



2014 Imperial County Transportation Commission Disparity Study

FINAL REPORT

Final Report

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2014 Imperial County Transportation Commission Disparity Study

Prepared for

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Table of Contents

Chapter ES. Executive Summary

Analyses in the 2014 Disparity Study	ES-1
Utilization and Disparity Analysis Results.....	ES-2
Overall DBE Goal.....	ES-4
Whether the DBE Goal Can be Achieved Through Neutral Means	ES-6
Implementing the Federal DBE Program.....	ES-8
Next Steps.....	ES-9

Chapter 1. Introduction

A. Background	1-1
B. Study Scope	1-3
C. Study Team.....	1-8

Chapter 2. Legal Framework

A. Measures that are Part of the Federal DBE Program.....	2-1
B. Measures that are Part of State and Local Programs	2-3
C. Legal Standards that Race- and Gender-Conscious Programs Must Satisfy	2-3

Chapter 3. Collection and Analysis of Contract Data

A. Overview of ICTC Transportation Contracts.....	3-1
B. Collection and Analysis of Contract Data	3-2
C. Collection of Information on Utilized Businesses.....	3-4
D. Location of Businesses Performing ICTC Work	3-5
E. Types of Work Involved in ICTC Transportation Contracts.....	3-5

Chapter 4. Marketplace Conditions

A. Entry and Advancement.....	4-1
B. Business Ownership	4-4
C. Access to Capital.....	4-7
D. Success of Businesses.....	4-15

Chapter 5. Availability Analysis

A. Purpose of the Availability Analysis	5-1
B. Definitions of MBEs, WBEs, Certified DBEs, Potential DBEs, and Majority-owned Businesses.....	5-2
C. Information Collected about Potentially Available Businesses	5-5
D. Businesses Included in the Availability Database	5-6
E. MBE/WBE Availability Calculations on a Contract-by-Contract Basis	5-7

Table of Contents

F. Availability Results	5–10
G. Potential Base Figure for ICTC’s Overall DBE Goal	5–10
H. Implications for Any DBE Contract Goals	5–12

Chapter 6. Utilization Analysis

A. Overview of the Utilization Analysis	6–1
B. Overall Utilization Results	6–2
C. Utilization Results for ICTC versus Local Agencies	6–4

Chapter 7. Disparity Analysis

A. Overview of Disparity Analysis	7–1
B. Overall Disparity Analysis Results.....	7–5
C. Statistical Significance of Disparity Analysis Results	7–7

Chapter 8. Overall DBE Goal

A. Establishing a Base Figure	8–1
B. Consideration of a Step-2 Adjustment	8–2

Chapter 9. Portion of DBE Goal to be Met through Race- and Gender-neutral Means

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?	9–2
B B. What has been the agency’s past experience in meeting its overall DBE goal?	9–3
C. What has DBE participation been when the agency did not use race- or gender-conscious measures?	9–3
D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?	9–3

Chapter 10. ICTC’s Implementation of the Federal DBE Program

Reporting to DOT — 49 CFR Part 26.11 (b)	10–1
Bidders List — 49 CFR Part 26.11 (c)	10–1
Prompt Payment Mechanisms — 49 CFR Part 26.29	10–2
DBE Directory — 49 CFR Part 26.31	10–2
Overconcentration — 49 CFR Part 26.33	10–2
Business Development Programs — 49 CFR Part 26.35 and Mentor-Protégé Programs – 49 CFR Appendix D to Part 26.....	10–3
Maximum Feasible Portion of Goal Met through Neutral Program Measures — 49 CFR Part 26.51(a).....	10–6

Table of Contents

Use of DBE Contract Goals— 49 CFR Part 26.51(d)	10-6
Flexible Use of any Race- and Gender-conscious Measures — 49 CFR Part 26.51(f)	10-7
Good Faith Effort Procedures — 49 CFR Part 26.53	10-7
Counting DBE and MBE/WBE Participation — 49 CFR Part 26.55.....	10-8
DBE Certification — 49 CFR Part 26 Subpart D.....	10-9
Monitoring Changes to the Federal DBE Program	10-9
ICTC’s Locally-funded Contracts	10-9

Appendices

A. Definition of Terms	A-1
B. Report on Legal Framework and Analysis	B-1
C. Utilization Analysis Methodology	C-1
D. General Approach to Availability Analysis	D-1
E. Entry and Advancement in the SANDAG Consortium Study Area Construction, Engineering, and Goods and Services Industries.....	E-1
F. Business Ownership in the SANDAG Consortium Study Area Construction, Engineering, and Goods and Services Industries.....	F-1
G. Access to Capital for Business Formation and Success	G-1
H. Success of Businesses in the Construction, Engineering, and Goods and Services Industries	H-1
I. Description of Data Sources for Marketplace Analyses	I-1
J. Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings.....	J-1
K. Detailed Disparity Results.....	K-1

CHAPTER ES.

Executive Summary

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Executive Summary

The federal government requires transportation agencies that receive U.S. Department of Transportation (USDOT) funds to implement the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is a program that is designed to encourage the participation of minority- and women-owned businesses (MBE/WBEs) in transportation contracting. Implementation of the program is guided by regulations in 49 Code of Federal Regulations (CFR) Part 26, USDOT guidance, and relevant court decisions.

The Imperial County Transportation Commission (ICTC) receives USDOT funds through the Federal Transit Administration (FTA), and thus, must implement the Federal DBE Program. ICTC retained BBC Research & Consulting (BBC) to conduct a “disparity study” to inform its implementation of the Federal DBE Program. The primary objective of the study was to examine whether there were any disparities between ICTC’s utilization of MBE/WBEs on its transportation contracts and the availability of those businesses to perform that work.¹ The study provided information that ICTC might consider in:

- Setting its overall DBE goal;
- Determining the portion of the goal that can be met through the use of race- and gender-neutral measures and, if necessary, race- and gender conscious measures; and
- If applicable, determining which groups would be eligible for any race- and gender-conscious measures.

Analyses in the 2014 Disparity Study

In addition to measuring potential disparities between MBE/WBE utilization and availability on ICTC transportation contracts, the disparity study examined other quantitative and qualitative information related to the legal framework surrounding ICTC’s implementation of the Federal DBE Program; local marketplace conditions for MBE/WBEs and for other small businesses; and contracting practices and business assistance programs that ICTC and other agencies currently have in place.

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal requirements related to the Federal DBE Program and an assessment of any state requirements concerning the implementation of the Federal DBE Program.

¹ The study team considered businesses as MBE/WBEs if they were owned and operated by minorities or women, regardless of whether they were certified as DBEs. In this study, “certified DBEs” refers to those businesses that are specifically certified as such through the California Unified Certification Program.

- BBC conducted quantitative analyses of the success of minorities, women, and MBE/WBEs throughout the local transportation contracting industry.² In addition, the study team collected qualitative information about potential barriers that small businesses and MBE/WBEs face in the local transportation contracting industry through in-depth anecdotal interviews and public meetings.
- BBC analyzed the percentage of MBE/WBEs that are available (i.e., “ready, willing, and able”) to perform on ICTC transportation prime contracts and subcontracts. That analysis was based on telephone surveys that the study team completed with 2,617 local businesses that work in industries related to the types of transportation contracts that ICTC awards. The study team attempted telephone surveys with every business establishment that it identified as doing work that is relevant to ICTC transportation contracting.
- BBC analyzed the dollars that ICTC awarded to MBE/WBEs on 47 transportation prime contracts and subcontracts executed in 2008, 2009, 2010, 2011, and 2012. BBC analyzed contracts that ICTC awarded and contracts that subrecipient local agencies awarded.
- BBC examined whether there were any disparities between the utilization and availability of MBE/WBEs on transportation contracts that ICTC awarded during the study period.
- BBC provided ICTC with information from the availability analysis and other research that the agency might consider in setting its overall DBE goal, including the base figure and consideration of a “step-2” adjustment.
- BBC reviewed ICTC’s current contracting practices and Federal DBE Program measures and provided guidance related to refining existing practices and measures and implementing additional practices and measures.

Utilization and Disparity Analysis Results

In accordance with the Federal DBE Program, if ICTC determines that it needs to use race- and gender-conscious measures on FTA-funded contracts, then it should evaluate which DBE groups are eligible to participate in those programs. If ICTC determines that only certain DBE groups (e.g., groups classified as underutilized DBEs) are eligible, then it must submit a waiver request to FTA. Utilization and disparity analysis results for ICTC transportation contracts—along with other pertinent information—might be relevant to the agency’s determination of which DBE groups could be eligible for any race- or gender-conscious measures.

Utilization results. The study team measured MBE/WBE participation in terms of “utilization”—the percentage of prime contract and subcontract dollars that ICTC awarded to MBE/WBEs during the study period. Figure ES-1 presents overall MBE/WBE utilization on transportation contracts that ICTC awarded during the study period, including both prime contracts and subcontracts. The darker portion of the bar presents ICTC’s utilization of MBE/WBEs that were DBE-certified during the study period. Overall, MBE/WBEs received 3.2 percent of ICTC prime contract and subcontract dollars during the study period. MBE/WBEs that were DBE-certified received 0.5 percent of those dollars.

² For the purposes of the disparity study, the relevant geographic market area included San Diego County, Orange County, and Imperial County.

Figure ES-1.
Overall MBE/WBE utilization on
ICTC and local agency
transportation prime contracts and
subcontracts

Note:

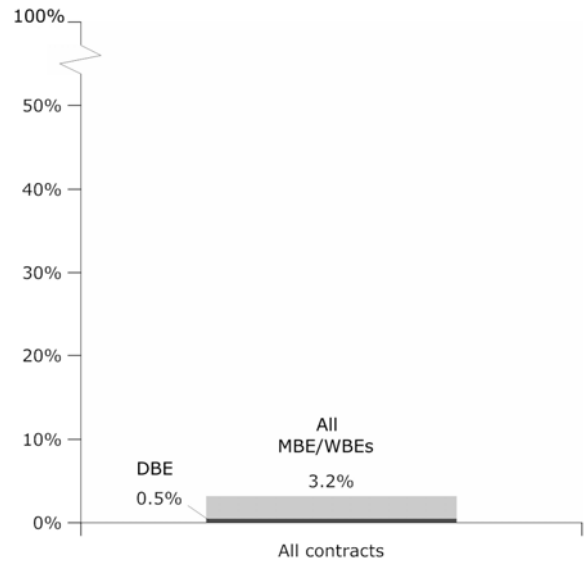
Darker portion of bar presents certified DBE utilization.

The study team analyzed 47 ICTC contracts.

For more detail and results by group, see Figure K-2 in Appendix K.

Source:

BBC Research & Consulting from ICTC contracting data.



Disparity analysis results. Although information about MBE/WBE utilization is important to consider on its own, utilization is more informative when it is compared with the availability of MBE/WBEs for contracting work. As part of the disparity study, BBC compared the utilization of MBE/WBEs on ICTC transportation 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. BBC expressed both utilization and availability as percentages of the total dollars that a particular group received for a particular set of contracts (e.g., 5% utilization compared with 4% availability). BBC then calculated a “disparity index” by dividing utilization by availability and multiplying by 100 (e.g., .05 divided by .04 equals 1.25, which multiplied by 100 equals a disparity index of 125). A disparity index of 100 indicates an exact match between utilization and availability for a particular group for a specific set of contracts (often referred to as “parity”). A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 are described in this report as “substantial.”³

All transportation contracts. BBC assessed any disparities between MBE/WBE utilization and availability on all transportation prime contracts and subcontracts that ICTC awarded during the study period. Figure ES-2 presents disparity indices for all MBE/WBE groups considered together and separately for each group. The line down the center of the graph shows a disparity index level of 100, which indicates parity between utilization and availability. A line is also drawn at an index level of 80, which indicates a substantial disparity.

³ Some courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse conditions for MBE/WBEs. For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

Figure ES-2.
Disparity indices for
ICTC and local agency
transportation
contracts

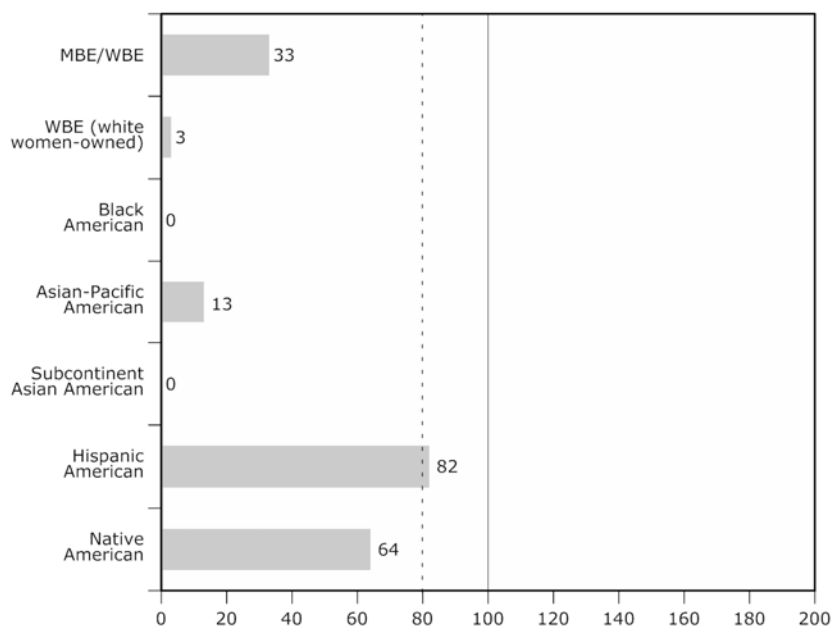
Note:

The study team analyzed 47 ICTC contracts.

For more detail, see Figure K-2 in Appendix K.

Source:

BBC Research & Consulting availability and utilization analyses.



The disparity index of 33 for MBE/WBEs indicates that all MBE/WBEs considered together received approximately \$0.33 for every dollar that they might be expected to receive based on their availability for the transportation prime contracts and subcontracts that ICTC and subrecipient local agencies awarded during the study period. ICTC and subrecipient local agencies did not apply DBE contract goals or any other race- and gender conscious measures to any of the contracts that the agency awarded during the study period. All MBE/WBE groups exhibited disparity indices substantially below parity, except for Hispanic American-owned businesses. However, Hispanic American-owned businesses exhibited a disparity index that was very close to what could be considered a substantial disparity (disparity index of 82).

If ICTC determines that the use of race- and gender-conscious program measures is appropriate, then it should consider the above information in determining which MBE/WBE groups are eligible for participation in such measures. As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for MBE/WBEs. ICTC should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures, and if so, in determining which racial/ethnic and gender groups should be considered eligible for those measures.

Overall DBE Goal

According to 49 CFR Part 26, an agency is required to develop and submit an overall annual goal for DBE participation. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency's USDOT-funded contracts. The agency must try to meet the goal each year using race- and gender-neutral

program measures and, if necessary, race- and gender-conscious measures (or a combination of both).⁴

As specified in The Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years.⁵ However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and that enable the agency to meet the goal in the next year. ICTC must prepare and submit an overall DBE goal that is supported by information about the steps that it used to develop the goal. ICTC is required to next submit a goal for federal fiscal years (FFYs) 2014 through 2016.

Federal regulations require ICTC to establish its overall DBE goal using a two-step process:

1. Determine a base figure; and
2. Consider a “step-2” adjustment.

Determine a base figure. Establishing a base figure is the first step in calculating an overall DBE goal for ICTC’s FTA-funded transportation contracts. BBC calculated the base figure by measuring the availability of “potential DBEs”—that is, MBE/WBEs that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26. BBC examined the availability of potential DBEs for FTA-funded contracts that ICTC awarded during the study period. BBC’s approach to calculating ICTC’s base figure is consistent with relevant court decisions, federal regulations, and USDOT guidance.

BBC’s analysis indicates that the availability of potential DBEs for ICTC’s FTA-funded transportation contracts is 7.2 percent. ICTC might consider 7.2 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FTA-funded contracts that it will award in the future are similar to the FTA-funded contracts that the agency awarded during the study period.

Many agencies implementing the Federal DBE Program set an overall DBE goal based on *currently certified* DBEs. BBC also calculated a base figure using this approach. Currently certified DBEs might be expected to receive 2.4 percent of ICTC’s FTA-funded transportation prime contract and subcontract dollars based on their availability for that work.

Consider a “step-2” adjustment. The Federal DBE Program requires that an agency consider a step-2 adjustment to its base figure as part of determining its overall DBE goal. Factors that an agency should assess in determining whether to make a step-2 adjustment include:

- Current capacity of DBEs to perform agency work, as measured by the volume of work DBEs have performed in recent years;

⁴ 49 CFR Sections 26.45, 26.51.

⁵ <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>.

- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.⁶

Based on information from the disparity study, there are reasons why ICTC might consider an upward adjustment to its base figure:

- ICTC might adjust its base figure upward to account for barriers that minorities and women face in owning businesses in the local transportation contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”⁷
- Evidence of barriers that affect minorities, women, and MBE/WBEs in obtaining financing, bonding, and insurance, and evidence that certain groups of MBE/WBEs are less successful than comparable non-Hispanic white male-owned businesses also supports an upward adjustment to ICTC’s base figure.

There are also reasons why ICTC might consider a downward adjustment to its base figure:

- ICTC must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. ICTC utilization reports for FFYs 2011 and 2012 indicated that ICTC had no DBE participation on its FTA-funded contracts during that time. USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past DBE participation.
- BBC’s analysis of DBE participation on ICTC’s FTA-funded transportation contracts also indicates DBE participation (0.5%) that is lower than the base figure.⁸ If ICTC were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 0.5 percent DBE participation.

USDOT “Tips for Goal-Setting” states that an agency is not required to make a step-2 adjustment to its base figure as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document. Those factors are discussed in Chapter 8 of the ICTC disparity study report.

Whether the DBE Goal Can Be Achieved through Neutral Means

The Federal DBE Program requires ICTC to assess the percentage of its overall DBE goal that can be achieved through race- and gender-neutral measures, and if necessary, the percentage that can be achieved through race- and gender-conscious measures. USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals

⁶ 49 CFR Section 26.45.

⁷ 49 CFR Section 26.45 (b).

⁸ See Chapter 6 for details about how BBC’s analysis differs from ICTC’s Uniform Reports of DBE Awards/Commitments and Payments.

that will be met through race- and gender-neutral and race- and gender-conscious measures. USDOT suggests examining four general questions:

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?
2. What has been the agency's past experience in meeting its overall DBE goal?
3. What has DBE participation been when the agency did not use race- or gender-conscious measures?
4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups? As discussed in detail in Chapter 4, BBC examined marketplace conditions in the relevant geographic market area, including in the areas of:

- Entry and advancement;
- Business ownership;
- Access to capital, bonding, and insurance; and
- Success of businesses.

There was quantitative evidence of disparities for MBE/WBEs overall, and for specific groups, in the above areas. Qualitative information also indicated evidence of discrimination affecting the local marketplace. However, some minority and female business owners that the study team interviewed as part of the disparity study did not think their businesses had been affected by any race- or gender-based discrimination.

2. What has been the agency's past experience in meeting its overall DBE goal?

Figure ES-4 presents the participation of certified DBEs on ICTC transportation contracts in recent years, as presented in ICTC reports to USDOT. As shown in Figure ES-4, ICTC has not met its DBE goal in recent years based on awards and commitments to DBE-certified businesses.

Figure ES-4.
ICTC's reported past certified DBE participation on FTA-funded contracts, FFYs 2011 through 2012

FFY	DBE attainment	Annual DBE goal	Difference
2011	0.00 %	1.40 %	-1.40 %
2012	0.00	1.40	-1.40

Source:

Commitments/Awards reported on ICTC Uniform Reports of DBE Awards/Commitments and Payments.

