owned construction firm reported, "Firms from Houston and other areas have come in and monopolized [local] work." [#AI-311]

- An African American part owner of a DBE/SLDBE-certified professional services firm commented that public agencies in New Orleans should "[give] more [projects] to local firms … we are starting to see DBEs and woman-owned firms from out-of-state now getting work." [#I-32b]

  His business partner agreed and added, "We're paying taxes in the state [of Louisiana] … the other ones aren't … and the work is going out." [#I-32a]

- A public meeting participant recommended that the City of New Orleans should "support the … local minority community." [#PMP-2]

- The African American female owner of a certified professional services firm recommended that like the City of Houston's "Hire Houston First" program, the City of New Orleans should encourage the hiring of local firms to keep taxpayer funds in the local community. [#I-4]

  The same business owner added, "I just … pray and hope that the City starts to 'love us like we love it,' and that we have a 'seat at the table,' because if we don't, the City is not going to move forward." [#I-4]

- The Hispanic American female owner of an SLDBE-certified professional services firm indicated that conditions in the New Orleans marketplace were good, except when larger firms "come in and establish a 'storefront' to pursue the opportunities and compete with local businesses." [#I-12]

- A public meeting participant recommended that the City of New Orleans adopt procurement practices that favor local firms. She reported, "… everybody that comes to [New Orleans] gets contracts and [local businesses] don't." [#PMP-2]

- The African American female representative of a minority trade association commented that post-Katrina, a trend persisted where local firms were unlikely to have their public-sector contracts renewed; rather, non-local firms were more likely to win those contracts. She commented that when local firms lost work to non-local firms, the taxpayers suffered by their dollars leaving the local area. [#TO-4]

- The representative of an African American female-owned professional services firm stated, "Most contracts I have [bid] on go to out-of-town companies versus staying in [City of New Orleans]. To the contrary, when I bid on out-of-town contracts, the in-state companies have a built-in ten-point advantage given to them. Therefore, [I'm] wondering why the City of New Orleans and the State of [Louisiana] can't do the same thing." [#AI-217]

- An African American representative of a nonprofit financial assistance organization commented that not all problems "are super hard to fix." He suggested that the City "really dedicate … effort into helping [local businesses] share [the] wealth that's being brought down here and then shipped off somewhere else." [#TO-2]

A focus group participant representing an African American trade association recommended a "local" component for certification. This participant suggested that in order for a firm to become certified, "[The business owner] has to prove that [he/she is] actually a resident of New Orleans and that [he/she is] in business for quite some time." [#FG-2]

One business owner directed her recommendations to the new administration. This Hispanic American female representative of a minority business association suggested, "In the upcoming administration, I would really like to see a commitment to small business, and to all of these issues." [#TO-6]

She went on to say, "[There has to be] more investment in programs, more investment in solving some of those kinks that we have along the way for those small business owners, and better communication. [We need] a committed administration with the local small business owners." [#TO-6]

Desire for continued action, based on the results of the disparity study. Several business owners and representatives reported their desire for continued action, based on the results of the disparity study, for example:

- A public meeting participant remarked regarding inequities in opportunities in the City of New Orleans marketplace, "… It's never been enough … and so we go to fight to make this disparity [study] work …we want to see what the numbers look like … when … the data come together." [#PMP-2]

- A focus group participant representing a minority-owned firm remarked, "My biggest concern is the disparity study and the results." He added, "I'm concerned about the effectiveness … because the same people that implement it … if they don't change, the results are going to be the same … politically it's weakened down by the Mayor …." [#FG-2]

- The African American female representative of a minority-business advocacy organization remarked that there was also a need for a statewide disparity study and a statewide DBE mandate. [#I-41]

APPENDIX K.
Summary of Other Available Assistance Programs
(draft, 01102018, not for public distribution)

In addition to City of New Orleans efforts, there is a broad range of assistance programs operated by state and local agencies, not-for-profit organizations and other groups available to businesses in the New Orleans area. This appendix provides examples of those programs. Appendix K is organized as follows:

A. Examples of Federal Programs;

B. Examples of Statewide Programs; and

C. Examples of other business assistance.

A. Examples of Federal Programs

State and local government agencies receiving U.S. Department of Transportation funds operate the Federal Disadvantaged Business Enterprise (DBE) Program or Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program, as described below. A network of public entities provide certification to disadvantaged business through the Louisiana Unified Certification Program (LA UCP).[1]

Federal DBE Program. The U.S. Department of Transportation requires state and local governments that receive funds from the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration to implement the Federal DBE Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation. As such, the City of New Orleans has contracts where it applies the Federal DBE Program, typically by setting DBE contract goals.[2]

To be certified as a DBE, a firm must be socially and economically disadvantaged. Revenue limits, personal net worth limits and other restrictions apply when determining economic disadvantage. Business owners who are minorities or women are presumed to be socially disadvantaged under the program. Firms owned by white male business owners who can demonstrate social and economic disadvantage can be certified as DBEs as well.[3]

Under the Federal DBE Program, a public agency can set DBE contract goals, where prime contractors must either include a level of DBE participation in their bid or proposal that meets the goal set for the contract or show good faith efforts to do so.