3. What has DBE participation been when the agency did not use race- or gender-conscious measures? ICTC did not apply DBE contract goals or any other race- or gender-conscious measures to any contracts that the agency awarded during the study period. Overall, certified DBEs received 0.5 percent of the dollars associated with those contracts. ICTC should consider that information when determining the percentage of its overall DBE goal that it can achieve through race- and gender-neutral measures.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When ICTC is considering the extent to which it could meet its overall DBE goal through race- and gender-neutral measures, it will need to review race- and gender-neutral measures that are already in place as well as neutral measures that it has planned or that could be considered for future implementation. The study team reviewed many of ICTC's current and planned measures as well as those of other organizations in California (for details, see Chapter 9). The neutral measures that ICTC currently has in place are extensive. ICTC plans on continuing to use those measures in the future. There were several recommendations that business owners and managers made related to those measures as part of in-depth anecdotal interviews and public meetings (for details, see Appendix J).

Implementing the Federal DBE Program

Chapter 10 reviews USDOT requirements for ICTC's implementation of the Federal DBE Program and identifies potential areas for further refinement. Three key potential areas of refinement are discussed below.

Encourage firms to become DBE-certified. Participation of certified DBEs would be higher if more MBE/WBEs that participate on, or are potentially available for, ICTC prime contracts and subcontracts would become DBE certified. For example, only about one-quarter of the MBE/WBEs that the study team included in the availability database are certified as DBEs. Many businesses participating in in-depth interviews or public meetings commented on the DBE certification process. Although some business owners gave favorable comments about the certification process, several business owners were highly critical about the difficulties and time requirements associated with certification. ICTC might consider more effectively communicating information about the Federal DBE Program to MBE/WBEs, particularly information about the benefits of DBE certification.

Account for potential DBE participation. MBE/WBEs that are not DBE-certified are considered in the overall DBE goal but are not counted in the participation reports that are used to measure whether ICTC has met its overall DBE goal.

USDOT permits agencies to explore whether one reason why they have not met their overall DBE goal is because they are not counting the participation of potential DBEs. USDOT might expect an agency to explore ways to further encourage potential DBEs to become DBE certified as one way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, ICTC might consider:

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses—not just certified DBEs—that participate in its contracts;

- Developing internal participation reports of MBE/WBEs (by race/ethnicity and gender) and of businesses that are currently or could potentially be DBE-certified for its contracts; and
- Continuing to track participation of certified DBEs on FTA-funded contracts, per USDOT reporting requirements.

Consider refinements to monitoring compliance with the current DBE contract goals program. Some individuals participating in in-depth interviews and public meetings suggested that agencies should explore ways of more effectively monitoring prime contractors' compliance with DBE contract goals to better achieve the objective of further developing MBE/WBEs. Many individuals indicated that there is widespread abuse of DBE contract goals and good faith efforts including false reporting of DBE participation, falsification of good faith efforts, and the reduction or elimination of DBEs' work scopes (for details, see Appendix J). ICTC might review such concerns further when evaluating ways to improve its current implementation of the Federal DBE Program, particularly if it determines that the use of race- and gender-conscious measures is appropriate. The agency should also review legal issues, including state contracting laws and whether certain program options would meet USDOT regulations.

Next Steps

The disparity study represents an independent analysis of information related to ICTC's implementation of the Federal DBE Program. ICTC should review study results and other relevant information when making decisions concerning its implementation of the Federal DBE Program. In addition, USDOT periodically revises the Federal DBE Program and issues guidance concerning implementation of the program. Also, new court decisions often provide insights related to the proper implementation of the Federal DBE Program. ICTC should closely follow such developments.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

The Imperial County Transportation Commission (ICTC) is an association of cities, counties, and other local governments in the Imperial Valley that is responsible for addressing regional transportation needs. ICTC oversees many transportation activities in the region including distributing funds to local agencies (subrecipients) for transportation projects; planning, programming and administering regional transit services; and encouraging citizen participation in the development and implementation of various transportation-related plans and programs. ICTC operates and manages several public transportation services, including the Imperial Valley Transit System.

As a USDOT fund recipient, ICTC is required to implement the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. The program's primary objectives are to:

- Ensure nondiscrimination in the award and administration of USDOT-assisted contracts;
- Help remove barriers to the participation of DBEs in USDOT-assisted contracts; and
- Assist the development of firms that can compete successfully in the marketplace outside of the DBE program.

ICTC, as part of the 2014 San Diego-Imperial Disparity Study, retained BBC Research & Consulting (BBC) to conduct a "disparity study" to provide information that will help the agency implement the Federal DBE Program. BBC introduces the 2014 ICTC disparity study in three parts:

- A. Background;
- B. Study scope; and
- C. BBC study team.

A. Background

After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, USDOT established a new Federal DBE Program for fund recipients to implement. TEA-21 has since been amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU").^{1, 2} Federal regulations in 49 Code of Federal Regulations (CFR) Part 26 guide how transportation agencies should

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

² USDOT most recently revised the Federal DBE Program in early 2011.

implement the Federal DBE Program.³ According to those regulations, an agency is required to develop and submit an overall percentage goal for DBE participation in its USDOT-funded contracts. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency's (or the subrecipient agency's) USDOT-funded contracts. The agency must try to meet the goal using race- and gender-neutral means or, if necessary, race- and gender-conscious means (or a combination of both).⁴ Race- and gender-neutral program measures are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses. Race- and gender-conscious measures are measures that are specifically designed to increase the participation of DBEs and minority- and women-owned business enterprises (MBE/WBEs), such as DBE contract goals or MBE/WBE participation goals.

As specified in the Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years.⁵ However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and enable the agency to meet the goal in the next year.

Setting an overall goal for DBE participation. Every three years, ICTC must develop an overall goal for DBE participation in its Federal Transit Administration (FTA)-funded contracts. ICTC's overall goal for DBE participation is aspirational. The agency does not have to meet the goal and failure to do so does not automatically lead to any penalties. The Federal DBE Program describes the steps an agency must follow in establishing its goal. To begin the goal-setting process, an agency must develop a base figure based on DBE availability or other information. Then, after considering various, related factors, the agency can make an upward adjustment, downward adjustment, or no adjustment to its base figure as it determines its overall DBE goal (referred to as a "step-2" adjustment).

Projecting the portion of the overall DBE goal to be met through race- and gender-neutral means. According to 49 CFR Part 26, an agency must meet the maximum feasible portion of its overall goal for DBE participation through race- and gender-neutral means.⁶ Race- and gender-neutral program measures are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses (for examples of race- and gender-neutral program measures, see 49 CFR Section 26.51(b)). If an agency can meet its goal solely through race- and gender-neutral means, it cannot implement race- or gender-conscious

³ <http://ecfr.gpoaccess.gov/cgi/t/text/textidx?region=DIV1:type=boolean:c=ecfr:cc=ecfr:sid=14e071f96d5d61cb9d2410ed56c59d3d;q1=dbe:rgn1=Section%20Heading:op2=and:rgn2=Section:op3=and:rgn3=Section:view=text:ldno=49:node=49%3A1.0.1.1.20:rgn=div5>

⁴ 49 CFR Sections 26.45, 26.51.

⁵ <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

⁶ 49 CFR Section 26.51.

measures as part of its program (i.e., measures specifically designed to increase the participation of DBEs and MBE/WBEs, such as DBE contract goals or MBE/WBE participation goals).

Every three years, the Federal DBE Program requires an agency to project the portion of its overall DBE goal that it will meet through race- and gender-neutral measures and the portion that it will meet through any race- or gender-conscious measures. USDOT has outlined a number of factors for an agency to consider when making such determinations.⁷

Determining which groups will be eligible for race- or gender-conscious program measures. If an agency determines that race- or gender-conscious program measures are appropriate for its implementation of the Federal DBE Program, then it must also determine which racial/ethnic or gender groups are eligible for participation in those measures. USDOT provides a waiver provision if an agency determines that its implementation of the Federal DBE Program does not need to include certain racial/ethnic or gender groups in the race- or gender-conscious program measures that it implements. For example, some agencies apply DBE contract goals to their USDOT-funded contracts for which only “underutilized DBEs” are eligible. Underutilized DBEs may not include all DBE groups.

Promoting DBE participation as prime contractors. The Federal DBE Program calls for agencies to address any barriers that DBEs face in participating on contracts as prime contractors but does not require agencies to implement programs that give preferences to DBE prime contractors. Quotas are prohibited, but under extreme circumstances, an agency can request USDOT approval to use preference programs related to DBE prime contracting. Small business preference programs, including reserving contracts on which only small businesses can bid as prime contractors, are permitted under the Federal DBE Program.

Legal challenges. Although agencies are required to implement the Federal DBE Program in order to receive USDOT funds, different groups have challenged some of those implementations in court. State transportation departments in California, Illinois, Minnesota, and Nebraska have successfully defended their implementations of the Federal DBE Program and so has a local transportation agency in New Jersey. In 2005, the Washington State Department of Transportation was not able to successfully defend its implementation of the Federal DBE Program in *Western States Paving Company vs. Washington State DOT*.⁸

B. Study Scope

USDOT recommends that an agency that is implementing the Federal DBE Program should consider conducting a disparity study for several reasons:

- The types of research that are conducted as part of a disparity study provide information that is useful to an agency for setting its overall DBE goal and fine-tuning its implementation of the Federal DBE Program (e.g., projecting the portion of its overall DBE goal to be met through race- and gender-neutral means).

⁷ <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>

⁸ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

- A disparity study often provides insights into how to improve contract opportunities for local small businesses.
- An independent, objective review of MBE/WBE participation in an agency's contracting is valuable to both agency leadership and to external groups that may be monitoring the agency's contracting practices.
- State and local agencies that have successfully defended their implementations of the Federal DBE Program in court have typically relied on the types of information collected as part of disparity studies.

The disparity study provides information that can help ICTC continue its implementation of the Federal DBE Program in a legally-defensible manner. At its core, the disparity study examined whether there are any disparities between:

- The percentage of contract dollars (including subcontract dollars) that ICTC and ICTC recipients awarded to MBE/WBEs during the study period (i.e., utilization); and
- The percentage of contract dollars that MBE/WBEs might be expected to receive on ICTC contracts based on their availability to perform specific types and sizes of the agency's prime contracts and subcontracts (i.e., availability).

The study also examined other qualitative and quantitative information related to:

- The legal framework surrounding ICTC's implementation of the Federal DBE Program;
- Local marketplace conditions for MBE/WBEs and for other small businesses; and
- Contracting practices and business assistance programs that ICTC currently has in place.

Information from the disparity study will be useful to ICTC as it continues to seek fairness in its contracting and procurement processes, including for non USDOT-funded contracts. In addition, information from the study will be useful to ICTC in:

- Establishing an overall goal for DBE participation in its FTA-funded contracts;
- Projecting the portion of its overall DBE goal to be met through race- and gender-neutral means and any portion to be met through race- and gender-conscious means;
- Identifying specific racial/ethnic or gender groups that are eligible for any race- or gender-conscious program measures; and
- Choosing specific program measures as part of its implementation of the Federal DBE Program.

Racial/ethnic and gender groups examined in the study. A DBE is defined in 49 CFR Part 26 as a for-profit small business that is owned and operated by one or more individuals who are socially and economically disadvantaged.⁹ The Federal DBE Program specifies that the following racial/ethnic and gender groups are presumed to be socially and economically disadvantaged:

- Black Americans;
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans;
- Women of any race or ethnicity; and
- Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration.

In addition, agencies can consider individuals to be socially and economically disadvantaged on a case-by-case basis.¹⁰ There is a gross receipts limit (\$22,410,000 over three years with even lower limits for certain lines of business) and a personal net worth limit (\$1.32 million not including equity in the business and in primary personal residences) that businesses and business owners must fall below to be able to be certified as a DBE.¹¹ As long as businesses and business owners do not exceed revenue and personal net worth limits, they are eligible for DBE certification.

BBC included MBEs and WBEs — regardless of DBE or other certifications — in the utilization, availability, disparity, and marketplace analyses. As a result, those analyses pertained to any potential barriers related specifically to the race/ethnicity and gender of business owners.

- The study team uses the terms “MBEs” and “WBEs” to refer to businesses that are owned and controlled by minorities or women (according to the race/ethnicity and gender definitions listed above), regardless of whether they are DBE-certified or meet the revenue and net worth requirements for DBE certification.¹²
- The study team uses the term “DBE” to refer specifically to businesses certified as such through the California Unified Certification Program, according to the definitions in 49 CFR Part 26.
- The study team uses the term “potential DBE” to refer to MBE/WBEs that are DBE-certified or appear that they could be DBE-certified based on the revenue

⁹ 49 CFR Section 26.5.

¹⁰ White male-owned businesses can also meet the federal certification requirements and be certified as DBEs. However, few DBEs are white male-owned businesses.

¹¹ USDOT periodically adjusts the gross receipt limits and the personal net worth limit that businesses and business owners must fall below to be able to be certified as a DBE.

¹² For this study, a WBE is a business with at least 51 percent ownership and control by non-Hispanic white women. Businesses owned and controlled by minority women are counted as minority-owned businesses.

requirements specified as part of the Federal DBE Program, regardless of actual DBE certification.

Analyses in the disparity study. The disparity study focused on FTA-related “transportation contracts” awarded by ICTC and ICTC subrecipient local agencies (e.g. the City of Brawley and the City of El Centro) — contracts that involve the planning, design, construction, maintenance, or repair of transportation infrastructure. It included analyses of whether there is a disparity between the utilization and availability of MBE/WBEs. The study team analyzed FTA- and locally-funded transportation contracts that ICTC or ICTC subrecipients awarded between January 1, 2008 and December 31, 2012. During the study period, ICTC did not apply DBE contract goals to any of its contracts. The agency encouraged MBE/WBE participation in its contracts solely through the use of race- and gender-neutral means.

In addition to examining the utilization and availability of MBE/WBEs for ICTC transportation contracts (and any resulting disparities), the study team also examined:

- Reviews of legal issues surrounding the implementation of the Federal DBE Program;
- Local marketplace conditions for MBE/WBEs and for other small businesses;
- ICTC’s contracting practices and local business assistance programs; and
- Other information for ICTC to consider as it sets its overall DBE goal for FTA-funded contracts and implements other components of the Federal DBE Program.

That information is organized in the disparity study report in the following manner:

Legal framework and analysis. The study team conducted a detailed analysis of relevant federal regulations, case law, state law, and other information to guide the methodology for the disparity study. The analysis included a review of federal requirements related to the Federal DBE Program and an assessment of any state requirements concerning the implementation of the Federal DBE program. The legal framework and analysis for the study are summarized in **Chapter 2** and presented in detail in **Appendix B**.

Data collection and analysis. BBC examined multiple ICTC data sources to complete the utilization and availability analyses. In addition, the study team conducted telephone interviews with thousands of businesses throughout ICTC’s relevant geographic market area.¹³ The scope of the study team’s data collection and analysis as it pertains to the utilization and availability analyses is presented in **Chapter 3**.

Marketplace conditions. BBC conducted quantitative analyses of the success of minorities and women and MBE/WBEs in the local transportation contracting industry. BBC compared business outcomes for minorities, women, and MBE/WBEs to outcomes for non-Hispanic white males and non-Hispanic white male-owned businesses. In addition, the study team collected qualitative information about potential barriers that small businesses and MBE/WBEs face in the local

¹³ For the purposes of the disparity study and based on ICTC contract and vendor data, ICTC’s relevant geographic market area included San Diego County, Orange County, and Imperial County.

transportation contracting industry through in-depth anecdotal interviews. Information about marketplace conditions is presented in **Chapter 4 and Appendices E, F, G, H, I, and J.**

Availability analysis. BBC analyzed the percentage of MBE/WBEs that are “ready, willing, and able” to perform on ICTC and ICTC subrecipient transportation prime contracts and subcontracts. That analysis was based on telephone interviews with hundreds of businesses located in ICTC’s relevant geographic market area that work in industries related to the types of transportation contracting dollars that ICTC and its subrecipient local agencies award. BBC analyzed availability for specific MBE/WBE groups and types of contracts. Results from the availability analysis are presented in **Chapter 5 and Appendix C.**

Utilization analysis. BBC analyzed contract dollars that ICTC and ICTC subrecipients awarded to MBE/WBEs on transportation contracts executed between January 1, 2008 and December 31, 2012. Those data included information about associated subcontracts.¹⁴ BBC analyzed contracts that were USDOT-funded and contracts that were solely funded through non-federal sources. Note that ICTC did not set DBE contract goals on either USDOT-funded contracts or on locally-funded contracts during those years. Results from the utilization analysis are presented in **Chapter 6 and Appendix D.**

Disparity analysis. BBC examined whether there were any disparities between the utilization of MBE/WBEs on transportation contracts awarded by ICTC and its subrecipients during the study period and the availability of those businesses for that work. BBC analyzed disparity results for specific MBE/WBE groups, types of contracts, contract roles, and contract sizes. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 7 and Appendix K.**

Overall DBE goal. Based on information from the availability analysis and other research, BBC provides ICTC with information that will help the agency set its three-year overall DBE goal for FTA-funded contracts, including a potential base figure and consideration of a step-2 adjustment. Information about ICTC’s overall DBE goal is presented in **Chapter 8.**

Portion of DBE goal to be met through race- and gender- neutral means. BBC reviewed information regarding evidence of discrimination in the local transportation contracting marketplace; analyzed ICTC’s experience with meeting its overall DBE goal; and provided information about ICTC’s past performance in meeting its overall DBE goal using race- and gender-neutral measures. Information from those analyses is presented in **Chapter 9.**

Implementation of the Federal DBE Program. BBC reviewed ICTC’s contracting practices and Federal DBE Program measures. BBC provided guidance related to additional program options and changes to current contracting practices. The study team’s review and guidance are presented in **Chapter 10.**

¹⁴ Note that prime contractors — not ICTC — actually “award” subcontracts to subcontractors. However, throughout the report, BBC refers to ICTC as “awarding” subcontracts to simplify those discussions.

C. Study Team

The BBC study team was made up of six firms that, collectively, possess decades of experience related to conducting disparity studies in connection with the Federal DBE Program and state and local MBE/WBE programs.

BBC (prime consultant). BBC is a Denver-based economic and policy research firm. BBC had overall responsibility for the study and performed all of the quantitative analyses.

Keen Independent Research. Keen Independent Research is a Denver-based economic and market research firm that specializes in disparity studies. Keen Independent Research advised on the study and reviewed portions of the final report.

Holland & Knight. Holland & Knight is a national law firm with offices throughout the country. Holland & Knight conducted the legal analysis that provided the basis for this study.

Action Research. Action Research is a DBE-certified research firm located in North San Diego County. Action Research conducted in-depth anecdotal interviews as part of the study team's qualitative analyses of marketplace conditions.

P. Dowell & Associates (PDA). PDA is a DBE- and SBE-certified management and community relations consulting firm based in Cerritos, California. PDA conducted in-depth anecdotal interviews as part of the study team's qualitative analyses of marketplace conditions.

Customer Research International (CRI). CRI is a minority-owned telephone survey firm in San Marcos, Texas. CRI conducted telephone surveys with businesses in ICTC's relevant geographic market area as part of the study team's utilization and availability analyses.

CHAPTER 2.

Legal Framework

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Legal Framework

Federal regulations — specifically, 49 Code of Federal Regulations (CFR) Part 26 — set forth the requirements for how state and local government agencies that receive United States Department of Transportation (USDOT) funds must implement the Federal Disadvantaged Business Enterprise (DBE) Program. The legal framework for the Imperial County Transportation Commission (ICTC) disparity study is based on those regulations as well as on U.S. Supreme Court decisions, other federal court rulings and relevant California regulations, laws and case rulings.

Several non-minority contractors and other groups have filed lawsuits challenging the constitutionality of the Federal DBE Program or the constitutionality of specific agencies' implementations of the Federal DBE Program. For example, contractors have filed lawsuits against agencies implementing the Federal DBE Program in California, Illinois, Minnesota, Montana, Nebraska, and Washington. Implementations of the program were successfully defended in California, Illinois, Minnesota, and Nebraska but not in Washington. (The case in Montana is still pending.) Appendix B provides further analysis of relevant legal decisions and federal regulations.¹

To understand the legal context for the disparity study, it is useful to review:

- A. Measures that are part of the Federal DBE Program;
- B. Measures that are part of state and local programs; and
- C. Legal standards that race- and gender-conscious programs must satisfy.

A. Measures That Are Part of the Federal DBE Program

Regulations that govern an agency's implementation of the Federal DBE Program require that the agency meet the maximum feasible portion of its overall DBE goal through race- and gender-neutral means.² Race- and gender-neutral program measures are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses. If an agency can meet its goal solely through race- and gender-neutral means, it cannot implement race- or gender-conscious measures as part of its program. Race- and gender-conscious measures are measures that are specifically designed to increase the participation of DBEs and minority- and women-owned business enterprises (MBE/WBEs), such as DBE contract goals or MBE/WBE participation goals.

¹ Neither Chapter 2 nor Appendix B constitutes a legal evaluation of ICTC's current contracting practices or of its implementation of the Federal DBE Program.

² 49 CFR Section 26.51.

If an agency cannot meet its overall DBE goal solely through race- and gender-neutral means, then it is permitted to use race- and gender-conscious program measures as part of its implementation of the Federal DBE Program. However, because such program measures are based specifically on the race or gender of business ownership, their use must satisfy certain legal and regulatory standards in order to be valid. Given that context, there are several general approaches that government agencies that receive USDOT funds could use to implement the Federal DBE Program.

1. Applying a combination of race- and gender-neutral and race- and gender-conscious measures with all certified DBEs considered eligible for race- and gender-conscious measures. Many agencies use a combination of race- and gender-neutral and race- and gender-conscious measures when implementing the Federal DBE Program where all certified DBEs are considered eligible for race- and gender-conscious measures. Those agencies use various measures that are designed to encourage the participation of small and emerging businesses in its contracting. In addition, they also specify percentage goals for DBE participation on many individual Federal Transit Administration (FTA)-funded contracts (DBE contract goals). Prime contractors that bid on those contracts must make subcontracting commitments to DBEs to meet those percentage goals, or they must show good faith efforts of having tried to do so. The participation of all certified DBEs — regardless of race/ethnicity or gender — count toward meeting individual contracting goals.

2. Applying a combination of race- and gender-neutral and race- and gender-conscious measures with only certain groups of certified DBEs considered eligible for conscious measures. Some agencies limit DBE participation in race- and gender-conscious measures to certain racial/ethnic or gender groups based on evidence of those groups facing discrimination within the agencies' respective relevant geographic market area (underutilized DBEs, or UDBEs). For example, the San Diego Association of Governments (SANDAG) currently implements the Federal DBE Program in that manner. SANDAG sets DBE contract goals on many individual FTA-funded contracts. Prime contractors that bid on those contracts must make subcontracting commitments to UDBEs to meet those percentage goals, or they must show good faith efforts of having tried to do so. In recent years, the California Department of Transportation (Caltrans) and the Oregon Department of Transportation, among other agencies, have also operated similar programs for UDBEs.

3. Applying a combination of race- and gender-neutral and more aggressive race- and gender-conscious measures in extreme circumstances. The Federal DBE Program provides that a recipient may not use more aggressive race- and gender-conscious program measures — such as setting aside contracts for DBE bidding — except in limited and extreme circumstances. An agency may only use set asides when no other method could be reasonably expected to redress egregious instances of discrimination.³ Specific quotas for DBE participation are strictly prohibited under the Federal DBE Program.

4. Operating an entirely race- and gender-neutral program. Some agencies have implemented the Federal DBE Program without the use of DBE contract goals or other race- and

³ 49 CFR Section 26.43.

gender-conscious measures. Instead, those agencies only use race- and gender-neutral measures as part of their implementation of the Federal DBE Program. ICTC currently implements the Federal DBE Program in that manner. ICTC does not apply race- or gender-conscious measures, such as DBE contract goals, to its USDOT-funded or to its locally-funded contracts.

B. Measures That Are Part of State and Local Programs

In addition to USDOT-funded contracts, ICTC and other agencies award transportation contracts that are solely funded through local sources. The Federal DBE Program does not apply to those contracts. Many agencies apply MBE/WBE goals to locally-funded contracts in a manner that is very similar to how they set DBE goals on federally-funded contracts. For example, the Texas Department of Transportation operates a Historically Underutilized Business Program that includes contract goals on certain locally-funded projects. The North Carolina Department of Transportation and the Indiana Department of Transportation both have MBE/WBE programs in place for to their locally-funded contracts that mirror the Federal DBE Program.

ICTC does not apply MBE/WBE goals to its locally-funded contracts because of Proposition 209, which California voters passed in November 1996. Proposition 209 amended state law to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. However, Proposition 209 did not prohibit those actions if an agency is required to take them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.” Thus, Proposition 209 prohibited government agencies in California from applying race- and gender-conscious measures to locally-funded contracts but not necessarily to federally-funded contracts.

C. Legal Standards that Race- and Gender-Conscious Programs Must Satisfy

The U.S. Supreme Court has established that government programs that include race-conscious measures must meet the “strict scrutiny” standard of constitutional review.⁴ The two key U.S. Supreme Court cases that established the strict scrutiny standard for race-conscious measures are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;⁵ and
- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.⁶

As described in detail in Appendix B, the strict scrutiny standard is extremely difficult for a government entity to meet. It presents the highest threshold for evaluating the legality of race-

⁴ Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply the “intermediate scrutiny” standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

⁵ *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

conscious programs short of prohibiting them altogether. Under the strict scrutiny standard, a governmental entity must:

- Have a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and
- Establish that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination. There are a number of factors a court considers when determining whether a program is narrowly tailored (see Appendix B).

A government agency must meet both components of the strict scrutiny standard. A program that fails to meet either one is unconstitutional.

Examples of race-conscious programs that have not satisfied the strict scrutiny standard. Many race-conscious programs have been challenged in court and have been found to be unconstitutional. The *Western States Paving Co. v. Washington State DOT* case is an example of a local government program that was found to not have met the strict scrutiny standard by failing to be narrowly tailored. Appendix B discusses the *Western States Paving Co. v. Washington State DOT* ruling and other related rulings.

Constitutionality of the Federal DBE Program on its face. The Federal DBE Program has been held to be constitutional “on its face” — or, as it is written rather than as it is applied — in several legal challenges to date (see discussion in Appendix B of *Northern Contracting, Inc. v. Illinois DOT*, *Sherbrooke Turf, Inc. v. Minn DOT*, *Gross Seed v. Nebraska Department of Roads*, *Western States Paving Co. v. Washington State DOT*, and *Adarand Constructors, Inc. v. Slater*).^{7, 8, 9} Some of those court decisions are discussed below.

Northern Contracting, Inc. v. Illinois DOT. In the *Northern Contracting, Inc. v. Illinois DOT* decision, the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold that “a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting ... cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”¹⁰

The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State DOT* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf, Inc. v. Minnesota DOT* relating to an “as applied” narrow tailoring analysis:¹¹

⁷ 473 F.3d 715 (7th Cir. 2007).

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

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).

¹⁰ 473 F.3d at 722.

¹¹ *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Road*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

- The Seventh Circuit held that IDOT's application of a federally-mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.¹²
- The Seventh Circuit analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions, and its use of race-neutral methods set forth in the federal regulations.¹³ The court held that Northern Contracting failed to demonstrate that IDOT did not satisfy compliance with the federal regulations.¹⁴

The Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.

Western States Paving Co. v. Washington State DOT. The constitutionality of the Federal DBE Program was also upheld by the Ninth Circuit Court of Appeals in *Western States Paving Co. v. Washington State DOT*. However, the Ninth Circuit found that the Washington State Department of Transportation failed to show that its implementation of the Federal DBE Program was narrowly tailored. After that ruling, state departments of transportation in the Ninth Circuit operated entirely race- and gender-neutral programs until disparity studies could be completed to provide information that would allow them to implement the Federal DBE Program in a narrowly tailored manner.¹⁵ The Ninth Circuit Court of Appeals recently examined another agency's implementation of the Federal DBE Program for the first time since *Western States Paving*. In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, the Court found the California Department of Transportation's implementation of the Federal DBE Program to be constitutional on its face and as applied.¹⁶

Guidance from decisions that have upheld state and local programs. In addition to the Federal DBE Program, some state and local government minority business programs have been found to meet the strict scrutiny standard. Appendix B discusses the successful defense of state and local race-conscious programs, including *Concrete Works of Colorado v. City and County of Denver* (upheld in part) and *H.B. Rowe Company, Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.*^{17, 18} Appendix B as well as USDOT guidance provide further instruction regarding legal issues in a government agency's implementation of the Federal DBE Program.¹⁹

¹² *Id.* at 722.

¹³ *Id.* at 723-24.

¹⁴ *Id.*

¹⁵ Disparity studies have been completed or are underway for state DOTs in each Ninth Circuit state as well as for many local transit agencies and airports in those states.

¹⁶ *AGC, San Diego Chapter v. California DOT*, 2013 WL 1607239 (9th Cir. April 16, 2013).

¹⁷ *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

¹⁸ *H.B. Rowe Company, Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.*; 589 F. Supp. 2d 587 (E.D.N.C. 2008), *appeal pending* in the Fourth Circuit Court of Appeals.

¹⁹ <http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm>.

CHAPTER 3.

Collection and Analysis of Contract Data

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Collection and Analysis of Contract Data

Chapter 3 provides an overview of Imperial County Transportation Commission (ICTC) contracts that the study team analyzed as part of the disparity study and describes the process that the study team used to collect prime contract data.

Chapter 3 is organized into five parts:

- A. Overview of ICTC transportation contracts;
- B. Collection and analysis of contract data;
- C. Collection of information on utilized businesses;
- D. Locations of businesses performing ICTC work; and
- E. Types of work involved in ICTC transportation contracts.

Appendix C provides additional details about the method BBC used to collect and analyze ICTC contract data.

A. Overview of ICTC Transportation Contracts

ICTC uses United States Department of Transportation (USDOT) and local funding to fund transportation-related construction, engineering, and goods and services projects throughout the relevant geographic market area.¹ Examples of such projects include designing accessible bus route access for persons with disabilities, maintaining road quality, and updating bus services. ICTC management is responsible for awarding contracts related to construction, engineering, and goods and services projects.

In general, ICTC awards all contracts worth more than \$3,000 using competitive bidding and proposal processes. If a contract is worth less than or equal to \$3,000, and if the price is deemed fair and reasonable, ICTC may make a purchase without using competitive processes.

Construction. For construction contracts that are worth more than \$3,000 but are worth less than or equal to \$50,000, ICTC is required to send written notices inviting bids (NIBs) to at least three qualified bidders. When possible, at least two of the NIBs must be sent to certified DBEs. ICTC then awards the contract to the lowest responsive and responsible bidder.

For construction contracts that are worth more than \$50,000, ICTC publicly solicits contractors for bids and awards the contract to the lowest responsive and responsible bidder.

¹ For the purposes of the disparity study, the relevant geographic market area included San Diego County, Orange County and Imperial County.

Engineering. For all engineering contracts that are worth more than \$3,000, ICTC uses competitive proposal procedures that are compliant with the Brooks Act and California Mini-Brooks Act, which forbid the use of price as an evaluation factor.² As a result, ICTC cannot use price as an evaluation factor in awarding engineering contracts. ICTC must award engineering contracts to the most qualified firm.

Goods and services. ICTC's contracting procedures differ for goods and for services contracts.

Goods contracts. For all goods contracts that are worth more than \$3,000 but that are worth less than or equal to \$50,000, ICTC uses an informal process to obtain price and rate quotes from qualified vendors. ICTC must seek quotes from at least three qualified vendors. For goods contracts that are worth more than \$50,000, ICTC publicly solicits vendors for bids and awards the contract to the lowest responsive and responsible bidder.

Services contracts. For all services contracts (other than engineering) that are worth more than \$3,000 but are worth less than or equal to \$100,000, ICTC uses an informal competitive process to obtain price and rate quotes from businesses. In general, ICTC must seek quotes from at least three qualified vendors. For services contracts that are worth more than \$100,000, ICTC uses a request for proposals (RFP) or request for qualifications (RFQ) procurement process. As part of those processes, ICTC publicly solicits vendors for proposals and awards the contracts to the vendor whose RFP or RFQ is deemed most advantageous to ICTC, taking price and other factors into consideration.

B. Collection and Analysis of Contract Data

The study team worked with ICTC to collect data on transportation contracts that the agency awarded during the study period.

Study period. BBC examined transportation contracts that ICTC awarded between January 1, 2008 and December 31, 2012.³ ICTC did not apply DBE contract goals or other race- and gender-conscious measures to any contracts during the study period.

Data sources. BBC relied on several sources of information to compile ICTC prime contract information. Appendix C describes the study team's data collection process in detail.

- ICTC provided the study team with electronic data on transportation-related construction, engineering, and goods and services contracts that the agency awarded during the study period.
- The cities of El Centro and Brawley received funds through ICTC as subrecipients of FTA funding. Representatives from those cities provided the study team with electronic data on

² The Brooks Act states that federal design and construction agencies must, "negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices." The California Mini-Brooks Act extends this requirement to state and local agencies.

³ ICTC was established in January 2010. ICTC acquired Imperial Valley Association of Governments (IVAG) contracts in March, 2010. IVAG's contract records were kept by Imperial County staff. As such, contracts included in the study from 2008 and 2009 were those that ICTC acquired at its formation.

FTA-funded construction, engineering, and goods and services prime contracts and subcontracts that the cities awarded during the study period.

Total number of ICTC contracts. The study team identified 15 transportation prime contracts and 32 associated subcontracts that ICTC and subrecipient local agencies awarded during the study period. ICTC awarded nine prime contracts and the City of Brawley and the City of El Centro each awarded three prime contracts. The contracts that the study team identified accounted for approximately \$19 million of ICTC spending during the study period.

Contracts included in the study team’s analyses. The study team included transportation-related construction, engineering, and goods and services contracts that ICTC and subrecipient local agencies awarded during the study period in its analyses. For each prime contract and subcontract, the study team determined the prime contractor’s *subindustry* that characterized the firm’s primary line of business (e.g., heavy construction). BBC identified subindustries based on ICTC and subrecipient contract data and the primary lines of work of prime contractors and subcontractors.

Figure 3-1 presents information about the 47 prime contracts and subcontracts that the study team included in its analyses. The study team included data on 15 prime contracts and 32 associated subcontracts in its analyses. All of ICTC’s contracts involved FTA funds.⁴

Figure 3-1.
Number of ICTC transportation
contracts included in the analyses,
2008-2012

Note:
Numbers rounded to nearest dollar and thus may not
sum exactly to totals.

Source:
BBC Research & Consulting from ICTC contract data.

Contract types	Number	Dollars (millions)
Construction contracts	23	\$5
Engineering contracts	15	\$1
Goods and services contracts	<u>9</u>	<u>\$13</u>
Total contracts	47	\$19

Contracts not included in the study team’s analyses. BBC did not include contracts in its analyses that:

- ICTC awarded to nonprofit organizations or to other government agencies;
- Were classified in industries that were not directly related to transportation contracting (e.g., financial services); or
- Were classified in industries for which ICTC awarded the majority of contracting dollars outside of the “relevant geographic market area” (i.e., outside of Imperial, San Diego, and Orange counties).⁵

⁴ ICTC, the City of Brawley, and the City of EL Centro provided information about whether each construction, engineering, or goods and services contract was FTA-funded.

⁵ BBC included the utilization of businesses that were located outside of the relevant geographic market area in its analyses. However, the study team did so only for those industries for which ICTC awarded the majority of contract dollars to firms located within the relevant geographic market area.

Prime contract and subcontract amounts. For each transportation contract, BBC examined dollars that ICTC awarded to the prime contractor and the dollars committed to any subcontractors at the time of award.

- If a contract did not include any subcontracts, the study team attributed the entire award amount (including any amendments) to the prime contractor.
- If a contract included subcontracts, the study team calculated subcontract amounts as the total subcontract amount (at the time of award) committed or budgeted to each subcontractor. BBC then calculated the prime contractor amount as the total award amount less the sum of dollars committed to all subcontractors.

C. Collection of Information on Utilized Businesses

The study team collected information on businesses that ICTC utilized on transportation-related construction, engineering, and goods and services contracts during the study period. BBC relied on a variety of sources for that information, including:

- ICTC and subrecipient contract and vendor data;
- The California Unified Certification Program (CUCP) directory of DBE-certified firms;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Business websites;
- Telephone interviews with business owners and managers; and
- ICTC and subrecipient staff reviews.

The study team compiled the following information about each utilized business:

- Business location;
- Ownership status (i.e., whether each business was minority- or women-owned);
- DBE certification status;
- Primary line of work;
- Year of establishment; and
- Business size (in terms of number of employees and revenue).

Appendix C presents additional information about the data that the study team collected on utilized firms.

D. Location of Businesses Performing ICTC Work

The Federal DBE program requires agencies to implement the DBE program based on information from the relevant geographic market area—the area in which the agency spends the substantial majority of its contracting dollars. The study team used ICTC’s contracting data to help determine the relevant geographic market area for the study.

- The study team summed the dollars that went to each prime contractor and subcontractor involved in ICTC transportation contracts during the study period.
- For each prime contractor and subcontractor, BBC determined the county in which the business was located.⁶
- BBC then added the transportation contracting dollars that ICTC awarded to businesses in each county and selected the counties that captured the substantial majority of ICTC contracts.

Based on that analysis, 97 percent of ICTC transportation contract dollars during the study period went to businesses with locations in Imperial, San Diego, and Orange counties indicating that those counties should be considered the relevant geographic market area for the study. As a result, BBC’s analyses, including the availability analysis and quantitative analyses of marketplace conditions, focused on Imperial, San Diego, and Orange counties.

E. Types of Work Involved in ICTC Transportation Contracts

The study team determined the subindustries, or specific work types, that were involved in relevant prime contracts and subcontracts. The study team based those determinations on ICTC contract data and information about each utilized prime contractor and subcontractor’s primary lines of work. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 3-2 presents the dollars that the study team examined in various transportation subindustries as part of its analyses.

The study team combined related subindustries that accounted for relatively small percentages of total contracting dollars into a single subindustry and labeled it “other construction.” For example, the contracting dollars that ICTC awarded to contractors for “service station equipment” represented less than 1 percent of total ICTC contract dollars that BBC examined in the study. As a result, BBC combined “service station equipment” with other types of work that also accounted for relatively small percentages of total contracting dollars and that were relatively dissimilar to other subindustries.

⁶ If a business had locations in multiple counties, priority was given to Imperial County and surrounding counties for the purpose of determining ICTC’s relevant geographic market area.

Figure 3-2.
ICTC contract dollars by
subindustry, 2008 - 2012

Note:

Numbers rounded to nearest dollar and
thus may not sum exactly to totals.

Source:

BBC Research & Consulting from ICTC
contract data.