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[1] See https://www.laucp.org.

[2] See https://www.fhwa.dot.gov/civilrights/programs/dbess.cfm.

[3] See http://www.dot.gov/osdbu/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise.

Federal ACDBE Program. An agency receiving FAA funds is also required to implement the Federal ACDBE Program related to certain airport concessions activities.

B. Examples of Statewide Programs

Examples of programs available throughout Louisiana include several Louisiana Department of Economic Development programs.

- Small and Emerging Business Development Program (SEBD).[4]
- The Hudson Initiative SE certification assists small businesses gain access to purchasing and contracting opportunities available at the state level.[5]
- The Veteran Small Entrepreneurship (VSE) program and the Small Entrepreneurship (VE) program provide assistant to businesses that are more than 50 percent owned by either a veteran or a disabled-in-service veteran.[6]

C. Examples of Other Business Assistance

Service providers such as New Orleans Business Alliance (NOLABA),[7] Greater New Orleans, Inc. (GNO, Inc.),[8] Louisiana Economic Development (LED),[9] local chambers and trade associations, and other groups offer basic to specialized business assistance services for companies in all stages of development (startup and business development through growth planning). Others providers include:

- The New Orleans Chamber of Commerce provides education, advocacy, networking and resources opportunities to promote the success of businesses in the community;[10]
- Good Work Network offers business assistance services including training, coaching and networking for minority and women business owners;[11]
- The Delgado Community College Business and Technology Small Business Center provides business assistance to individuals launching or growing small businesses;[12]
- The Urban League of Louisiana Women's Business Resource Center offers assistance including business plan preparation, marketing assistance and other support to early stage women-owned firms;[13]

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[4] See https://www.opportunitylouisiana.com.

[5] See https://www.opportunitylouisiana.com.

[6] See https://www.opportunitiylouisiana/small- business.com.

[7] See https://www.nolaba.org.

[8] See https://www.gnoinc.org.

[9] See https://www.opportunitylouisiana.com.

[10] See https://www.neworleanschamber.org.

[11] See https://www.goodworknetwork.org.

[12] See https://www.dcc.edu/academics/smallbiz.

- New Orleans BioInnovation Center Business Assistance Program offers business assistance to technical, biotechnical and clean technology business start-ups;[14]

- Propeller is a New Orleans-based non-profit small business accelerator providing support for all stages of small business development;[15]

- The Small Business Incubator at SUNO promotes success of small businesses and business assistance;[16] and

- The Small Business Development and Management Institute (SBDMI) offers consulting services that fosters small business growth.[17]

Programs focusing on financial assistance include:

- LiftFund, which is a Community Development Financial Institution (CDFI) that provides microlending and credit advising to small firms;[18]

- The Regional Loan Corporation, a non-profit small business development company providing low interest loans to small firms;[19]

- NewCorp, Inc., which is a CDFI that specializes in providing technical assistance and access to capital;[20]

- A non-profit lender, ASI Federal Credit Union (ASI FCU), whose mission is to strengthen the financial health of underserved communities through education and financial services;[21] and

- Hope Credit Union (HOPE), a CDFI offering affordable financial products and services to small businesses.[22]

Some of the small business financing is provided using loans with Small Business Administration (SBA) guarantees.

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[13] See https://www/urbanleaguela.org/WBRC.

[14] See https://www.neworleansbio.com/programs/business-assistance.

[15] See https://www.gopropeller.org.

[16] See https://www.suno.edu.

[17] See https://www.suno.edu.

[18] See https://www.liftfund.com.

[19] See https://www.rlcsbidco.com.

[20] See https://www.newcorpinc.com.

[21] See https://www.asifcu.org.

[22] See https://www.pinnaclefcu.org.

Programs focusing on entrepreneurs of color include:

- The Southern Region Minority Supplier Development Council (SRMSDC), which serves to promote procurement opportunities for minority-owned firms;[23]
- New Orleans Regional Black Chamber of Commerce offers programs and activities to promote minority business owner participation in the marketplace;[24]
- PowerMoves.NOLA, a non-profit incubator that promotes the increase of venture-backed minority-founded companies locally and nationally through fellowships, pitch competitions and boot camps;[25] and
- The Louisiana Hispanic Chamber of Commerce facilitates a business climate within the Hispanic Community for economic growth.[26]

Other groups provide assistance to veteran-owned firms, persons with disabilities and other local small businesses.