Industry	Total (in thousands)
Construction	
Heavy construction	\$3,630
Electrical work	505
Masonry and other stonework	262
Water, sewer and utility lines	106
Landscape services	64
Fencing, guardrails and signs	60
Other construction	174
Other construction supplies	<u>63</u>
Total Construction	\$4,628
Engineering	
Engineering	\$711
Construction management	202
Landscape architecture	174
Environmental research and consulting	33
Testing services	<u>1</u>
Total Engineering	\$1,121
Goods and Services	
Transit services	<u>\$12,755</u>
Total Goods and Services	\$12,755
Total	\$18,504

CHAPTER 4.

Marketplace Conditions

CHAPTER 4.

Marketplace Conditions

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, barriers to the formation of minority-owned construction businesses, and barriers to entry.”^{1, 2} Congress found that discrimination has impeded the formation and expansion of qualified minority- and women-owned business enterprises (MBE/WBEs). BBC Research & Consulting (BBC) conducted quantitative and qualitative analyses to examine whether barriers for MBE/WBEs that Congress found on a national level also appear in the relevant geographic market area.³ BBC analyzed whether barriers exist in the local transportation contracting industry—that is, in construction; engineering; and goods and services—for minorities, women, and for MBE/WBEs, and whether such barriers affect the utilization and availability of MBE/WBEs for the Imperial County Transportation Commission’s (ICTC’s) contracting.⁴

BBC examined conditions in the local marketplace in four primary areas:

- A. Entry and advancement;
- B. Business ownership;
- C. Access to capital; and
- D. Success of businesses.

Appendices E through I present quantitative information concerning conditions in the local marketplace. Appendix J presents qualitative information that the study team collected through in-depth anecdotal interviews with business owners and others throughout the region; and public meetings that BBC conducted in the relevant geographic market area.

A. Entry and Advancement

Several business owners and managers that the study team interviewed as part of the disparity study commented that individuals who form businesses in the transportation contracting industry tend to work in the industry before starting their own businesses (for details, see Appendix J). Any barriers related to entry or advancement in the transportation contracting industry may prevent some minorities and women from starting such businesses in the relevant

¹ *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d, 970 (8th Cir. 2003) (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167 – 76).

² *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 992 (9th Cir. 2005).

³ For the purposes of the disparity study, the relevant geographic market area included San Diego County, Orange County, and Imperial County.

⁴ Information for “engineering” refers to architectural, engineering, and related services. Each reference to “engineering” work pertains to those types of services. In the 2000 Census industrial classification system, “Architectural, engineering and related services” was coded as 729. In the 2009-2011 ACS, the same industry was coded as 7290. Information for “goods and services” refers to petroleum wholesalers, bus service and urban transit, and investigation and security services. Those industries most closely relate to the petroleum, transit, and security goods and services that are related to transportation contracting.

geographic market area. Several studies throughout the United States have indicated that race- and gender-based discrimination has affected the employment and advancement of certain groups in the transportation contracting industry. The study team examined the representation of minorities and women among all workers in the local transportation contracting industry. In addition, for the construction industry, the study team examined the advancement of minorities and women into supervisory and managerial roles. Appendix E presents those results in more detail.

Quantitative information about entry and advancement in construction. Quantitative analyses of the relevant geographic market area—based primarily on data from the 2000 U.S. Census and the 2009-2011 American Community Survey (ACS)—showed that, in general, certain minority groups and women appear to be underrepresented among all workers in the local construction industry relative to all industries considered together. In addition, minorities and women appear to face barriers regarding advancement to supervisory or managerial positions.

Overall representation. Black Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women accounted for a smaller percentage of workers in the local construction industry than in all local industries in 2009 through 2011.

- Black Americans made up 1 percent of workers in the local construction industry compared with 4 percent of workers in all local industries.
- Asian-Pacific Americans (5%) and Subcontinent Asian Americans (less than 1%) were also underrepresented in the local construction industry relative to their representation in all local industries (14% and 1%, respectively).
- Women made up about 10 percent of the workforce in the local construction industry compared with 44 percent of the workforce in all local industries. In all construction trades that the study team examined in the relevant geographic market area, women made up less than 5 percent of workers.

Representation of Native Americans in the local construction industry was similar to the representation of Native Americans in the workforce for all local industries (1%). Representation of Hispanic Americans in the local construction industry (44%) was substantially higher than the representation of Hispanic Americans in the workforce for all local industries (32%).

Advancement. Minority and female workers in the local construction industry were less likely than non-Hispanic whites and males to advance to the level of first-line supervisor based on data for 2009 through 2011.

- Only 35 percent of first-line supervisors were minorities, less than the percentage of all local construction workers that were minorities (51%).
- Similar to that result, women made up only 3 percent of first-line supervisors in the local construction industry compared to 10 percent of all workers in the local construction industry.

- In addition, minorities and women (with the exception of Subcontinent Asian Americans and “other” minorities) were generally less likely than non-Hispanic whites and males to advance to the level of construction manager in the local construction industry.

Formal education beyond high school is not a prerequisite for most construction jobs. Because the average educational attainment of minorities and women was generally consistent with educational requirements for construction jobs, factors other than formal education may explain the relatively low representation of minorities and women among workers in the local construction industry and the relatively low representation of minorities and women working in supervisory and managerial roles.

Quantitative information about entry into engineering. BBC also used 2000 U.S. Census data and 2009-2011 ACS data to examine employment for minorities and women in the local engineering industry. Subcontinent Asian Americans (2%) and women (25%) were underrepresented in the local engineering industry relative to their representation in all local industries in 2009 through 2011 (3% and 43%, respectively), even when limiting the analyses to only those individuals with college degrees. The representation of all other groups in the local engineering industry was comparable to their representation in all local industries.

Quantitative information about entry into goods and services. BBC also used 2000 U.S. Census data and 2009-2011 ACS data to examine employment for minorities and women in the local goods and services industry. Women (23%) were underrepresented in the local goods and services industry relative to their representation in all local industries in 2009 through 2011 (45%). The representation of all minority groups in the local goods and services industry was comparable to their representation in all local industries.

Qualitative information about entry and advancement. BBC collected qualitative information about entry and advancement in the local transportation contracting industry through in-depth interviews and public meetings.

Interviewees indicated transportation contracting businesses are often started by individuals working in those industries or with other connections to those industries. Most interviewees reported that they worked in the transportation contracting industry before starting their businesses. Therefore, any barriers to becoming employed in the transportation contracting industry could also affect business ownership.

Some interviewees reported a discriminatory work environment for women and minorities in transportation contracting industries. Some interviewees reported a discriminatory work environment for women on worksites. Some interviewees reported that women in the transportation contracts industry have difficulty commanding respect. One female business owner said that, early in the life of her business, she could not negotiate a contract without a male present. Another interviewee reported that her ideas are often ignored by her male peers.

Some interviewees reported a discriminatory work environment for minorities.

- Some minority business owners said that customers and prime contractors assume that minorities do not know what they are doing on a worksite.

- Several interviewees said that they had personally experienced disrespectful behavior and offense comments.

Effects of entry and advancement. The barriers that minorities and women appear to face entering and advancing within the local transportation contracting industry may have substantial effects on business outcomes for MBE/WBEs.

- Typically, employment and advancement are preconditions to business ownership in the transportation contracting industry. Because certain minority groups and women appear to be underrepresented in the local construction, engineering, and goods and services industries—both in general and as supervisors and managers—it follows that such underrepresentation may prevent some minorities and women from ever starting businesses, reducing overall MBE/WBE availability in the local transportation contracting industry.
- Underrepresentation of certain minority groups and women in the local transportation contracting industry—particularly in supervisory and managerial roles—may perpetuate beliefs and stereotypical attitudes that MBE/WBEs may not be as qualified as majority-owned businesses (i.e., non-Hispanic white male-owned businesses). Those beliefs may make it more difficult for MBE/WBEs to win work in the relevant geographic market area, including work with ICTC.

B. Business Ownership

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

BBC used regression analyses and data sources that were similar to those used in other studies to analyze business ownership in the local transportation contracting industry. BBC used 2009-2011 ACS data to examine whether there are differences in business ownership rates between minorities and women and non-Hispanic whites and males in the local transportation contracting industry.

The regression models that the study team developed showed that certain minority groups and women are less likely to own businesses than non-Hispanic whites and males, even after accounting for various personal characteristics including education, age, and

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

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

the ability to speak English. For those groups that were significantly less likely to own businesses, BBC compared their actual business ownership rates with simulated rates if those groups owned businesses at the same rate as non-Hispanic whites or non-Hispanic white males (in the case of non-Hispanic white women) who share similar race- and gender-neutral personal characteristics. Appendix F provides details about BBC’s quantitative analyses of business ownership rates.

Quantitative information about business ownership in construction. Regression analyses of the local construction industry revealed that certain groups were significantly less likely than non-Hispanic whites and males to own construction businesses, even after accounting for various race- and gender-neutral personal characteristics such as education, age, personal net worth, and ability to speak English. Those groups were:

- Hispanic Americans; and
- Non-Hispanic white women.

For each of those groups, Figure 4-2 presents actual business ownership rates and simulated business ownership rates (i.e., “benchmarks”) if those groups owned businesses in the local construction industry at the same rate as non-Hispanic whites or non-Hispanic white males (in the case of non-Hispanic white women) who share similar personal characteristics. The study team calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the benchmark business ownership rate and then multiplying the result by 100. Values less than 100 indicate that the group is less likely to own businesses than what would be expected for non-Hispanic whites or non-Hispanic white males who share similar race- and gender-neutral personal characteristics.

Figure 4-2.
Comparison of actual business ownership rates to simulated rates
for local construction workers, 2009-2011

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	13.4%	19.1%	70
Non-Hispanic white female	14.8%	32.5%	45

Note: Because benchmarks can only be estimated for records with an observed (rather than imputed) dependent variable, comparisons are made using only that subset of the sample. For that reason, actual self-employment rates may differ slightly from those shown in Figure 4-2.

Source: BBC Research & Consulting from statistical models of 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

As shown in Figure 4-2, both Hispanic Americans and non-Hispanic white women in the relevant geographic market area own construction businesses at rates that are substantially lower than those of non-Hispanic whites and non-Hispanic white males who share similar personal characteristics. Hispanic Americans own construction businesses at approximately 70 percent of the rate that would be expected for non-Hispanic whites who share similar personal characteristics. Non-Hispanic white women own construction businesses at less than one-half of

the rate (disparity index of 45) that would be expected based on the simulated business ownership rates of non-Hispanic white males who share similar personal characteristics.

Quantitative information about business ownership in engineering. As with construction, BBC examined differences in business ownership rates between minorities and women and non-Hispanic whites and males in the local engineering industry. Regression analysis results revealed that Asian-Pacific Americans were significantly less likely than non-Hispanic whites to own engineering businesses, even after accounting for various race- and gender-neutral personal characteristics such as education, age, personal net worth, and ability to speak English.

Figure 4-3 presents actual business ownership rates and simulated business ownership rates if Asian-Pacific Americans owned businesses in the local engineering industry at the same rate as non-Hispanic whites who share similar personal characteristics. Asian-Pacific Americans in the relevant geographic market area own engineering businesses at a rate that is substantially lower than that of non-Hispanic whites who share similar personal characteristics. Asian-Pacific Americans own engineering businesses at approximately 36 percent of the rate that would be expected for non-Hispanic whites who share similar personal characteristics.

Figure 4-3.
Comparison of actual business ownership rates to simulated rates
for local engineering workers, 2009-2011

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian-Pacific American	4.9%	13.3%	36

Note: Because benchmarks can only be estimated for records with an observed (rather than imputed) dependent variable, comparisons are made using only that subset of the sample. For that reason, actual self-employment rates may differ slightly from those shown in Figure 4-3.

Source: BBC Research & Consulting from statistical models of 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Quantitative information about business ownership in goods and services. As with construction and engineering, BBC examined differences in business ownership rates between minorities and women and non-Hispanic whites and males in the local goods and services industry. Regression analysis results revealed that Hispanic Americans were significantly less likely than non-Hispanic whites to own engineering businesses, even after accounting for various race- and gender-neutral personal characteristics such as education, age, personal net worth, and ability to speak English.

Figure 4-4 presents actual business ownership rates and simulated business ownership rates if Hispanic Americans owned businesses in the local goods and services industry at the same rate as non-Hispanic whites who share similar personal characteristics. Hispanic Americans in the relevant geographic market area own goods and services businesses at a rate that is substantially lower than that of non-Hispanic whites who share similar personal characteristics. Hispanic Americans own goods and services businesses at approximately 26 percent of the rate that would be expected for non-Hispanic whites who share similar personal characteristics.

Figure 4-4.
Comparison of actual business ownership rates to simulated rates
for local goods and services workers, 2009-2011

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	2.6%	10.1%	26

Note: Because benchmarks can only be estimated for records with an observed (rather than imputed) dependent variable, comparisons are made using only that subset of the sample. For that reason, actual self-employment rates may differ slightly from those shown in Figure 4-4.

Source: BBC Research & Consulting from statistical models of 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Qualitative information about business ownership. BBC collected qualitative information about business ownership in the local transportation contracting industry through in-depth interviews and public meetings. According to most interviewees, the transportation contracting industry in the relevant geographic area is dynamic and highly competitive. It is difficult to start and successfully operate a business within that market. Business owners who were minority, female, and non-Hispanic white male reported facing many of the same challenges.

- Many business owners reported difficulties with the preconditions of starting and maintaining a business including financing, bonding, equipment, and being excluded from industry networks.
- Some interviewees commented on the connection between personal assets and the ability to obtain financing, which then impacts successfully starting and expanding a business.

Effects of business ownership. The barriers that certain minority groups and women appear to face regarding business ownership may have substantial effects on the current composition of the local transportation contracting industry. Evidence indicates that certain minority groups and women are less likely than non-Hispanic whites and males to own businesses in the local transportation contracting industry. There is also evidence that some MBE/WBEs may have never formed as a result of different barriers related to race/ethnicity and gender in the relevant geographic market area.

C. Access to Capital

Access to capital represents one of the key factors 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 or expand a business. BBC examined whether MBE/WBEs have access to capital—both for their homes and for their businesses—that is comparable to that of non-Hispanic white male-owned businesses. In addition, the study team examined information about whether minorities and women face any barriers in obtaining bonding and insurance. Appendix G provides details about BBC’s quantitative analyses of access to capital, bonding, and insurance.

Quantitative information about homeownership and mortgage lending. Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership or home equity can affect business opportunities by limiting the availability of funds for new or expanding businesses. BBC analyzed the potential effects of race/ethnicity on homeownership and on mortgage lending in the relevant geographic market area based on 2009-2011 ACS data and 2012 Home Mortgage Disclosure Act (HMDA) data, respectively.

Homeownership rates. Many studies have documented past discrimination in the national housing market. BBC used 2009-2011 ACS data to examine homeownership rates in the relevant geographic market area. Every minority group that the study team examined—Asian-Pacific Americans (57%), Black Americans (32%), Hispanic Americans (41%), Native Americans (55%), Subcontinent Asian Americans (53%), and “other” minorities (56%)—owned homes in the relevant geographic market area at a lower rate than non-Hispanic whites (65% own homes). Although those differences were all statistically significant, the differences between non-Hispanic whites and Black Americans and between non-Hispanic whites and Hispanic Americans were the most pronounced.

BBC also examined median home values among local homeowners and found that Asian-Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, and “other” minority homeowners tend to own homes of lower values than non-Hispanic white homeowners.

Mortgage lending. If minorities are discriminated against when applying for home mortgages, then they may be denied opportunities to own homes, purchase more expensive homes, or access equity in their homes. The study team explored market conditions for mortgage lending in the relevant geographic market area using 2012 HMDA data. The data indicated that Black Americans (16%), Hispanic Americans (14%), and Native Americans (17%) are denied mortgages at substantially higher rates than non-Hispanic whites (10%). There is also evidence suggesting that minorities are generally more likely than non-Hispanic whites to have subprime loans.

Quantitative information about business credit. Business credit is also an important source of funds for small businesses. Any race- or gender-based barriers in the application or approval processes of business loans could affect the formation and success of MBE/WBEs. To examine the effect of race/ethnicity and gender in business capital markets, the study team analyzed data from the Federal Reserve Board’s 1998 and 2003 Survey of Small Business Finances (SSBF).⁵ Because SSBF records the geographic location of firms by Census Division, BBC examined data for the Pacific Census Division, which includes Washington, Alaska, California, Hawaii, and Oregon. The Pacific Census Division is the level of geographic detail of SSBF data most specific to the relevant geographic market area.

⁵ Data from the 2003 SSBF were the most current SSBF data available at the time of this study.

Business loan approval rates. BBC developed regression models of business loan approvals based on 2003 SSBF data to examine outcomes for MBEs and female-owned businesses after statistically controlling for race- and gender-neutral characteristics of businesses.

- The results from the model indicated that Black American-owned businesses in the U.S. were significantly less likely than non-Hispanic white-owned businesses to be approved for business loans. That disparity was not significantly different in the Pacific Census Division.
- Female-owned businesses were no less likely than male-owned businesses to be approved for business loans.

For Black American-owned businesses, Figure 4-5 presents actual business loan approval rates and simulated loan approval rates (i.e., “benchmarks”) if Black American-owned businesses were approved for business loans at the same rate as non-Hispanics white male-owned businesses that share similar race- and gender-neutral business characteristics. The study team calculated a loan approval disparity index for Black American-owned businesses by dividing the observed loan approval rate by the benchmark loan approval rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, Black American-owned businesses are less likely to be approved for a business loan than what would be expected for non-Hispanic white male-owned businesses that share similar business characteristics.

Figure 4-5
Comparison of actual business loan approval rates to simulated rates
(“benchmark”), Pacific Census Division, 2003

Group	Loan approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
Black American	49.1%	68.8%	71

Source: BBC Research & Consulting analysis of 2003 NSSBF data.

As shown in Figure 4-5, Black American-owned businesses in the Pacific Census Division are approved for business loans at rates that are substantially lower than those of non-Hispanic white male-owned businesses. Black American-owned businesses are approved for loans at 71 percent of the rate that would be expected for non-Hispanic white-owned businesses that share similar characteristics.

Loan values and interest rates. BBC also examined the average business loan values for businesses that received loans. Data from the 2003 SSBF indicated that minority- and women-owned businesses in the Pacific Census Division received business loans that, on average, were worth less than two-thirds of the loans that majority-owned businesses received (\$289,000 versus \$456,000). In addition, minority- and women-owned businesses in the Pacific Census Division received business loans that had, on average, higher interest rates than loans that majority-owned businesses received (8.5% versus 6.9%).

Experiences of MBEs, WBEs and majority-owned businesses with obtaining lines of credit and business loans. As part of availability interviews that the study team conducted, BBC asked several questions related to potential barriers or difficulties that businesses have faced in the local marketplace. The interviewer introduced those questions with the following description:

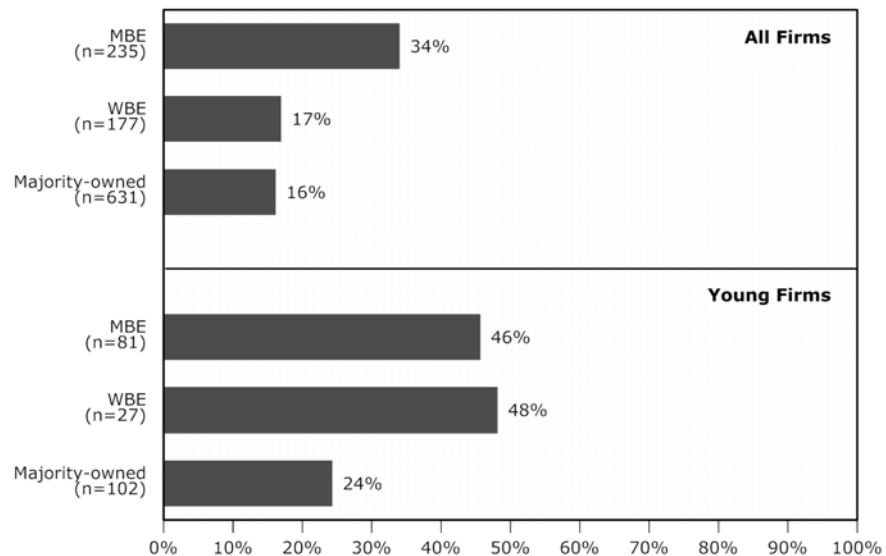
“Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences in California within the past five years as we ask you these questions.”

For each potential barrier, the study team examined whether the percentage of businesses that had experienced that barrier or difficulty differed among MBEs, WBEs, and majority-owned businesses. The study team also examined those data separately for young businesses (i.e., businesses that were 12 years old or younger, which corresponded to the youngest quarter of businesses across all completed availability interviews).

The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” As shown in Figure 4-6, of all businesses, 34 percent of MBEs reported difficulties obtaining lines of credit or loans. A smaller percentage of WBEs (17%) and majority-owned businesses (16%) reported that they had experienced difficulties with obtaining lines of credit or loans.

Figure 4-6.
Has your company experienced any difficulties in obtaining lines of credit or loans?

Source:
BBC Research & Consulting
from Availability Interviews.



Overall, a larger percentage of young businesses reported that they had experienced difficulties with obtaining lines of credit or loans compared to all businesses. Young MBEs and WBEs were much more likely to report such difficulties than young majority-owned businesses.

Quantitative information about bonding and insurance. As part of the availability interviews, BBC also examined potential barriers that businesses face in obtaining bonding and insurance.

Bonding. To research whether bonding represents a barrier for local businesses, BBC asked businesses completing availability interviews the following two questions:

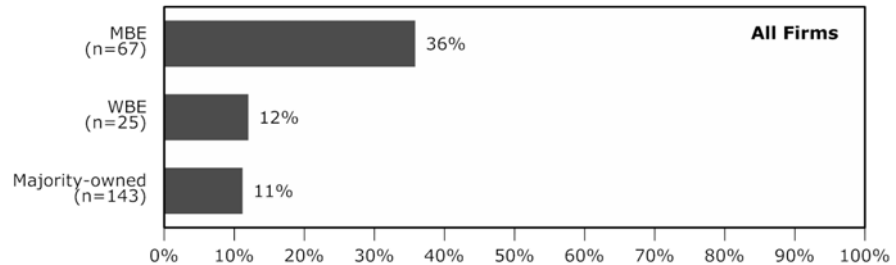
- Has your company obtained or tried to obtain a bond for a project?
- [And if so] Has your company had any difficulties obtaining bonds needed for a project?

Figure 4-7 presents results from those questions. Among businesses that reported that they had obtained or tried to obtain a bond, 36 percent of MBEs reported difficulties with obtaining bonds needed for a project. A smaller percentage of WBEs (12%) and majority-owned businesses (11%) reported difficulties with obtaining bonds needed for a project.⁶

Figure 4-7.
Has your company
had any difficulties
obtaining bonds
needed for a
project?

Source:

BBC Research & Consulting from
Availability Interviews.



Insurance. BBC also examined whether MBE/WBEs were more likely than majority-owned businesses to report that insurance requirements presented a barrier to bidding by asking the question, “Have any insurance requirements on projects presented a barrier to bidding?” Figure 4-8 presents those results. About 22 percent of MBEs and 23 percent of WBEs reported such difficulties. Compared to MBE/WBEs, a slightly smaller percentage of majority-owned businesses (18%) reported that insurance requirements present a barrier to bidding on projects.

Overall, a larger percentage of young businesses reported that insurance requirements on a project present a barrier to bidding compared to all businesses. Among young businesses, a larger percentage of MBEs (31%) than WBEs (29%) and majority-owned businesses (24%) reported that insurance requirements on a project present a barrier to bidding.

Qualitative information about access to capital. BBC collected qualitative information about access to capital for businesses in the local transportation contracting industry through in-depth interviews, availability interviews, and public meetings.

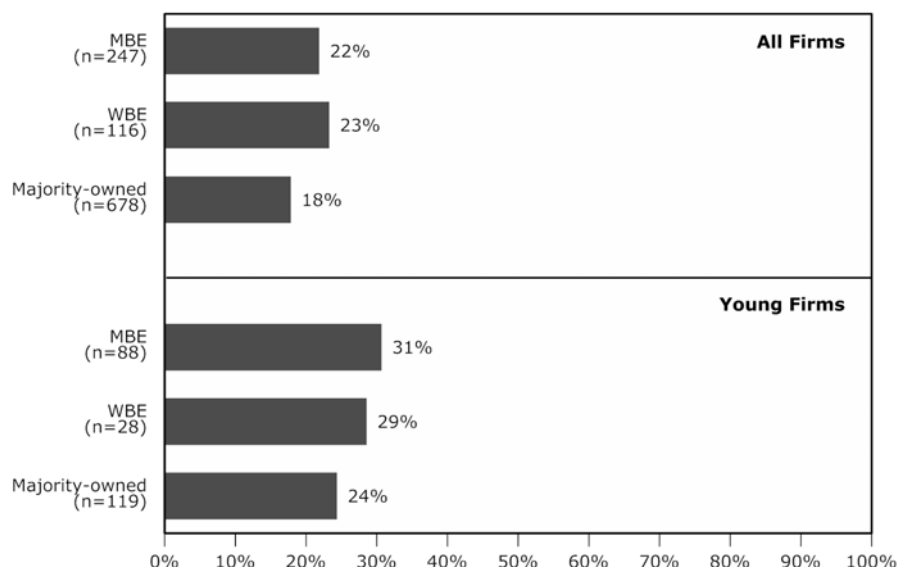
Many business owners reported that obtaining financing was important in establishing and growing their businesses and to surviving poor market conditions. Many interviewees indicated that access to financing was a barrier for small businesses in general, especially when starting and first growing.

- The general manager of a certified Black American-owned construction firm said that it can be difficult to obtain financing because “we’ve been through a rough period” that could have potentially damaged credit. He went on to say, “I think the banks aren’t quite set up to ... look at your history from a subjective perspective and say, ‘Oh, it was hard times here, so we’ll cut them a break.’”

⁶ There were not enough businesses that had answered whether they had experienced difficulties obtaining bonds needed for a project to draw conclusions for the young business analysis for that question.

Figure 4-8.
Have any insurance
requirements on
projects presented a
barrier to bidding?

Source:
 BBC Research & Consulting
 from Availability Interviews.



- The Caucasian estimator at an SBE-certified construction company said that financing can be challenging in his business. Because they do shoring work before the general contractor arrives, they often have to order supplies that need to be paid for long before his company will be paid for the completed work. He said, “In the public works contract they don’t have to pay for 45 days. So, what happens is, unless I have the money to fund the project, I get behind [in paying his vendors].” He said that this can have a bad effect on his company’s standing with vendors.
- The owner of a WBE-certified engineering firm stated that for the first two years of business, her firm was unable to get a line of credit from the bank. She stated, “No one got paid the first two years.” She reported that she was able to obtain a larger line of credit within the past year. In addition, she stated, “You need a banker on your side.”

According to interviewees, a few businesses may have survived because they were well-capitalized going into the economic downturn. For example, when asked how his company survived the economic downturn, the vice president of a WBE-certified Hispanic construction company said, “We are using a lot of savings at this time. We are waiting for the large job that we just got, but it was postponed for budgeting situation with the federal government. We are at this time using savings and back-ups.”

Some business owners explained the connection between personal assets and the ability to obtain financing. For example:

- The Black American owner of an MBE-certified security company said that obtaining financing has been difficult because, “Most minority small businesses don’t have good credit.” He feels that this impedes a lot of promising minority businesses from getting started: “If you don’t have a house or collateral or real good credit, you might as well hang it up.” He later added that potential creditors only base a small proportion of their decision on the merits of the business plan, and a larger proportion on credit and years of experience.

- The owner of a DBE-certified Black American-owned goods and services firm said that obtaining financing has been a barrier for her business. She said, “I remember when I went to [a private bank], I was trying to get the seed money I needed, and they said my income wasn’t enough coming in. They needed to attach something, a home, something. So then I went to [two other private banks] and was turned down because my credit score wasn’t high enough. I had a job on the side that I was doing that I could pay back the money, but it didn’t work out.”

Interviewees had different opinions on whether race or gender affected access to financing.

Some minority and female business owners indicated that race- and gender-based discrimination does not affect obtaining financing. However, some minority and female business owners indicated that race- and gender-based discrimination does affect financing. For example:

- When asked if she believed that the barrier is related to racial discrimination, the owner of a DBE-certified Black American-owned goods and services firm said, “It depends on your skin color in a lot of these situations. And it really depends on how much money you have in the bank. There could be someone identical to me in the same situation, but because I’m an African American, they wouldn’t [give me the loan]. If I were white, or Filipino, or Asian, they would.” When asked if she believed that this discrimination is specific to Black Americans, she said that she believes it is against both Black Americans and people of Hispanic origin.
- The female owner of a certified construction company said that “it’s very, very hard for a woman to get financing. ... If you’re married, they want your husband to come in and sign, and I don’t think that any man that owns a business has to take his wife in to sign, or is even asked to do that.”
- The female Hispanic Operations Manager of a DBE-certified towing company said that the Hispanic owner of the business has not been able to obtain loans. She said the institutions they have tried to work with keep requesting more collateral. She feels that the practices are probably discriminatory based on her past experiences when she was part-owner: “I got a lot of the ‘You’re a woman. You don’t belong in this industry. Why are you here?’”

Qualitative information about access to bonding. BBC collected qualitative information about access to bonding for businesses in the local transportation contracting industry through in-depth interviews, availability interviews, and public meetings.

Some business owners and managers indicated that bonding requirements had adversely affected their growth and opportunities to bid on public contracts. For example:

- When asked about bonding requirements being a barrier, the general manager of a certified Black American-owned construction firm said that this was a barrier because bonding requirements are related to the problems with credit and obtaining financing.
- The owner of a WBE-certified engineering firm stated that as a small business bonding is a challenge. She stated, “Even applying for a bond is a big pain.” She further reported, “There are [projects] we had to walk away from that I know we could have done.”

- The co-owner of a WBE-certified construction firm reported that it's difficult to get work in the public sector because of the "cost for obtaining a bid bond is way too high. The money I have to pay out up front is more than I can afford."
- The Caucasian female co-owner of an SBE-certified construction company said, "Bonding is difficult. The only way we have been able to bond, so far, is to do a cash deposit ... and we were only able to do that as a joint venture with our other company that is already established."

A few interviewees indicated that racial- and gender-based discrimination existed in obtaining bonding. For example:

- The female owner of a WBE-certified construction company said that she feels there is discrimination against women when it comes to bonding, similar to that faced when they are trying to obtain financing.
- The president and CEO of the National Black Contractors Association said, "Lending institutions have discriminated against the small companies and the African Americans and what have you. They go in and give them their balance sheet and they don't show a steady flow of cash and they don't have an asset base. So they don't get the bonding."

Qualitative information about access to insurance. BBC collected qualitative information about whether insurance requirements and obtaining insurance presented barriers to doing business.

Many interviewees said that they could obtain insurance, but that the cost of obtaining it, especially for small businesses, was a barrier. For example:

- The owner of a DBE-certified Black American-owned goods and services firm said that obtaining insurance can be a barrier because of the high prices. She said, "There are seven or eight different insurances that I need. They consider you new in business when you don't have work or dollar volume coming in. It's a huge barrier because then your insurance is so much more. It costs a ton."
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, "Obtaining insurance is not difficult, just expensive. The barrier is the cost. Our rates have jumped to all-time highs due to our record year. Again, this has nothing to do with discrimination."
- When asked if insurance presents a barrier for his company, the Native American male owner of non-certified environmental consulting firm said, "Obtaining it wasn't the issue, paying for it was. This was mostly when we were a new company."

Effects of access to capital, bonding, and insurance. Potential barriers associated with access to capital, bonding, and insurance may affect various business outcomes for MBE/WBEs.

- There is quantitative and qualitative evidence indicating that it is more difficult for minorities, women, and MBE/WBEs than it is for non-Hispanic whites, males, and non-Hispanic white male-owned businesses to obtain capital, bonding, and insurance, or that barriers to accessing capital, bonding, and insurance disproportionately affect MBEs and WBEs. Such difficulties may reduce the number of MBE/WBEs that form, survive, and grow, which could reduce overall MBE/WBE availability in the local transportation contracting industry.
- In addition, access to capital, bonding, and insurance are often required for businesses to pursue certain types of public sector contracts, limiting access to ICTC transportation contracts.

D. Success of Businesses

BBC completed quantitative and qualitative analyses that assessed whether the success of MBE/WBEs differs from that of non-Hispanic white male-owned businesses in the local transportation contracting industry. The study team examined business success in terms of:

- Participation in the public and private sector;
- Relative capacity;
- Business closure, expansion, and contraction; and
- Business receipts and earnings.

Appendix H provides details about BBC's quantitative analyses of success of businesses. BBC also collected and analyzed information from interviews with business owners and managers and others knowledgeable about the local contracting industry.

Quantitative analysis of participation in the public and private sectors. BBC drew on information from availability interviews to examine any patterns of MBE/WBE and non-Hispanic white male-owned business participation in the industry. There was some indication from those data that MBE/WBE engineering businesses were slightly more likely to have pursued work in the public sector than the private sector within the past five years. MBE construction businesses were slightly more likely to bid as prime contractors on public sector work than private sector work.

Compared to majority-owned businesses (82%), a slightly smaller percentage of MBEs (78%) and WBEs (74%) reported bidding on private sector construction work in the past five years. Similarly, a smaller percentage of MBEs (80%) and WBEs (70%) than majority-owned businesses (89%) reported bidding on private sector engineering work in the past five years. Those results suggest that barriers to competing for private sector work may have a greater impact on MBE/WBEs than on majority-owned businesses.

Quantitative analysis of relative capacity. BBC collected information about “relative capacity” from businesses as part of availability interviews with owners and managers. A business’ relative capacity refers to the largest contract or subcontract that the business bid on or performed within the five years preceding the time when the study team interviewed the business. BBC collected capacity information from businesses as part of availability interviews with owners and managers. Availability interview data indicated that WBE/MBEs have lower relative capacities than majority-owned businesses in the construction and engineering industries. Further analyses indicated that work specializations and age of business explain those differences. In other words, there was no indication that MBEs or WBEs have lower relative capacities than majority-owned businesses that work in the same industries and that have been in business for the same lengths of time.

Quantitative analysis of business closures, expansions, and contractions. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. The report included analysis of business closures, contractions, and expansions in California between 2002 and 2006.⁷ Data were available for Black American-owned businesses, Hispanic American-owned businesses, Asian American-owned businesses, and non-Hispanic white-owned businesses. Those data indicated that Black American-owned businesses (42%) closed at a substantially higher rate than non-Hispanic white-owned businesses (31%) between 2002 and 2006. Hispanic American-owned businesses (34%) and Asian American-owned businesses closed at a slightly higher rate than non-Hispanic white-owned businesses.

Quantitative analysis of business receipts and earnings. BBC examined several sources of information to analyze business receipts and earnings for local businesses.

Business receipts. Analysis of the 2007 Survey of Business Owners (SBO), which was part of the U.S. Census Bureau’s 2007 Economic Census, indicate that average receipts for MBE/WBEs in the relevant geographic market area are lower than average receipts for all businesses considered together. Based on data for all of California, Hispanic American-owned businesses and Native American-owned businesses showed the lowest average receipts among MBE/WBE groups. Those differences were evident in the construction industry, engineering and goods and services.

BBC also analyzed revenue data for businesses in the local transportation contracting industry that the study team collected as part of availability interviews. Key results included the following:

- A larger percentage of MBE and WBE construction and engineering businesses have annual revenue of only \$1 million or less compared with majority-owned businesses; and
- A smaller percentage of MBEs and WBEs than majority-owned businesses earn relatively high levels of revenue in the construction and engineering industries.

⁷ Lowrey, Ying. 2010. “Race/Ethnicity and Establishment Dynamics, 2002-2006.” U.S. Small Business Administration Office of Advocacy. Washington D.C. Those data were the most recent business closure, contractions, and expansion data available for California at the time of the disparity study. No recent studies have examined business closure, contractions, and expansion data available for the relevant geographic market area.

Data from the availability interviews, along with data from the 2007 SBO, suggest that MBE/WBEs are more likely to be small businesses than majority-owned businesses.

Business owner earnings. The 2000 U.S. Census of Population and 2009-2011 ACS provide data on the earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. BBC analyzed those data for the construction, engineering, and goods and services industries in the relevant geographic market area for 1999 (the time period reported in the 2000 Census) and between 2008 and 2011 (the time period reported in the ACS data). In the local construction industry between 2008 and 2011, minority owners of construction businesses earned substantially less than non-minority owners of construction businesses, and those differences were statistically significant. With regard to gender, female owners of construction businesses tended to earn nearly as much as male owners of construction businesses.

For the engineering and goods and services industries, BBC relied on data for the entire state of California due to sample size issues with data pertaining specifically to the relevant geographic market area. In the California engineering industry between 2008 and 2011, “other” minority owners of engineering businesses earned significantly less than non-minority owners of engineering businesses. Similarly, female owners of engineering businesses earned significantly less than male owners of engineering businesses. Hispanic American and Asian-Pacific American owners of engineering businesses did not differ significantly from non-minority owners in terms of earnings.

In the California goods and services industry between 2008 and 2011, only Hispanic American owners of goods and services businesses earned significantly less than non-minority owners of goods and services businesses. None of the other minority groups that the study team examined differed significantly from non-minority owners of goods and services businesses. With regard to gender, female owners of goods and services businesses tended to earn more than male owners of goods and services businesses, but that difference was not statistically significant.

BBC performed regression analyses using 2009-2011 ACS data to examine whether there were differences in business earnings in the construction and engineering industries between 2008 and 2011 between minorities and non-Hispanic whites and between women and men after statistically controlling for certain race- and gender-neutral personal characteristics.

In construction, minority owners of construction businesses did not differ significantly from non-minority owners in earnings after statistically controlling for race- and gender-neutral personal characteristics. Similarly, female owners of construction businesses did not differ significantly from male owners after statistically controlling for race- and gender-neutral personal characteristics.

In engineering, minority owners of engineering businesses did not differ significantly from non-minority owners in earnings after statistically controlling for race- and gender-neutral personal characteristics. However, female owners of engineering businesses tended to earn substantially less than male owners after statistically controlling for race- and gender-neutral personal characteristics.

Qualitative information about success of businesses. BBC also collected qualitative information about success of businesses in the local transportation contracting industry. BBC collected that information through in-depth interviews, availability interviews, and public meetings.

Disadvantages for small businesses. Many interviewees indicated that small businesses are at a disadvantage when competing in the transportation contracting industry. Interviewees reported that public agency contracting processes and requirements often put small businesses at a disadvantage when competing for public sector work.