- Landing Zone is a non-profit incubator offering assistance to veteran entrepreneurs and others to grow their businesses through programs, co-working space and other business support;[27]
- StayLocal is a Greater New Orleans Independent Business Alliance devoted to increasing the visibility and opportunities of small local firms;[28]
- Louisiana's Veteran Initiative (LAVETBIZ) is a certification program to promote business opportunities for veteran-owned and service-disabled veteran-owned firms;[29] and
- The Abilities Fund is a nationwide organization that specializes in helping small business owners with disabilities secure the financial funding they need to sustain or start a business.[30]

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[23] See https://www.srmsdc.org.

[24] See https://www.norbchamber.org.

[25] See https://www.nola.com.

[26] See https://www.hccl.biz.

[27] See https://www.lznola.com.

[28] See https://www.urbanconservancy.org.

[29] See https://www.opportunitylouisiana.com.

[30] See https://www.abilitiesfund.org.

APPENDIX L.
Disparity Analysis Methodology

Keen Independent's disparity analysis compares the percentage of contract dollars going to MBEs and WBEs with the level of participation that might be expected based on the availability analysis. Appendix L provides disparity calculations and describes the statistical significance of the results. The appendix includes five sections:

A. City of New Orleans contracts;
B. City Restoration Tax Abatement (RTA) projects;
C. General contractors and design firms on public and commercial construction projects;
D. Contractors issued building permits for construction projects; and
E. Statistical significance of disparity analysis results.

A. City Contracts

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on City prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work. Availability is also referred to as a "benchmark" for the disparity analysis.

Disparity index. In the disparity analyses for City contracts, Keen Independent expressed both utilization and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable. Keen Independent then calculated a "disparity index" to help compare utilization and availability results among MBE/WBE groups and across different sets of contracts (see Figure L-1).

Figure L-1.
Calculation of disparity indices

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

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

For example, if actual utilization of MBEs on a set of City contracts was 10 percent and the availability of MBEs for those contracts was 20 percent, then the disparity index would be 10 percent divided by 20 percent, which would then be multiplied by 100 to equal 50. In sum, MBEs would have received 50 cents of every dollar that they might be expected to receive based on their availability for the work.

The value of an index can be interpreted as follows:

- A disparity index of 100 indicates an exact match (often referred to as "parity") between actual utilization and what might be expected based on MBE/WBE availability for a specific set of contracts.
- A disparity index of less than 100 may indicate a disparity between utilization and availability, and

- Disparities of less than 80 in this report are described as "substantial."[1]

Results for all City contracts and subcontracts. Figures L-2 and L-3 report utilization of MBE/WBEs and majority-owned firms and the results of the disparity analysis for all City contracts and subcontracts examined for 2014 through 2016.

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

- Total number of procurements awarded to the group (e.g., 304 prime contracts, subcontracts and other procurements to African American-owned firms);

- Combined dollars of procurements going to the group (e.g., $156,015,000 to African American-owned firms); and

- The percentage of combined contract dollars for the group (e.g., African American-owned firms received 29.00 percent of the City procurement dollars examined in the study).

As shown in the top portion of Figure 7-2, African American-owned firms received the largest number of procurements, the most dollars and the highest share of dollars out of all MBE/WBE groups. White women-owned firms (WBEs) obtained $76 million of City procurement dollars (14.19% of total). Among minority-owned firms, 2.30 percent of City procurement dollars went to Hispanic American-owned firms, $12 million of City procurement dollars. Asian American-owned firms obtained $5 million of City procurement dollars (1.00% of total) and Native American-owned received $2.5 million in City procurement dollars (0.48% of total).

In total, minority- and women-owned firms received 46.97 percent of City procurement dollars during the study period.

The bottom portion of Figure 7-2 presents the number of procurements and procurement dollars going to firms that were certified at the time of the procurement award. As shown, 43.22 percent of City procurement dollars examined in this study went to certified businesses. Firms owned by African Americans and white women accounted for most of the utilization of certified businesses (28.75% and 10.03%, respectively).

[1] Some courts deem a disparity index below 80 as being "substantial" and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, *et al.*, 713 F. 3d 1187 (9th Cir. 2013); *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023 (Fed. Cir 2008); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 914 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994). Also see Appendix B for additional discussion.

Figure L-2.
MBE/WBE utilization on City contracts and subcontracts, 2014–2016.