Some small business owners said that it was more difficult for smaller firms to market and identify contract opportunities. For example:

- The Asian American owner of a DBE-certified engineering company said that it is difficult for a small firm to learn about work, because small firms do not have sufficient capacity to effectively market and complete project work. He said it is difficult to “knock on doors,” attend pre-proposal meetings and outreach events, and also meet current project obligations.
- The female owner of an SLBE-certified environmental consulting company reported that overall, running a small business is challenging and that there isn’t time to do all of the marketing and relationship-building she would like to do. “Just keeping up with the website is hard,” she said.
- The Subcontinent Asian American female owner of a certified engineering firm said, “It is difficult for a small firm to spend time marketing. Big firms can afford to hire someone to track opportunities.”
- **Some interviewees indicated that the size of public sector contracts presents a barrier for small businesses.** For example:
 - The female owner of a WBE-certified construction company said, “Another thing that affects us [small businesses], is bundling of the contracts ... and particularly SANDAG projects are pretty big. If they would break a big job up into three or four they would get a lot more participation.”
 - The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that another way to help small firms would be the “unbundling of contracts ... because the more you bid out the more competitive bids will come in. ... This may be difficult for contract managers, but good for small firms.”
 - The president a DBE-certified Black American engineering firm said, “SANDAG opportunities are harder to find because most of their projects are too large for a firm like ours.”
 - When asked about why his company did not bid on SANDAG project, the vice president of a WBE-certified Hispanic construction company said, “They make it so large that these small contractors cannot bid on those.”

Some business owners, especially owners of smaller of newly-formed companies, indicated that prequalification requirements presented a barrier. For example:

- The owner of a certified Native American-owned construction firm who said that there can be too much paperwork involved in prequalification requirements. He said, “Most of our jobs [are] \$10,000 to \$25,000 on a \$5 million contract, and they want you to fill out paperwork for three days. There’s normally only one of us. It’s hard to go out and work and do the paperwork. Maybe they need an agency where somebody has all the forms filled out and you just sign your name.”
- The owner of a DBE-certified Black American-owned goods and services firm said that prequalification requirements are a barrier to new businesses because it is hard to prove your capabilities without previous work experience. She said, “I need a break so I can at least get in the door and show you that I can get the job done for you.”

Some interviewees indicated that bidding processes presented a barrier to firms seeking public sector work. For example:

- The owner of a majority-owned goods and services firm said that the bidding process is often expensive, which can be inhibitive for small businesses. He said, “That’s the overhead that every one of your customers pays for even if you don’t get the work.”
- The co-owner of a WBE-certified construction firm said that the paperwork requirements in the public sector bidding can be over burdensome.

Some interviewees indicated that experience requirements were a barrier to doing business with public agencies. For example:

- A public meeting participant said: “I have been to couple of these conferences where they encourage SBE participation. However, most of these projects (including the Mid-Coast project) require subs to have prior experience in large projects. For a small and emerging business such as myself, I feel it is almost impossible to get these jobs because of this requirement. Even though we are fully capable of doing the actual work, we do not have prior experience working on large projects.”
- The owner of an SBE-certified surveying firm said, “I know that it is all about establishing relationships and getting to know these people, and getting to know them well enough that they’ll trust you on a bid opportunity and put you on their team. However, it’s kind of a catch-22 for most companies that, we don’t have the experience and we are looking for that one chance for the experience, but we’re not going to get those opportunities because we don’t have the experience.”
- **Slow payment by public agencies or by prime contractors was reported to be an issue by many interviewees.** Interviewees indicated that slow payment is more of a problem with public sector work than with private sector work. This barrier can adversely affect small businesses, especially those with limited access to financing. For example:

- The Black American owner of a WBE-certified security company said that he sometimes has to wait 45 days to get paid, which is a burden on a small business that does not have a lot of cash on hand.
- In regards to timely payment, the Subcontinent Asian American female owner of a DBE-certified engineering firm said, “That’s an issue. They pay us when they get paid and that can string us out for at least 90 days. That is very difficult for a small business.”
- The owner of a certified W/MBE consulting firm said, “We are just waiting for checks to come in and the payment. And with SANDAG it’s outrageous. It is sometimes two or three months. One time it was like three or four months before we finally got paid and I don’t know if it was the cost of primes submitting the invoices late or whatever but being a small business, we can’t wait that long.”
- The Caucasian project manager of a HUBZone-certified construction company said that prompt payment is the company’s primary complaint when doing jobs for SANDAG and the NCTD. He compared the process to improvements made by the federal government, which now requires payment within 14 days as a result of the Prompt Payment Act. He said that although the law says that SANDAG contracts must pay within 30 days of an invoice, it often does not happen.

Impact of recent economic downturn. Many business owners and managers of large and small businesses reported that the recent economic downturn has had an effect on all businesses, but especially on small businesses.

- Most interviewees indicated that market conditions since 2008 have made it difficult to stay in business.
- Many business owners and managers reported that they have seen much more competition during the economic downturn.
- Several interviewees noted that a slowdown in private sector work resulted in more companies pursuing public sector work.
- Some business owners and managers said that economic conditions were improving, but some reported that they had yet to see any improvement.

Impact of disadvantages for small businesses on MBE/WBEs. Because MBE/WBEs are more likely than majority-owned businesses to be small businesses, any barriers for small businesses may have a disproportionate effect on MBEs and WBEs. Minority and female interviewees indicated that many of the barriers that they face are due to the size of their business. In interviews, written comments, and public testimony that the study team analyzed, some interviewees indicated that difficulties for minorities and women beyond those associated with being a small business. Two of the most frequently mentioned types of barriers were negative stereotypes for minorities and women and the presence of a “good ol’ boy” network in the local industry.

- Some interviewees indicated that prime contractors or customers had discriminated against businesses based on race/ethnicity or gender.

- Several interviewees reported that minorities and women are the subject of stereotypical attitudes.
- Many business owners reported widespread abuse of the DBE Program through false reporting of DBE participation and through falsifying good faith efforts.
- The presence of a “good ol’ boy” network was widely reported across minority, female, and white male interviewees.
- Views as to whether racial- or gender-based discrimination affected MBE/WBEs did not completely align according to the race/ethnicity and gender of the interviewee. Not every minority and female interviewee indicated that discrimination affected the local marketplace today. Appendix J presents views from a broad range of business owners and managers who are knowledgeable about the local transportation contracting industry.

Effects of success of businesses. The differences that the study team observed between MBE/WBEs and non-Hispanic white male-owned businesses regarding business success may affect business outcomes for MBE/WBEs in the local transportation contracting industry. Quantitative and qualitative analyses suggest that, in general, MBE/WBEs may be less successful than non-Hispanic white male-owned businesses and they may close at greater rates.

- Disparities in business receipts and earnings for certain MBE/WBE groups may make it difficult for existing MBE/WBEs to obtain the resources to effectively compete for contracts, particularly those contracts that are relatively large in size. Such limitations may affect the number and types of public sector contracts and subcontracts on which MBE/WBEs are able to bid.
- Because of the nature of the data pertaining to business success, it is difficult to quantify the effect that associated barriers may have had on MBE/WBE availability for contracts that ICTC awarded during the study period. However, barriers to business success—along with barriers to entry and advancement; business ownership; and access to capital, bonding and insurance—may reduce the existing availability of MBE/WBEs for ICTC transportation contracts.

CHAPTER 5.

Availability Analysis

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Availability Analysis

BBC analyzed the availability of minority- and women-owned business enterprises (MBE/WBEs) that are ready, willing, and able to perform on Imperial County Transportation Commission (ICTC) prime contracts and subcontracts. ICTC can use that and other information from the study to help it implement the Federal Disadvantaged Business Enterprise (DBE) Program. Chapter 5 describes BBC's availability analysis in eight parts:

- A. Purpose of the availability analysis;
- B. Definitions of MBEs, WBEs, certified DBEs, potential DBEs, and majority-owned businesses;
- C. Information collected about potentially available businesses;
- D. Businesses included in the availability database;
- E. MBE/WBE availability calculations on a contract-by-contract basis;
- F. Availability results;
- G. Potential base figure for ICTC's overall DBE goal; and
- H. Implications for any DBE contract goals.

Appendix D provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of MBE/WBEs for ICTC and local agency prime contracts and subcontracts primarily to:

- Use as inputs in the disparity analysis; and
- Help develop the base figure for ICTC's overall DBE goal.

Inputs in the disparity analysis. BBC's analysis of the availability of MBE/WBEs for ICTC work provides a benchmark against which to compare MBE/WBE utilization in the disparity analysis. In the disparity analysis, BBC compared the percentage of ICTC contract dollars that went to MBE/WBEs during the study period (i.e., utilization) to the percentage of dollars that might be expected to go to those businesses based on their availability for specific types and sizes of ICTC contracts (i.e., availability). Comparisons between utilization and availability allowed the study team to determine whether any MBE/WBE groups were underutilized during the study period relative to their availability for ICTC work.

Base figure for ICTC's overall DBE goal. ICTC implements the Federal DBE Program, and, as part of the program, it must establish an overall aspirational goal for DBE participation in its Federal Transit Administration (FTA)-funded contracts. ICTC must begin the goal-setting process by calculating a base figure for the availability of DBEs, which can be similar to

determining MBE/WBE availability in a disparity analysis.¹ However, unlike calculating overall availability, the base figure calculation only includes those MBE/WBEs that appear that they would be eligible for DBE certification or are currently certified (i.e., potential DBEs). The Final Rule effective February 28, 2011 and the United States Department of Transportation's (USDOT's) "Tips for Goal-Setting" explain that MBE/WBEs that are not currently certified as DBEs but that could be DBE-certified should be counted as DBEs in the base figure. However, businesses that have been denied certification, have been decertified, or have graduated from the DBE Program should not be counted in the base figure. Tips for Goal-Setting" discusses multiple ways that an agency might establish a base figure, and some of those methods involve using the number of certified DBEs if an agency feels that its DBE directory accurately reflects the number of potential DBEs in the agency's area.

B. Definitions of MBEs, WBEs, Certified DBEs, Potential DBEs, and Majority-owned Businesses

To interpret the availability analysis, as well as other analyses presented in the disparity study, it is useful to understand the differences between all MBE/WBEs and MBE/WBEs that are DBE-certified or could be DBE-certified. In addition, it is important to understand how BBC treated businesses owned by minority women.

MBE/WBEs. The definitions that the study team used for MBE/WBE groups in the disparity study were consistent with the definitions specified in 49 Code of Federal Regulations (CFR) Part 26. The study team examined utilization, availability, and disparities separately for Black American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American-, and non-Hispanic white women-owned businesses.

All MBE/WBEs, not only certified DBEs. The study team analyzed the possibility that race- or gender-based discrimination affected the participation of MBE/WBEs in ICTC work through analyses of availability and utilization based on the race/ethnicity and gender of business ownership and not on DBE certification status. Therefore, the study team counted businesses as minority- or women-owned regardless of whether they were, or could be, certified as DBEs through the California United Certification Program (CUCP). Analyzing the availability and utilization of MBE/WBEs regardless of DBE certification allows one to assess whether there are disparities affecting all MBE/WBEs and not just certified businesses. Businesses may be discriminated against because of the race or gender of their owners regardless of whether they have successfully applied for certification.

Moreover, the study team's analyses of whether MBE/WBEs face disadvantages include the most successful, highest-revenue MBE/WBEs. A disparity study that focuses only on MBE/WBEs that are, or could be, DBE-certified would improperly compare outcomes for "economically disadvantaged" businesses with all other businesses, including both non-Hispanic white male-owned businesses and relatively successful MBE/WBEs.² Limiting the analyses to a group of businesses that only includes low-revenue companies would have inappropriately made it more

¹ 49 CFR Section 26.45 (c)

² In addition, 49 CFR Part 26 allows certification of white male-owned businesses as DBEs. Thus, disparity analyses based on certified DBEs might not purely be an analysis of disparities based on race/ethnicity and gender.

likely for the study team to observe disparities for MBE/WBE groups.³ The courts that have reviewed disparity studies have accepted analyses based on race/ethnicity and gender of ownership rather than on DBE certification status.

Certified DBEs. Certified DBEs are businesses that are certified as such through CUCP, which means that they are businesses that:

- Are owned and controlled by one or more individuals who are presumed to be both socially and economically disadvantaged according to 49 CFR Part 26;⁴ and
- Meet the gross revenue and personal net worth requirements described in 49 CFR Part 26.

Because implementation of the Federal DBE Program requires ICTC to track DBE utilization, BBC reports utilization results for all MBE/WBEs and separately for those MBE/WBEs that are DBE-certified. However, BBC does not report availability or disparity analysis results separately for certified DBEs.

Businesses owned by minority women. Businesses owned by minority women presented a data coding challenge in the availability and utilization analyses. BBC considered four options for coding businesses owned by minority women:

- Coding those businesses as both minority-owned and women-owned;
- Creating unique groups of minority women-owned businesses;
- Grouping minority women-owned businesses with all other women-owned businesses; and
- Grouping minority women-owned businesses with their corresponding minority groups.

BBC chose not to code businesses as both women-owned and minority-owned to avoid double-counting certain businesses when reporting total MBE/WBE utilization and availability. Creating groups of minority women-owned businesses that were distinct from minority male-owned businesses (e.g., Black American women-owned businesses versus Black American male-owned businesses) was also unworkable because some minority groups had utilization and availability so low that further disaggregation by gender made it even more difficult to interpret the results.

After rejecting the first two options, BBC then considered whether to group minority women-owned businesses with all other women-owned businesses or with their corresponding minority groups. BBC chose the latter (e.g., grouping Black American women-owned businesses with all other Black American-owned businesses). Thus, “WBEs” in this report refers to non-Hispanic white women-owned businesses. The study team’s definition of WBE gives ICTC

³ An analogous situation concerns analysis of possible wage discrimination. A disparity analysis that would compare wages of minority employees to wages of all employees should include both low- and high-wage minorities in the statistics for minority employees. If the analysis removed high-wage minorities from the analyses, any comparison of wages between minorities and non-minorities would more likely show disparities in wage levels.

⁴ The Federal DBE Program specifies that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women of any race or ethnicity, and any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration are presumed to be disadvantaged.

information to answer questions that sometimes arise pertaining to the utilization of non-Hispanic white women-owned businesses, such as whether the work that goes to MBE/WBEs disproportionately goes to businesses owned by non-Hispanic white women.

Potential DBEs. Potential DBEs are MBE/WBEs that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26 (regardless of actual certification). The study team did not count businesses that have been decertified or had graduated from the DBE Program as potential DBEs in this study. BBC examined the availability of potential DBEs as part of helping ICTC calculate the base figure of its overall DBE goal. Figure 5-1 provides further explanation of BBC's definition of potential DBEs.

Majority-owned businesses. Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white males). In the utilization and availability analyses, the study team coded each business as minority-, women-, or majority-owned. Majority-owned businesses included any non-Hispanic white male-owned businesses that were certified as DBEs.⁵

All other businesses. The study team categorized all businesses that were not "potential DBEs" as "all other businesses" in the base figure analysis. All other businesses included all MBE/WBEs that were not currently DBE-certified and that:

- Had graduated from the DBE Program;
- Had been denied DBE certification; or
- Appeared to be too large for DBE certification based on revenue size standards.

All other businesses also included majority-owned businesses that were not DBE-certified, which was all majority-owned businesses.

Figure 5-1. Definition of potential DBEs

To help ICTC calculate its overall DBE goal, BBC did not include the following types of MBE/WBEs in its definition of potential DBEs:

- MBE/WBEs that had graduated from the DBE Program and not been recertified;
- MBE/WBEs that are not currently DBE-certified that had applied for certification with CUCP and had been denied; and
- MBE/WBEs that are not currently DBE-certified that appeared to have average annual revenues over the most recent three years so high as to deem them ineligible for DBE certification.

At the time of this study, the overall revenue limit for DBE certification was \$22,410,000 based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to the U.S. Small Business Administration (SBA) small business size standards. Only a few MBE/WBEs appeared to have exceeded those revenue limits based on information that they provided as part of availability interviews. The revenue categories used to classify firms reflect recent changes to the Table of Small Business Size Standards published by the SBA.

Business owners must also meet USDOT personal net worth limits for their businesses to qualify for DBE certification. The personal net worth of business owners was not available as part of this study and thus was not considered when determining potential DBE status.

⁵ There were no DBE-certified white male-owned businesses that were utilized on or potentially available for ICTC transportation contracts.

C. Information Collected about Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the types of transportation-related construction and engineering contracts that ICTC awarded during the study period. BBC identified specific subindustries for inclusion in the availability analysis and identified the geographic market areas in which ICTC awarded most of the corresponding contract dollars (i.e., the relevant geographic market area). BBC considered San Diego, Orange, and Imperial counties as the relevant geographic market area for the study. The study team then developed a database of potentially available businesses through interviews with local business establishments within relevant subindustries. That method of examining availability is sometimes referred to as a "custom census" and has been accepted in federal court. Figure 5-2 summarizes characteristics of BBC's custom census approach to examining availability.

Overview of availability interviews. The study team conducted telephone interviews with business owners and managers to identify businesses that are potentially available for ICTC transportation prime contracts and subcontracts.⁶ BBC began the interview process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace listings.⁷ BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the transportation contracts that ICTC and local agencies awarded during the study period. D&B provided 11,903 business listings related to those work specialization codes.

Information collected in availability interviews. BBC worked with Customer Research International (CRI) to conduct telephone interviews with the owners or managers of the identified business establishments. Interview questions covered many topics about each organization, including:

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Qualifications and interest in performing transportation-related work for ICTC and other state and local government agencies;

Figure 5-2. Summary of the strengths of BBC's "custom census" approach

Federal courts have reviewed and upheld "custom census" approaches to examining availability. Compared with some other previous court-reviewed custom census approaches, BBC added several layers of screening to determine which businesses are potentially available for work in the transportation contracting industry in California.

For example, the BBC analysis included discussions with businesses about interest in state and local government work, contract role, and geographic locations of their work — items not included in some of the previous court-reviewed custom census approaches. BBC also analyzed the sizes of contracts and subcontracts on which businesses have bid on or performed in the past.

⁶ The study team offered business representatives the option of completing interviews via fax or e-mail if they preferred not to complete interviews via telephone.

⁷ D&B Marketplace is accepted as the most comprehensive and complete source of business listings in the nation.

- Qualifications and interest in performing transportation-related work as a prime contractor or as a subcontractor;
- Ability to work in specific geographic regions of California;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Appendix D provides details about specific interview questions and an example of the availability interview instrument.

Considering businesses as potentially available. CRI asked business owners and managers that they successfully contacted several questions concerning the types of work that their companies performed; their past bidding histories; and their qualifications and interest in working on contracts for ICTC and other state and local government agencies, among other topics. BBC considered businesses to be potentially available for ICTC transportation prime contracts or subcontracts if they reported possessing *all* of the following characteristics:

- a. Being a private business (as opposed to a nonprofit organization);
- b. Having performed work relevant to ICTC transportation contracting;
- c. Having bid on or performed transportation-related public or private sector prime contracts or subcontracts in California in the past five years; and
- d. Being qualified for and interested in work for ICTC and other state or local governments.⁸

BBC also considered the following information to determine if businesses were potentially available for specific contracts that ICTC awarded during the study period:

- e. The ability to work in specific regions of California;
- f. The largest contract bid on or performed in the past; and
- g. The year the business was established.

D. Businesses Included in the Availability Database

After conducting availability interviews with thousands of businesses in San Diego, Imperial and Orange Counties, the study team developed a database of information about businesses that are potentially available for ICTC transportation contracting work. The study team used the availability database to produce availability benchmarks to:

- Determine whether there were any disparities in ICTC's utilization of MBE/WBEs during the study period; and
- Help calculate a base figure for ICTC's overall DBE goal.

⁸ That information was gathered separately for prime contract and subcontract work.

Data from the availability interviews allowed BBC to develop a representative depiction of businesses that are qualified and interested in ICTC work, but it should not be considered an exhaustive list of every business that could potentially participate in ICTC transportation work. Appendix D provides a detailed discussion about why the database should not be considered an exhaustive list of potentially available businesses.