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	304	$ 156,015	29.00 %
Asian American-owned	49	5,359	1.00
Hispanic American-owned	78	12,387	2.30
Native American-owned	7	2,581	0.48
Total MBE	438	$ 176,342	32.78 %
WBE (white women-owned)	271	76,312	14.19
Total MBE/WBE	**709**	**$ 252,654**	**46.97 %**
Majority-owned	551	285,253	53.03
Total	**1,260**	**$ 537,907**	**100.00 %**
Certified firms			
African American-owned	293	$ 154,622	28.75 %
Asian American-owned	45	5,186	0.96
Hispanic American-owned	72	11,416	2.12
Native American-owned	7	2,581	0.48
Total MBE	417	$ 173,806	32.31 %
WBE (white women-owned)	204	53,977	10.03
White male-owned	29	4,724	0.88
Total certified	**650**	**$ 232,507**	**43.22 %**
Non-DBE	610	305,400	56.78
Total	**1,260**	**$ 537,907**	**100.00 %**

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

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

Source: Keen Independent from data on NOLA procurements 2014–2016.

Disparity analysis for City contracts and subcontracts. 2014-2016. Figure L-3 shows utilization, availability and disparity indices for each MBE group and for white women-owned firms on City contracts and subcontracts for 2014 through 2016 that were examined in the study. Overall MBE/WBE utilization (46.97%) exceeded what might be expected from the availability analysis for these contracts (40.66%). Utilization exceeded availability for African American- and white women-owned firms. Although utilization was relatively small for Native American-owned firms (0.48% of contract dollars), it was about what might be expected from the availability analysis (0.38%).

For Asian American- and Hispanic American-owned firms, utilization on City contracts fell below what might be expected from the availability analysis. The disparity index for Asian American-owned companies was 41 and the index for Hispanic American-owned businesses was 67. The disparity indices for both groups were below 80, which indicates that they are "substantial."

Figure L-3.
Disparity analysis for City of New Orleans contracts, 2014-2016

	Utilization	Availability	Disparity index
African American-owned	29.00 %	25.29 %	115
Asian American-owned	1.00	2.45	41
Hispanic American-owned	2.30	3.43	67
Native American-owned	0.48	0.38	126
Unknown MBE	0.00		
Total MBE	32.78 %	31.55 %	104
WBE (white women-owned)	14.19	9.11	156
Total MBE/WBE	**46.97 %**	**40.66 %**	**116**

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for all APS contracts examined in the study.

Results for City construction, professional services, goods and other services contracts. Figures L-4 through L-7 present utilization results for City contracts, by industry, followed by the disparity analysis for all industries in Figure L-8.

In Figures L-4 through L-7, participation of minority- and women-owned firms is shown in the top portion (including certified and non-certified firms as MBE/WBEs) and results based on certification status are provided in the bottom portion (including white male-owned SLDBEs as certified companies).

Construction. Figure L-4 examines City construction contracts (including subcontracts) for 2014 through 2016. MBE/WBEs received 40 percent of construction contract dollars. MBEs accounted for 16.5 percentage points of that participation and white women-owned firms represented 23.9 percent of the utilization.

Firms that were certified as SLDBEs or DBEs obtained 34.5 percent of the City's construction contract dollars. Most of the dollars going to certified firms went to minority- and women-owned businesses.

Figure L-4.
MBE/WBE utilization on City construction contracts and subcontracts, 2014–2016.

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	107	$ 23,236	11.10 %
Asian American-owned	11	1,415	0.68
Hispanic American-owned	42	7,770	3.71
Native American-owned	6	2,131	1.02
Total MBE	166	$ 34,552	16.51 %
WBE (white women-owned)	122	50,015	23.89
Total MBE/WBE	**288**	**$ 84,567**	**40.40 %**
Majority-owned	185	124,745	59.60
Total	**473**	**$ 209,312**	**100.00 %**
Certified firms			
African American-owned	106	$ 23,231	11.10 %
Asian American-owned	11	1,415	0.68
Hispanic American-owned	39	7,687	3.67
Native American-owned	6	2,131	1.02
Total MBE	162	$ 34,465	16.47 %
WBE (white women-owned)	103	34,804	16.63
White male-owned	6	3,041	1.45
Total certified	**271**	**$ 72,311**	**34.55 %**
Non-certified	197	137,001	65.45
Total	**473**	**$ 209,312**	**100.00 %**

Note: *Number of prime contracts, subcontracts and other procurements.
Number rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.
Source: Keen Independent from data on NOLA procurements 2014–2016.

Professional services. Figure L-5 examines utilization of minority- and women-owned firms for City professional services contracts for 2014-2016. MBEs received 23 percent of professional services procurement dollars and WBEs received 12 percent of those dollars (35.5% total MBE/WBE).

MBE/WBEs that were certified obtained 31 percent of professional services contract dollars. About 0.4 percent of professional services dollars went to white male businesses that were certified as SLDBEs or DBEs.

Figure L-5.
MBE/WBE utilization on City professional service contracts and subcontracts, 2014–2016.

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	159	$ 31,704	18.28 %
Asian American-owned	37	3,921	2.26
Hispanic American-owned	33	4,567	2.63
Native American-owned	1	450	0.26
Total MBE	230	$ 40,642	23.44 %
WBE (white women-owned)	122	20,896	12.05
Total MBE/WBE	**352**	**$ 61,538**	**35.49 %**
Majority-owned	281	111,863	64.51
Total	**633**	**$ 173,401**	**100.00 %**
Certified firms			
African American-owned	154	$ 30,446	17.56 %
Asian American-owned	34	3,771	2.17
Hispanic American-owned	30	3,678	2.12
Native American-owned	1	450	0.26
Total MBE	219	$ 38,345	22.11 %
WBE (white women-owned)	89	15,787	9.10
White male-owned	14	694	0.40
Total certified	**322**	**$ 54,826**	**31.62 %**
Non-certified	311	118,575	68.38
Total	**633**	**$ 173,401**	**100.00 %**

Note: *Number of prime contracts, subcontracts and other procurements.
Number rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: Keen Independent from data on NOLA procurements 2014–2016.

Goods. The City was able to provide a portion of its goods procurements to the study team for analysis in the disparity study. Small procurements, which are made through purchase orders, are not included in these data. Purchases made from cooperative agreements were also not provided for analysis. Keen Independent excluded the types of goods purchases typically made from national markets (computers and off-the-shelf software, for example).

Of the $29 million in goods purchases that were analyzed in the disparity study, about $2 million went to MBE/WBEs, as presented in Figure L-6. White women-owned firms accounted for most of that utilization; about 1 percent of City goods procurement dollars went to MBEs.

Certified firms accounted for most of the participation of MBE/WBE utilization in City goods purchases. One-half of 1 percent of goods procurement dollars went to certified WBEs.

Figure L-6.
MBE/WBE utilization on City goods contracts and subcontracts, 2014–2016.

	Number of procurements*	$1,000s	Percent of dollars
Business ownership			
African American-owned	5	$ 275	0.96 %
Asian American-owned	0	0	0.00
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	5	$ 275	0.96 %
WBE (white women-owned)	2	1,688	5.89
Total MBE/WBE	**7**	**$ 1,963**	**6.85 %**
Majority-owned	18	26,693	93.15
Total	**25**	**$ 28,656**	**100.00 %**
Certified firms			
African American-owned	5	$ 275	0.96 %
Asian American-owned	0	0	0.00
Hispanic American-owned	0	0	0.00
Native American-owned	0	0	0.00
Total MBE	5	$ 275	0.96 %
WBE (white women-owned)	1	1,463	5.11
White male-owned	0	0	0.00
Total certified	**6**	**$ 1,738**	**6.07 %**
Non-certified	19	26,918	93.93
Total	**25**	**$ 28,656**	**100.00 %**

Note: *Number of prime contracts, subcontracts and other procurements.
Number rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: Keen Independent from data on NOLA procurements 2014–2016.

Other services. Figure L-7 outlines participation of minority- and women-owned firms in City other services procurements (services other than professional services). More than $100 million in contract dollars went to MBE/WBEs, mostly because of a large waste disposal contract. MBE/WBE utilization was 83 percent of total other services contract dollars.

Most of the total MBE/WBE participation was certified companies, as presented in the bottom half of Figure L-7. White male-owned firms that were certified obtained about 1 percent of City other services procurement dollars.

Figure L-7.
MBE/WBE utilization on City other services contracts and subcontracts, 2014–2016.

	Number of procurements	$1,000s	Percent of dollars
Business ownership			
African American-owned	33	$ 100,801	79.66 %
Asian American-owned	1	23	0.02
Hispanic American-owned	3	50	0.04
Native American-owned	0	0	0.00
Total MBE	37	$ 100,874	79.72 %
WBE (white women-owned)	25	3,713	2.93
Total MBE/WBE	**62**	**$ 104,586**	**82.65 %**
Majority-owned	67	21,952	17.35
Total	**129**	**$ 126,538**	**100.00 %**
Certified firms			
African American-owned	28	$ 100,670	79.56 %
Asian American-owned	0	0	0.00
Hispanic American-owned	3	50	0.04
Native American-owned	0	0	0.00
Total MBE	31	$ 100,720	79.60 %
WBE (white women-owned)	11	1,923	1.52
White male-owned	4	989	0.78
Total certified	**46**	**$ 103,632**	**81.90 %**
Non-certified	83	22,906	18.10
Total	**129**	**$ 126,538**	**100.00 %**

Note: *Number of prime contracts, subcontracts and other procurements.
Number rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.
Source: Keen Independent from data on NOLA procurements 2014–2016.