Figure 5-3 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. The information in Figure 5-3 solely reflects a simple count of firms with no analysis of availability for specific ICTC contracts. Thus, it represents only a first step toward analyzing the availability of MBE/WBEs for ICTC work.

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

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

Source:
BBC Research & Consulting availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	20	2.1 %
Asian-Pacific American-owned	48	5.0
Subcontinent Asian American-owned	23	2.4
Hispanic American-owned	114	11.8
Native American-owned	17	1.8
Total MBE	222	23.0 %
WBE (white women-owned)	107	11.1
Total MBE/WBE	329	34.1 %
Total majority-owned firms	635	65.9
Total firms	964	100.0 %

As shown in Figure 5-3, the study team considered 964 businesses to be potentially available for specific transportation contracts that ICTC and local agencies awarded during the study period. Of those businesses, 329 (34%) were MBEs or WBEs.

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

BBC analyzed information from the availability database to develop dollar-weighted availability estimates for use in the disparity analysis and in helping ICTC set its overall DBE goal. Dollar-weighted availability estimates represent the percentage of ICTC transportation contracting dollars that MBE/WBEs would be expected to receive based on their availability for specific types and sizes of ICTC transportation-related construction and engineering prime contracts and subcontracts. BBC's approach to calculating availability was a bottom up, contract-by-contract "matching" approach.

Steps to calculating availability. Only a proportion of the businesses in the availability database were considered potentially available for any given ICTC construction, engineering or goods and services prime contract or subcontract (referred to collectively as "contract elements"). BBC first examined the characteristics of each specific contract element, including type of work, contract size, and contract date. BBC then identified businesses in the availability database that perform work of that type, of that size, in that role (i.e., prime contractor or subcontractor), and that were in business in the year that the contract element was awarded.

BBC identified the specific characteristics of each of the 47 ICTC prime contracts and subcontracts that the study team examined as part of the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
 - Are qualified and interested in performing transportation-related work in that particular role for that specific type of work for ICTC and other local public agencies;
 - Are able to serve customers in that geographic location;
 - Have bid on or performed work of that size; and
 - Were in business in the year that ICTC awarded the contract.
2. 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.

BBC repeated those steps for each contract element that the study team examined as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was a dollar-weighted estimate of overall availability of MBE/WBEs and estimates of availability for each MBE/WBE group. Figure 5-4 provides an example of how BBC calculated availability for a specific subcontract associated with an engineering prime contract that ICTC awarded during the study period.

Improvements on a simple “head count” of businesses.

BBC used a custom census approach to calculating MBE/WBE availability for ICTC work rather than using a simple “head count” of MBE/WBEs (i.e., simply calculating the percentage of all transportation contracting businesses in the relevant geographic market area that are minority- or women-owned). Using a custom census approach typically results in lower availability estimates for MBEs and WBEs than a headcount approach due in large part to BBC’s consideration of “relative capacity” in measuring availability and to dollar-weighting availability results. MBE/WBEs tend to be smaller than other businesses, and the largest contracts that they

Figure 5-4. Example of an availability calculation for a ICTC subcontract

On a contract that ICTC awarded in 2012, the prime contractor awarded a subcontract worth \$700 for testing services work. To determine the overall availability of MBE/WBEs for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2012;
- b. Indicated that they performed testing services work;
- c. Reported bidding on work of similar or greater size in the past;
- d. Reported qualifications and interest in working as a subcontractor on ICTC and other local agency transportation projects.

The study team found 13 businesses in the availability database that met those criteria. Of those businesses, 1 were MBEs or WBEs. Thus, MBE/WBE availability for the subcontract was 7.7 percent (i.e., $1/13 \times 100 = 7.7$).

have bid on or performed also tend to be smaller than those of other businesses. Therefore, MBE/WBEs are less likely to be identified as available for the largest prime contracts and subcontracts.

There are several important ways in which BBC's custom census approach to measuring availability is more precise than completing a simple head count.

BBC's approach accounts for type of work. USDOT suggests calculating availability based on businesses' abilities to perform specific types of work. USDOT gives the following example in "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program:"

If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction businesses that are MBEs or WBEs and the percentage of trucking businesses that are MBEs or WBEs, and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall MBE/WBE availability.⁹

The BBC study team took type of work into account by examining 14 different subindustries related to construction, engineering, and goods and services as part of estimating availability for ICTC work.

BBC's approach accounts for qualifications and interest in transportation-related prime contract and subcontract work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors, or both on ICTC transportation work, in addition to the consideration of several other factors related to ICTC prime contracts and subcontracts (e.g., contract types and sizes):

- Only businesses that reported being qualified for and interested in working as prime contractors were counted as available for prime contracts;
- Only businesses that reported being qualified for and interested in working as subcontractors were counted as available for subcontracts; and
- Businesses that reported being qualified for and interested in working as both prime contractors and subcontractors were counted as available for both prime contracts and subcontracts.

BBC's approach accounts for the size of prime contracts and subcontracts. BBC 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., relative 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, BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value.

BBC's approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Western States Paving*

⁹ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>

Company v. Washington State DOT, Rothe Development Corp. v. U.S. Department of Defense,¹⁰ and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*¹¹).

BBC’s approach generates dollar-weighted results. BBC examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements. BBC’s approach is consistent with USDOT’s “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program,” which suggests a dollar-weighted approach to calculating availability.

F. Availability Results

BBC used a custom census approach to estimate the availability of MBE/WBEs and majority-owned businesses for the 47 transportation-related construction, engineering, and goods and services prime contracts and subcontracts that ICTC and local agencies awarded during the study period. Figure 5-5 presents overall dollar-weighted availability estimates by MBE/WBE group for those contracts.

Overall, MBE/WBE availability for ICTC transportation contracts is 9.6 percent. Hispanic American-owned businesses (3.1%), WBEs (2.9%), and Asian-Pacific American-owned businesses (1.3%) exhibited the highest availability percentages among all MBE/WBE groups. Note that availability estimates varied when the study team examined different subsets of those contracts.

Figure 5-5.
Overall dollar-weighted availability estimates by MBE/WBE group

Note:
Numbers rounded to nearest tenth of 1 percent.
Numbers may not add to totals due to rounding.
For more detail and results by group, see Figure K-2 in Appendix K.

Source:
BBC Research & Consulting availability analysis.

Race/ethnicity and gender	Utilization benchmark (availability %)
Black American-owned	0.9 %
Asian-Pacific American-owned	1.3
Subcontinent Asian American-owned	0.7
Hispanic American-owned	3.1
Native American-owned	0.6
Total MBE	6.7 %
WBE (white women-owned)	2.9
Total MBE/WBE	9.6 %

G. Potential Base Figure for ICTC’s Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ICTC’s USDOT-funded transportation contracts. BBC calculated a potential base figure using the same availability database and approach described above except that calculations only included potential DBEs (including currently certified DBEs) and only included FTA-funded prime contracts and subcontracts. BBC’s approach to calculating ICTC’s base figure is consistent with:

¹⁰ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

¹¹ *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

- Court-reviewed methodologies in several states, including Washington, California, Illinois, and Minnesota;
- Instructions in The Final Rule effective February 28, 2011 that outline revisions to the Federal DBE Program; and
- USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."

For more details about ICTC's overall DBE goal, see Chapter 8.

Potential base figure for FTA-funded contracts. BBC's availability analysis indicates that the availability of potential DBEs for ICTC's FTA-funded transportation contracts is 7.2 percent (see Table K-16 in Appendix K). ICTC might consider 7.2 percent as the base figure for its overall goal for DBE participation, assuming that the types, sizes, and locations of FTA-funded contracts that the agency awards in the time period that the goal will cover are similar to the types of FTA-funded contracts that the agency awarded during the study period.

If ICTC determines that the number of MBE/WBEs that decide to become certified as DBEs will remain relatively stable in the future, then ICTC might consider the availability of *certified DBEs* when determining the base figure of its overall DBE goal. Certified DBEs might be expected to receive 2.2 percent of ICTC's FTA-funded transportation prime contract and subcontract dollars based on their availability for that work. Based on the availability of certified DBEs, ICTC might consider 2.2 as the base figure for its overall DBE goal.

Differences from overall MBE/WBE availability. The availability of potential DBEs for FTA-funded contracts is less than the overall MBE/WBE availability presented in Figure 5-5. BBC's calculation of overall MBE/WBE availability includes three groups of MBE/WBEs that the study team did not count as potential DBEs when calculating the base figure:

- MBE/WBEs that graduated from the DBE Program (that were not recertified);
- MBE/WBEs that are not currently DBE-certified that had applied for DBE certification with CUCP and had been denied; and
- MBE/WBEs that are not currently DBE-certified that reported annual revenues over the most recent three years so high as to deem them ineligible for DBE certification.

In addition, the study team's analyses for calculating the base figure only included FTA-funded prime contracts and subcontracts. The calculations for overall MBE/WBE availability included both FTA- and locally-funded transportation prime contracts and subcontracts.

Additional steps before ICTC determines its overall DBE goal. ICTC must consider whether to make a “step-2” adjustment to the base figure as part of determining its overall DBE goal. Step-2 adjustments can be upward or downward, but there is no requirement for ICTC to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 8 discusses factors that ICTC might consider in deciding whether to make a step-2 adjustment to the base figure.

H. Implications for Any DBE Contract Goals

If ICTC chooses to use DBE contract goals in the future, it might use information from the availability analysis when setting any DBE contract goals. It might also use information from a current DBE directory, a current bidders list, or other sources that could provide information about the availability of MBE/WBEs to participate in particular contracts.

The Federal DBE Program allows flexibility in how agencies set DBE contract goals. DBE goals on some contracts might be higher than the overall DBE goal. DBE goals on other contracts might be lower than the overall DBE goal. In addition, there may be some FTA-funded contracts for which setting DBE contract goals would not be appropriate (e.g. a contract that appears to have no subcontracting opportunities).

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about minority- and women-owned business enterprise (MBE/WBE) participation on Federal Transit Administration- (FTA-) funded transportation prime contracts and subcontracts that the Imperial County Transportation Commission (ICTC) awarded during the study period. Chapter 3 and Appendix C provide additional information about utilization data collection and methodology.

Chapter 6 is organized in three parts:

- A. Overview of the utilization analysis;
- B. Overall utilization results; and
- C. Utilization results for ICTC versus local agencies.

A. Overview of the Utilization Analysis

BBC analyzed FTA-funded transportation contracts that ICTC and local agencies awarded between January 1, 2008 and December 31, 2012. The analysis included contracts using FTA funds that ICTC passed through to the cities of El Centro and Brawley (referred to here as local agencies). These local agencies apply ICTC's implementation of the Federal DBE Program when they administer contracts using FTA funds.

Definition of utilization. The study team measured MBE/WBE participation in terms of “utilization” — the percentage of prime contract and subcontract dollars that ICTC and local agencies awarded to MBE/WBEs during the study period. Figure 6-1 presents more information about BBC's definition of utilization and how it was measured.

Figure 6-1. Defining and measuring “utilization”

“Utilization” of MBE/WBEs refers to the share of prime contract and subcontract dollars that an agency awarded to MBE/WBEs during a particular time period. BBC measures the utilization of all MBE/WBEs, regardless of certification, and separately of MBE/WBEs that are DBE-certified. BBC examines utilization separately by racial/ethnic and gender groups.

BBC measures MBE/WBE utilization as the percentage of total prime contract and subcontract dollars. For example, if 5 percent of prime contract and subcontract dollars went to WBEs on a particular set of contracts, WBE utilization for that set of contracts would be 5 percent.

Information about MBE/WBE utilization is instructive on its own, but it is even more instructive when it is compared with the utilization that might be expected based on the availability of MBE/WBEs for ICTC work. BBC presents such comparisons as part of the disparity analysis in Chapter 7.

Differences between BBC's analysis and ICTC Uniform Reports of DBE

Awards/Commitments and Payments. The United States Department of Transportation (USDOT) requires ICTC to submit reports about Disadvantaged Business Enterprise (DBE) utilization on its FTA-funded transportation contracts twice each year (typically in June and December). BBC's analysis of MBE/WBE utilization goes beyond what ICTC is required to report to USDOT, in that BBC counts all MBE/WBEs, not only certified DBEs.

Per USDOT regulations, ICTC is required to prepare DBE utilization reports for FTA based on information about certified DBEs. ICTC does not track the utilization of MBE/WBEs that are not DBE-certified. In contrast, BBC's utilization analyses include utilization of *all* MBE/WBEs (certified and non-certified) — not just the utilization of certified DBEs. The study team counted businesses as MBE/WBEs that may have once been DBE-certified and graduated (or let their certifications lapse) as well as MBE/WBEs that have never been certified. BBC provides utilization results for all MBE/WBEs and separately for MBE/WBEs that were DBE-certified during the study period.¹

B. Overall Utilization Results

Figure 6-2 presents overall MBE/WBE utilization (as a percentage of total dollars) on FTA-funded transportation contracts that ICTC and local agencies awarded during the study period, including both prime contracts and subcontracts. The darker portion of the bar presents ICTC's utilization of MBE/WBEs that were DBE-certified during the study period.

As shown in Figure 6-2, overall, MBE/WBEs received 3.2 percent of ICTC and local transportation prime contract and subcontract dollars during the study period. About 0.5 percent of the overall dollars went to MBE/WBEs that were DBE-certified.

¹ Although businesses that are owned and operated by socially- and economically-disadvantaged white men can become certified as DBEs, BBC identified no DBE-certified white male-owned businesses that ICTC utilized during the study period. In other words, all DBEs that ICTC utilized during the study period were MBE/WBEs. Thus, utilization results for certified DBEs are a subset of the utilization results for all MBE/WBEs.

Figure 6-2.
Overall MBE/WBE utilization on
ICTC and local agency
transportation prime contracts and
subcontracts

Note:

Includes FTA- and locally-funded ICTC contracts.

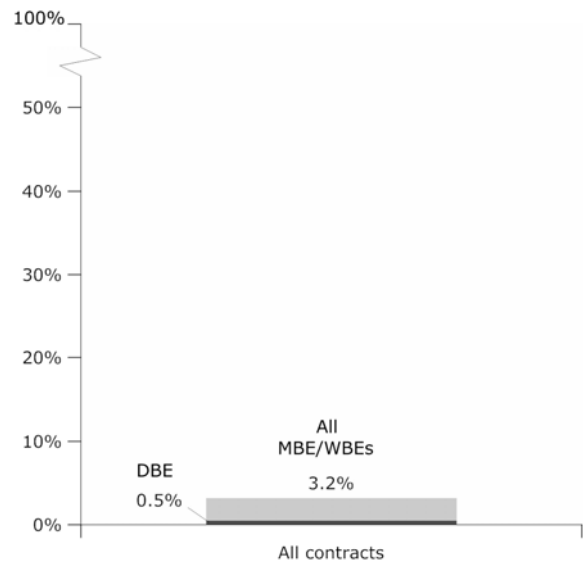
Darker portion of bar presents certified DBE utilization.

Number of prime contracts/subcontracts analyzed was 47.

For more detail and results by group, see Figure K-2 in Appendix K.

Source:

BBC Research & Consulting from ICTC and local agency contracting data.



In addition, BBC separately examined utilization of each MBE/WBE group that is identified in 49 Code of Federal Regulations Part 26. Key results shown in Figure 6-3 include:

- ICTC and local agency utilization was dominated by Hispanic American owned businesses (2.5%);
- Native American-owned businesses had the next largest utilization at 0.4 percent of ICTC and local agency contract dollars; and
- Black American-owned businesses and Subcontinent Asian American-owned businesses received no FTA-funded ICTC or local agency transportation prime contracts or subcontracts.

Given the small number of prime contracts and subcontracts in the analysis (47), these results should be used with caution.

Figure 6-3.
Overall MBE/WBE utilization
on ICTC transportation
prime contracts and
subcontracts
by MBE/WBE group

Note:

Only includes FTA-funded ICTC and local agency contracts.

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

Number of prime contracts/subcontracts analyzed was 47.

For more detail and results by group, see Figure K-2 in Appendix K.

Source:

BBC Research & Consulting from ICTC and local agency contracting data.

	Total	
	\$ in thousands	Percent
MBE/WBEs		
Black American-owned	\$0	0.0 %
Asian-Pacific American-owned	31	0.2
Subcontinent Asian American-owned	0	0.0
Hispanic American-owned	474	2.5
Native American-owned	74	0.4
WBE (white women-owned)	15	0.1
Total MBE/WBE	\$594	3.2 %
Majority-owned	18,147	96.8
Total	\$18,741	100.0 %
DBEs		
Black American-owned	\$0	0.0 %
Asian-Pacific American-owned	31	0.2
Subcontinent Asian American-owned	0	0.0
Hispanic American-owned	59	0.3
Native American-owned	0	0.0
WBE (white women-owned)	0	0.0
Total DBE	\$90	0.5 %
Non-DBE	18,651	99.5
Total	\$18,741	100.0 %

C. Utilization Results for ICTC versus Local Agencies

During the study period, ICTC let only nine prime contracts amounting to approximately \$12.8 million. (Two of those contracts were awarded prior to ICTC's establishment in 2009 and assumed by ICTC.) Those contracts were all related to turn-key transit services provision and did not have any subcontracts. There was no MBE/WBE utilization on any of the ICTC contracts.

ICTC local agencies (i.e., the cities of El Centro and Brawley) let three prime contracts each. All of the utilization shown in Figures 6-2 and 6-3 resulted from those local agency prime contracts and subcontracts.

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

The disparity analysis compared the utilization of minority- and women-owned businesses (MBE/WBEs) on transportation contracts that the Imperial County Transportation Commission (ICTC) awarded during the study period to what those businesses might be expected to receive based on their availability for that work. Chapter 7 presents the disparity analysis in three parts:

- A. Overview of disparity analysis;
- B. Overall disparity analysis results; and
- D. Statistical significance of disparity analysis results.

A. Overview of Disparity Analysis

As part of the disparity analysis, BBC compared the actual utilization of MBE/WBEs on ICTC and local agency FTA-funded transportation 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 the “utilization benchmark.”) BBC made those comparisons for each individual MBE/WBE group. Due to the limited number of contract elements during the study period, BBC reports disparity analysis results for all ICTC and local agency transportation contracts considered together.

BBC expressed both actual utilization and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable (e.g., 5% utilization compared with 4% availability). BBC then calculated a “disparity index” to help compare utilization and availability results among MBE/WBE groups and across different sets of contracts. Figure 7-1 describes how BBC calculated disparity indices.

A disparity index of 100 indicates an exact match between actual utilization and availability for a particular MBE/WBE group for a specific set of contracts (often referred to as “parity”). A

Figure 7-1.
Calculation of disparity indices

The disparity index provides a way of assessing how closely the actual utilization of an MBE/WBE group matches the percentage of contract dollars that the group might be expected to receive based on its availability for a specific set of contracts. One can directly compare a disparity index for one group to that of another group and compare disparity indices across different sets of contracts. BBC calculates disparity indices using the following formula:

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

For example, if actual utilization of WBEs on a set of contracts was 2 percent and the availability of WBEs for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20. In this example, WBEs would have actually received 20 cents of every dollar that they might be expected to receive based on their availability.

disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 are described in this report as “substantial.”¹

The disparity analysis results that BBC presents in Chapter 7 summarize detailed disparity analysis tables provided in Appendix K. Each table in Appendix K presents disparity analysis results for a different set of ICTC and local agency contracts. For example, Figure K-2 in Appendix K reports disparity analysis results for *all* ICTC and local agency transportation contracts that the study team examined as part of the study — that is, FTA-funded transportation-related construction and engineering prime contracts and subcontracts that ICTC and local agencies awarded during the study period. Given the limited number of ICTC and local agency contract elements that were awarded during the study period, Appendix K does not include disparity analyses for different subsets of contracts (e.g., prime contracts and subcontracts or contracts from different years in the study period).