Disparity analysis by industry for City contracts and subcontracts. 2014-2016. Keen Independent compared MBE/WBE utilization, by racial, ethnic and gender group, to the availability benchmarks developed for each group for each of the four industries. The study team followed the procedures described in Appendix D to determine availability benchmarks for each industry. Figure L-8 on the following page provides results.

There was no disparity between overall MBE/WBE utilization and availability for City professional services and other services contracts and only a small disparity for City construction contracts (disparity index of 93).

There was a substantial disparity for MBE/WBEs for City goods procurements. This was the portion of City contracts for which the SLDBE Program had little application during the study period.

Within the construction industry:

- There were disparities between the utilization and availability of African American- and Hispanic American-owned companies on City contracts (including subcontracts);
- Utilization of Asian American-owned construction firms was about what might be expected from the availability analysis for those contracts; and
- Participation of Native American- and white women-owned businesses exceeded what might be expected from the availability analysis.

For professional services contracts:

- There was a disparity between the utilization and availability of Hispanic American-owned companies for these contracts; and
- Utilization was close to or exceeded availability for all other MBE groups and for white women-owned businesses.

For other services contracts:

- Utilization exceeded availability for African American-owned firms; and
- Utilization was below availability benchmarks for all other MBEs and for WBEs.

Figure L-8.
Disparity analysis for City of New Orleans contracts, 2014–2016

	Utilization	Availability	Disparity index
Construction			
African American-owned	11.10 %	27.44 %	40
Asian American-owned	0.68	0.66	103
Hispanic American-owned	3.71	5.77	64
Native American-owned	1.02	0.10	1,020
Total MBE	16.51 %	33.97 %	49
WBE (white women-owned)	23.89	9.57	250
Total MBE/WBE	**40.40 %**	**43.54 %**	**93**
Professional services			
African American-owned	18.28 %	19.12 %	96
Asian American-owned	2.26	1.66	136
Hispanic American-owned	2.63	3.29	80
Native American-owned	0.26	0.09	289
Total MBE	23.44 %	24.16 %	97
WBE (white women-owned)	12.05	11.38	106
Total MBE/WBE	**35.49 %**	**35.54 %**	**100**
Goods			
African American-owned	0.96 %	9.13 %	11
Asian American-owned	0.00	0.00	0
Hispanic American-owned	0.00	0.75	0
Native American-owned	0.00	0.00	0
Total MBE	0.96 %	9.88 %	10
WBE (white women-owned)	5.89	10.93	54
Total MBE/WBE	**6.85 %**	**20.81 %**	**33**
Other services			
African American-owned	79.66 %	33.88 %	235
Asian American-owned	0.02	7.48	0
Hispanic American-owned	0.04	0.37	11
Native American-owned	0.00	1.34	0
Total MBE	79.72 %	43.06 %	185
WBE (white women-owned)	2.93	4.83	61
Total MBE/WBE	**82.65 %**	**47.89 %**	**173**

Note: Disparity index = 100 x Utilization/Availability.

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

B. Restoration Tax Abatement (RTA) Projects

As discussed in Appendix C, Keen Independent reviewed Office of Supplier Diversity utilization reports to City Council to determine DBE utilization on Restoration Tax Abatement (RTA) projects. These reports were provided for January 2015 to September 2017. Keen Independent analyzed the reports that fell within the study period (January 2015 – December 2016).

As shown in Figure L-9, DBE utilization was 26.7 percent based on dollars paid for RTA projects between January 2015 and December 2016.

Keen Independent did not perform a disparity analysis based on these projects from these data because of limitations in the information provided, and the fact they were not direct City procurements.

Figure L-9.
DBE utilization for RTA projects, January 2015–December 2016

RTA projects	Total Dollars (1,000s)	Percent
DBE	$ 46,995	26.7 %
Non-DBE	129,326	73.3
Total	$ 176,321	100.0 %

Source: Keen Independent from analysis of Office of Supplier Diversity RTA utilization reports data.

C. General Contractors and Design Firms on other Construction Projects in the New Orleans Metropolitan Area

Keen Independent compiled data on non-City public and commercial construction projects in the New Orleans metropolitan area, as described in Appendix C. Projects had start dates from January 2012 to December 2016. Results are analyzed below.

Utilization and availability of general contractors for public and commercial projects in the New Orleans Metropolitan Area. Keen Independent examined 2,174 non-City public and commercial construction projects from 2012 through 2016 based on Dodge Reports data purchased from Dodge Data & Analytics. Those contracts had a total value of $15.6 billion. Minority-owned companies were general contractors for about $400 million of these projects, or about 2.6 percent of the total contract dollars. Firms identified as white women-owned were general contractors for about $677 million, or approximately 4.4 percent of the dollars. Figure L-10 provides detailed results.

Figure L-10.
Dollars of contracts on non-City public and commercial construction projects within the New Orleans Metropolitan Area, 2012–2016

	Number of projects	$1,000s	Percent of dollars
Business ownership			
African American-owned	88	$ 200,610	1.29 %
Asian American-owned	16	45,937	0.30
Hispanic American-owned	45	126,851	0.82
Native American-owned	12	26,519	0.17
Total MBE	161	$ 399,917	2.57 %
WBE (white women-owned)	243	677,312	4.35
Total MBE/WBE	**404**	**$ 1,077,229**	**6.92 %**
Majority-owned	1,770	14,484,638	93.08
Total	**2,174**	**$ 15,561,867**	**100.00 %**

Source: Keen Independent from Dodge Data & Analytics Dodge Reports data.

Keen Independent compared the utilization results for metropolitan area construction contracts with what might be anticipated based a contract-by-contract availability analysis (see Appendix D).

Utilization of MBEs (2.57%) was substantially below what might be expected based on the availability analysis (14.46%). Utilization of WBEs (4.35%) was also substantially below the availability benchmark of 5.53 percent. Disparity indices were 18 for MBEs and 79 for WBEs, which means that the identified disparities were substantial. As shown in Figure L-11, there were substantial disparities in the utilization of African American-, Hispanic American-, Native American- and white women-owned firms as general contractors on these projects.

Figure L-11.
Disparity analysis for prime contracts on public and commercial construction projects within the New Orleans Metropolitan Area, 2012–2016

	Utilization	Availability	Disparity index
African American-owned	1.29 %	11.60 %	11
Asian American-owned	0.30	0.31	97
Hispanic American-owned	0.82	2.26	36
Native American-owned	0.17	0.28	61
Total MBE	2.57 %	14.46 %	18
WBE (white women-owned)	4.35	5.53	79
Total MBE/WBE	**6.92 %**	**19.99 %**	**35**

Source: Keen Independent from analysis of Dodge Data & Analytics Dodge Reports data and 2017 availability survey data for construction firms qualified and interested in City prime contracts.

These utilization results do not include subcontract information. The availability data were collected for firms qualified and interested in construction contracts in the City of New Orleans availability survey and performed the identified types of general contracting work, which might not reflect availability for construction projects across the New Orleans Metropolitan Area. In addition, there were certain limitations in identifying ownership of minority-, women- and majority-owned contractors identified in the Dodge Reports data.

Even with these limitations, the above data indicate very large disparities for MBE/WBEs for these projects in the New Orleans metropolitan area.

Utilization and availability of design firms for public and commercial construction projects in the New Orleans Metropolitan Area. The Dodge Reports data also provided information on the lead design firm working on many of those public and commercial construction projects.

Design firms were listed 1,481 times (some projects had multiple firms listed). Minority-owned firms were identified as the design firm 86 times and businesses owned by white women were listed 55 times. Relative to the total number of design contracts identified, MBEs accounted for 5.8 percent of the design contracts and WBEs received 3.7 percent of the design contracts. (Dollars of design contracts were not provided in the Dodge Reports data.)

Figure L-12.
Number of design contracts for non-City public and commercial construction projects within the New Orleans Metropolitan Area, 2014-2016

	Number of projects	Percent of dollars
Business ownership		
African American-owned	49	3.31 %
Asian American-owned	11	0.74
Hispanic American-owned	25	1.69
Native American-owned	1	0.07
Total MBE	86	5.81 %
WBE (white women-owned)	55	3.71
Total MBE/WBE	**141**	**9.52 %**
Majority-owned	1,340	90.48
Total	**1,481**	**100.00 %**

Source: Keen Independent from analysis of Dodge Data & Analytics Dodge Reports data.

Keen Independent developed availability benchmarks for design work on these projects based on the number of architecture and engineering firms indicating qualifications and interest in City contracts in the 2017 availability survey. (The study team also examined whether firms were in business in the year of the project.) Note that because no Native American-owned A&E firms in the New Orleans metropolitan area responded to the survey, availability for that group was 0 percent.

Figure L-13 compares the percentage of design contracts going to MBEs and WBEs with those availability benchmarks. As shown, the representation of minority-owned firms and white women-owned businesses as design firms (9.52%) was substantially below what might be anticipated from the availability analysis (32.79%), with disparity indices below 80 for both MBEs and WBEs.

Figure L-13.
Disparity analysis for design contracts for non-City public and commercial construction projects within the New Orleans Metropolitan Area, 2012–2016

	Utilization	Availability	Disparity index
African American-owned	3.31 %	13.89 %	24
Asian American-owned	0.74	3.88	19
Hispanic American-owned	1.69	1.91	88
Native American-owned	0.07	0.00	
Total MBE	5.81 %	19.68 %	30
WBE (white women-owned)	3.71	13.11	28
Total MBE/WBE	**9.52 %**	**32.79 %**	**29**

Source: Keen Independent from analysis of Dodge Data & Analytics Dodge Reports data and 2017 availability survey data for A&E firms.

D. Contractors Issued Building Permits for Construction Projects within New Orleans City Limits

Figure L-15 presents the number of building permits obtained by minority-, women- and majority-owned contractors for specific types of work on public and commercial projects within New Orleans city limits from 2012 through 2016.

Of the 36,201 permits examined, minority-owned firms accounted for 7,272, or about 20 percent of the total permits. Businesses identified as white women-owned obtained 1,382 permits (3.8% of the total). Combined, MBE/WBE contractors obtained about 24 percent of the construction permits.

Figure L-15
Number of public and private sector building permits issued on non-City public and commercial construction projects within New Orleans city limits, 2012–2016

	Number of permits	Percent of permits
Business ownership		
African American-owned	5,435	15.05 %
Asian American-owned	574	1.59
Hispanic American-owned	1,257	3.48
Native American-owned	6	0.02
Total MBE	7,272	20.14 %
WBE (white women-owned)	1,382	3.83
Total MBE/WBE	**8,654**	**23.97 %**
Majority-owned	27,448	76.03
Total	**36,102**	**100.00 %**

Source: Keen Independent from City of New Orleans building permits data.

Keen Independent compared the relative number of permits obtained by MBEs and WBEs to availability benchmarks for those firms. The study team determined availability on a project-by-project basis after considering the type of work and year of the project.

As shown in Figure L-16, the 20.14 percent of City of New Orleans building permits for public and commercial construction projects obtained by MBEs appears to be considerably less than what might be expected given the relative availability of MBEs for that work (33.77%). The 3.83 percent of building permits obtained by WBEs was also less than the 12.66 percent availability of white women-owned firms for such work. Both of these disparities were substantial (disparity indices of 60 for MBEs and 30 for WBEs).

Note that the disparity index for Asian American-owned businesses greatly exceeded 100, and is shown as "100+" in Figure L-16.

Figure L-16.
Disparity analysis for public and commercial building permits issued on non-City construction projects within New Orleans city limits, 2012–2016

	Utilization	Availability	Disparity index
African American-owned	15.05 %	30.04 %	50
Asian American-owned	1.59	0.05	100+
Hispanic American-owned	3.48	3.64	96
Native American-owned	0.02	0.04	50
Total MBE	20.14 %	33.77 %	60
WBE (white women-owned)	3.83	12.66	30
Total MBE/WBE	**23.97 %**	**46.34 %**	**52**

Source: Keen Independent utilization and availability analyses using City of New Orleans building permits data and 2017 availability survey.

E. Statistical Significance of Disparity Analysis Results

Testing for statistical significance relates to testing the degree to which a researcher can reject "random chance" as an explanation for any observed differences.

Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. However, the study team attempted to contact every firm in the relevant geographic market area identified as possibly doing business within relevant subindustries (as described in Appendix C), mitigating many of the concerns associated with random chance in data sampling as they may relate to Keen Independent's availability analysis.

The utilization analysis also approaches a "population" of contracts. Therefore, one might consider any disparity identified when comparing overall utilization with availability to be "statistically significant."

Figure L-17 explains the high level of statistical confidence in the results.

Figure L-17.
Confidence intervals for availability and utilization measures

Keen Independent conducted telephone interviews with 5,153 business establishments, which might be treated as a "population," not a sample. However, if the results are treated as a sample, the reported 30.2 percent representation of MBEs among all available firms is accurate within about +/- 1.0 percentage points. The level of accuracy for WBEs is similar (+/- 0.7 of the overall figure of 14.4 percent). By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Keen Independent applied a 95 percent confidence level and the finite population correction factor when determining these confidence intervals.)

Keen Independent attempted to collect data for all relevant City contracts above $10,000 during the study period and no confidence interval calculation applies for the utilization results. The analyses of Dodge Data and City permits were based on populations, with no sampling of the data received from either source.