A review of Figure 7-2 helps to introduce the calculations and format of the overall disparity analysis table in Appendix K. (Figure 7-2 is identical to Figure K-2 in Appendix K.) As illustrated in Figure 7-2, the disparity analysis table presents information about each MBE/WBE group (as well as about all businesses) in separate rows:

- “All firms” in row (1) pertains to information about all non-Hispanic white male-owned businesses (i.e., majority-owned businesses) and MBE/WBEs considered together.
- Row (2) provides results for all MBE/WBEs, regardless of whether they were certified as MBE/WBEs or as Disadvantaged Business Enterprises (DBEs) through the California Unified Certification Program (CUCP).
- Row (3) provides results for all WBEs, regardless of whether they were certified as WBE/DBEs through CUCP.
- Row (4) provides results for all MBEs, regardless of whether they were certified as MBE/DBEs through CUCP.
- Rows (5) through (10) provide results for businesses of each individual minority group, regardless of whether they were certified as MBE/DBEs through CUCP.

The bottom half of Figure 7-2 presents analogous results for businesses that were certified as DBEs when each of the corresponding contract elements was awarded. BBC included a row for white male-owned DBEs, although the analysis did not identify any white male-owned DBEs that ICTC utilized on transportation prime contracts or subcontracts during the study period.

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 *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

Figure 7-2.
Example of a disparity analysis table from Appendix K (same as Figure K-2 in Appendix K)

Firm Type	(a) Number of contracts (subcontracts) in sample	(b) Dollars in sample (thousands)	(c) Estimated total dollars (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	47	\$18,741	\$18,741				
(2) MBE/WBE	16	\$594	\$594	3.2	9.6	-6.4	33.1
(3) WBE	1	\$15	\$15	0.1	2.9	-2.9	2.7
(4) MBE	15	\$579	\$579	3.1	6.7	-3.6	46.4
(5) Black American-owned	0	\$0	\$0	0.0	0.9	-0.9	0.0
(6) Asian-Pacific American-owned	2	\$31	\$31	0.2	1.3	-1.1	12.8
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.7	-0.7	0.0
(8) Hispanic American-owned	9	\$474	\$474	2.5	3.1	-0.6	81.7
(9) Native American-owned	4	\$74	\$74	0.4	0.6	-0.2	63.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	6	\$90	\$90	0.5			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	6	\$90	\$90	0.5			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian-Pacific American-owned DBE	2	\$31	\$31	0.2			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	4	\$59	\$59	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0	\$0	0.0			
(20) White male-owned DBE	0	\$0					
(21) Unknown DBE	0	\$0					

Notes: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Utilization. Each disparity table includes the same columns and rows:

- Column (a) presents the number of prime contracts and subcontracts (i.e., contract elements) that the study team analyzed for that particular set of contracts. As shown in row (1) of column (a) of Figure 7-2, the study team analyzed 47 contract elements. The value presented in column (a) for each individual MBE/WBE group represents the number of contract elements on which businesses of that particular group were utilized (e.g., as shown in row (6) of column (a), Asian-Pacific American-owned businesses were utilized on 2 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-2, the study team examined approximately \$18.7 million for the set of contract elements. The dollar totals include both prime contract and subcontract dollars.
- Column (c) presents the contract dollars (in thousands) for which each MBE/WBE group was utilized on the set of contracts after adjusting total dollars for businesses that the study team identified as MBEs, but for which specific race/ethnicity information was not available. As shown in row (10) of column (b), there were no contract elements that went to unknown MBEs. Therefore, no adjustments were made and column (c) is identical to column (b).
- Column (d) presents the utilization of each MBE/WBE group as a percentage of total dollars associated with the set of contract elements. The study team calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Asian-Pacific American-owned businesses, the study team divided \$31,000 by \$18.7 million and multiplied by 100 for a result of 0.2%, as shown in row (6) of column (d)).

Availability (utilization benchmark). Column (e) of Figure 7-2 presents the availability of each MBE/WBE group for all transportation prime contracts and subcontracts that ICTC and local agencies awarded during the study period. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as a benchmark against which to compare utilization for a specific group for a particular set of contracts (e.g., as shown in row (6) of column (e), availability of Asian-Pacific American-owned businesses is 1.3%, compared with 0.2% utilization for those businesses). BBC did not calculate availability figures separately for businesses that were DBE-certified.

Differences between utilization and availability. The next step in analyzing whether there was a disparity between the utilization and availability of a particular MBE/WBE group is to subtract the utilization result from the availability result. Column (f) of Figure 7-2 presents the percentage point difference between utilization and availability for each MBE/WBE group. For example, as presented in row (2) of column (f) of Figure 7-2, MBE/WBE utilization was 6.4 percentage points lower than MBE/WBE availability.

Disparity indices. It is sometimes difficult to interpret absolute percentage differences between utilization and availability, especially when the percentages are relatively small. Therefore, BBC also calculated a disparity index for each MBE/WBE group, which measured utilization relative to availability and served as a metric to compare any disparities across different MBE/WBE groups and across different sets of contracts. BBC calculated disparity indices by dividing percent utilization for each group by percent availability and multiplying the result by 100. Thus, smaller values for the disparity indices indicated greater disparities (i.e., a greater degree of underutilization).

Column (g) of Figure 7-2 presents the disparity index for each MBE/WBE group. For example, as reported in row (2) of column (g), the disparity index for all MBE/WBEs considered together was approximately 33, indicating that MBE/WBEs actually received approximately \$0.33 for every dollar that they might be expected to receive based on their availability for the transportation prime contracts and subcontracts that ICTC and local agencies awarded during the study period. BBC did not calculate disparity indices separately for DBE-certified businesses.

Results when disparity indices were very large or when availability was zero. BBC applied the following rules when disparity indices were exceedingly large or could not be calculated because the study team did not identify any businesses of a particular group as available for a particular set of contract elements:

- When BBC's calculations showed a disparity index exceeding 200, BBC reported an index of "200+." A disparity index of 200+ means that utilization was more than twice as much as availability for a particular group for a particular set of contracts.
- When there was no utilization and 0 percent availability for a particular group for a particular set of contracts, BBC reported a disparity index of "100," indicating parity.
- When utilization for a particular group for a particular set of contracts was greater than 0 percent but availability was 0 percent, BBC reported a disparity index of "200+."²

B. Overall Disparity Analysis Results

BBC used the disparity analysis results from Figure 7-2 (corresponding to Figure K-2 in Appendix K) to assess any disparities between MBE/WBE utilization and availability on all transportation prime contracts and subcontracts that ICTC and local agencies awarded during the study period. Figure 7-3 presents disparity indices for all MBE/WBE groups considered together and separately for each group. The line down the center of the graph shows a disparity index level of 100, which indicates parity between utilization and availability. Disparity indices less than 100 indicate disparities between utilization and availability (i.e., underutilization). For reference, a line is also drawn at an index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

² A particular MBE/WBE group could show a utilization percentage greater than 0 percent but an availability percentage of 0 percent for many reasons, including the fact that one or more utilized businesses were out of business at the time that BBC conducted availability interviews.

Figure 7-3.
Disparity indices for
ICTC and local agency
transportation
contracts

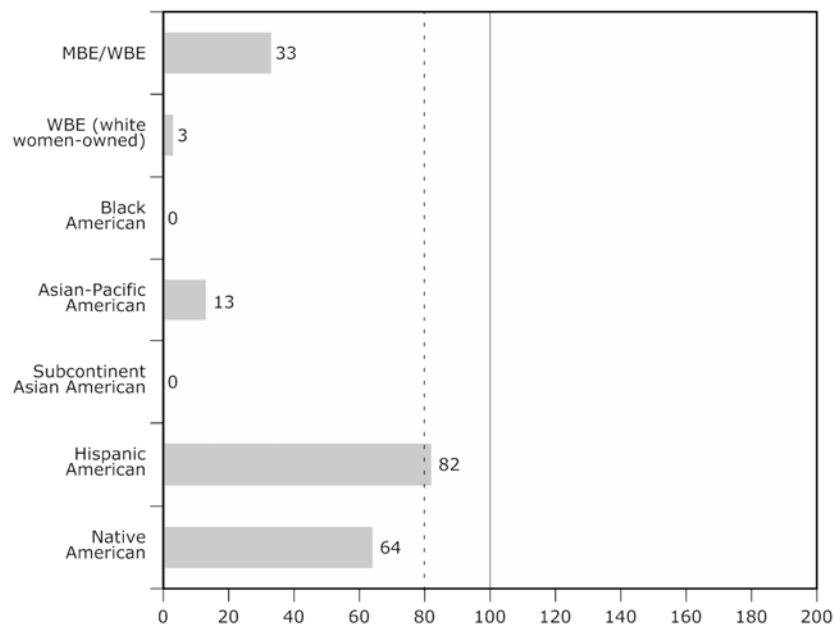
Note:

Number of prime contracts/subcontracts analyzed was 11,385.

For more detail, see Figure K-2 in Appendix K.

Source:

BBC Research & Consulting availability and utilization analyses.



As shown in Figure 7-3, overall, utilization of MBE/WBEs on ICTC transportation contracts during the study period was lower than what might be expected based on their availability for those contracts. The disparity index of 33 indicates that all MBE/WBEs considered together received about 33 percent of the contract dollars that they might be expected to receive based on their availability for those contracts. Key disparity analysis results include:

- MBE/WBEs overall exhibited substantial disparities (disparity index of 33);
- All MBE/WBE groups except Hispanic American-owned businesses exhibited substantial disparities: non-Hispanic white women-owned businesses (disparity index of 3); Black American-owned businesses (disparity index of 0); Asian-Pacific American-owned businesses (disparity index of 13); Subcontinent Asian American-owned businesses (disparity index of 0); and Native American-owned businesses (disparity index of 64); and
- Hispanic American-owned businesses exhibited disparities (disparity index of 82).

C. Statistical Significance of Disparity Analysis Results

Statistical significance tests allow researchers to test the degree to which they can reject “random chance” as an explanation for any observed quantitative differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. However, BBC attempted to contact every firm in the relevant geographic market area that Dun & Bradstreet (D&B) identified as doing business within relevant subindustries (as described in Chapter 5), mitigating many of the concerns associated with random chance in data sampling as they may relate to BBC’s availability analysis. Much of 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

7-4 explains the relatively high level of statistical confidence inherent in the utilization and availability results.

Figure 7-4. Statistical confidence in availability and utilization results

As part of the availability analysis, BBC conducted telephone interviews with more than 4,000 business establishments — a number of completed interviews that is generally considered large enough to be treated as a “population,” not a sample. The confidence interval around BBC’s estimate of MBE/WBE representation among all businesses available for SANDAG transportation work — 34.1 percent — is accurate within about +/- 1.5 percentage points at the 95 percent confidence level (BBC applied the finite population correction factor when determining confidence intervals). By comparison, many survey results for proportions reported in the popular press are accurate within about +/- 5 percentage points.

Monte Carlo analysis. BBC used a sophisticated simulation tool to further examine statistical significance of disparity analysis results. There were many opportunities in the sets of prime contracts and subcontracts that BBC analyzed as part of the disparity study for MBE/WBEs to be awarded work. Some contract elements involved large dollar amounts and others involved only a few thousand dollars.

The analyses that the study team completed as part of the disparity study were well-suited for using Monte Carlo analysis to test the statistical significance of disparity analysis results. Monte Carlo analysis was appropriate for that purpose, because, among the contracts ICTC and local agencies awarded during the study period, there were many individual chances for businesses to win prime contracts and subcontracts, each with a different payoff (i.e., each with a different dollar value). Figure 7-5 describes BBC’s use of Monte Carlo analysis.

It is important to note that Monte Carlo simulations may not be necessary to establish the statistical significance of results (see discussion in Figure 7-4), and it may not be appropriate for very small populations of businesses.

Figure 7-5.
Monte Carlo Analysis

The study team began the Monte Carlo analysis by examining individual contract elements. For each contract element, BBC's availability database provided information on individual businesses that were available for that contract element based on type of work, contractor role, contract size, and location of the work.

The study team assumed that each available business had an equal chance of winning that contract element. For example, the odds of a WBE receiving that contract element were equal to the number of WBEs available for the contract element divided by the total number of businesses available for the work. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

The Monte Carlo simulation repeated the above process for all other elements in a particular set of contracts. The output of a single Monte Carlo simulation for all contract elements in the set represented simulated utilization of MBE/WBEs, by group, for that set of contract elements.

The entire Monte Carlo simulation was then repeated one million times for each set of contracts. The combined output from all 1 million simulations represented a probability distribution of the overall utilization of MBE/WBEs if contracts were awarded randomly based on the availability of businesses working in the transportation contracting industry in ICTC's relevant geographic market area.

The output of the Monte Carlo simulations represents the number of runs out of 1 million that produced a simulated utilization result that was equal or below the observed utilization in the actual data for each MBE/WBE group and for each set of contracts. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of runs), then the study team considered that disparity index to be statistically significant at the 95 percent confidence level. If that number was less than or equal to 100,000 (i.e., 10.0% of the total number of runs), then the study team considered that disparity index to be statistically significant at the 90 percent confidence level.

Results. BBC identified substantial disparities for MBE/WBEs overall on all ICTC and local agency contracts.

BBC applied Monte Carlo analysis to the disparity analysis results. Figure 7-6 presents the results from the Monte Carlo simulations as it relates to the statistical significance of disparities that the study team observed for MBE/WBEs.

As shown in Figure 7-6, Monte Carlo simulations indicated that the disparities that MBE/WBEs overall exhibited on all contracts were statistically significant at the 90 percent confidence level.

Figure 7-6.
Monte Carlo simulation results for disparity analysis, MBE/WBEs overall

Contract set	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
All contracts	33	85,110	8.5 %

Note: Numbers rounded to nearest tenth of 1 percent.

Source: BBC Research & Consulting availability and utilization analyses.

CHAPTER 8.

Overall DBE Goal

CHAPTER 8.

Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the Imperial County Transportation Commission (ICTC) is required to set an overall goal for DBE participation on its Federal Transit Administration (FTA)-funded transportation contracts. The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program need to develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its United States Department of Transportation (USDOT)-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and enable the agency to meet the goal in the next year.

ICTC must prepare and submit a Goal and Methodology document to FTA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. ICTC last developed its overall DBE goal for federal fiscal years (FFYs) 2011 through 2013 (a goal of 1.4%). ICTC is required to develop a new goal for FFYs 2014 through 2016. Chapter 8 provides information that ICTC might consider as part of setting its overall DBE goal. Chapter 8 is organized in two parts that are based on the two-step process that 49 Code of Federal Regulations (CFR) Part 26.45 outlines for agencies to set their overall DBE goals:

- A. Establishing a base figure; and
- B. Consideration of a step-2 adjustment.

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ICTC's FTA-funded transportation contracts. As presented in Chapter 5, potential DBEs—that is, minority- and women-owned business enterprises (MBE/WBEs) that are DBE-certified or appear that they could be DBE-certified based on annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 7.2 percent of ICTC's FTA-funded transportation prime contract and subcontract dollars based on their availability for that work. ICTC might consider 7.2 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FTA-funded contracts that it will award in the future are similar to the FTA-funded contracts that the agency awarded during the study period.

If ICTC determines that the number of minority- and women-owned businesses that decide to become certified as DBEs will remain relatively stable in the future, then ICTC might consider the availability of *certified DBEs* when determining the base figure of its overall DBE goal. Certified DBEs might be expected to receive 2.2 percent of ICTC's FTA-funded transportation prime contract and subcontract dollars based on their availability for that work. Based on the availability of certified DBEs, ICTC might consider 2.2 percent as the base figure for its overall DBE goal.

B. Consideration of a Step-2 Adjustment

The Federal DBE Program requires ICTC to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal. ICTC is not required to make a step-2 adjustment as long as it considers appropriate factors and explains its decision in its Goal and Methodology document. The Federal DBE Program outlines several factors that an agency must consider when assessing whether to make a step-2 adjustment to its base figure:

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;
3. Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
4. Other relevant data.¹

BBC completed an analysis of each of the above step-2 factors. Information that BBC examined was not easily quantifiable but is still relevant to ICTC as it determines whether to make a step-2 adjustment.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" (*Tips for Goal-setting*) suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation:

Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outlier (abnormally high or abnormally low) past participation percentages.²

Based on ICTC Uniform Reports of DBE Awards or Commitments and Payments, as reported to FTA, ICTC had no DBE participation on its FTA-funded contracts for FFYs 2011 and 2012. That information supports a downward adjustment to ICTC's base figure. If ICTC were to use the approach that USDOT outlined in *Tips for Goals Setting*, its overall DBE goal would be the average of its base figure and the 0 percent past DBE participation. BBC also assessed DBE participation on ICTC's FTA-funded transportation contracts that the study team examined as part of the disparity study. DBE-certified businesses received 0.5 percent of those contract dollars.³ That information also supports a downward adjustment to ICTC's base figure. If ICTC were to adjust its base figure based on DBE participation information from the disparity study, it might

¹ 49 CFR Section 26.45.

² Section III (A)(5)(c) in USDOT's "Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program." <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

³ See Chapter 6 for details about how BBC's analysis differs from ICTC's Uniform Reports of DBE Awards/Commitments and Payments.

consider taking the average of its base figure and the 0.5 percent DBE participation figure from the disparity study.

2. Information related to employment, self-employment, education, training, and unions. Chapter 4 summarizes information about conditions in the local transportation contracting industry for minorities, women, and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in the local marketplace are presented in Appendices E through H. BBC's analyses indicate that there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the local construction, engineering, and goods and services industries. Such barriers may decrease the availability of MBE/WBEs to obtain and perform ICTC transportation contracts, which supports an upward step-2 adjustment to ICTC's base figure.

3. Any disparities in the ability of DBEs to get financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and MBE/WBEs do not have the same access to those business inputs as non-Hispanic white males and non-Hispanic white male-owned businesses in the San Diego area. Any barriers to obtaining financing, bonding, and insurance might decrease opportunities for minorities and women to successfully form and operate businesses in the local transportation contracting marketplace. Any barriers that MBE/WBEs face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in obtaining ICTC transportation prime contracts and subcontracts. Thus, the information about financing, bonding, and insurance also supports an upward step-2 adjustment to ICTC's base figure.

4. Other factors. The Federal DBE Program suggests that federal fund recipients also examine "other factors" when determining whether to make step-2 adjustments to their base figures.⁴

Success of businesses. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned businesses and face greater barriers in the marketplace, even after considering race- and gender-neutral factors. Chapter 4 summarizes that evidence and Appendix H presents corresponding quantitative analyses. There is also qualitative evidence of barriers to the success of MBE/WBEs, as explored in Appendix J (and also summarized in Chapter 4). Some of that information suggests that discrimination on the basis of race/ethnicity and gender affects MBE/WBEs in the local transportation contracting industry.

Evidence from disparity studies conducted within the jurisdiction. USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make step-2 adjustments to their base figures. BBC recently conducted a disparity study for the San Diego County Regional Airport Authority (SDCRAA). To the study team's knowledge, the SDCRAA disparity study is the only disparity study that has been conducted in the San Diego area since ICTC's 2010 disparity study. ICTC might consider examining results from the SDCRAA disparity study in determining its overall DBE goal. However, ICTC should note that the availability figures that BBC calculated as part of the

⁴ 49 CFR Section 26.45.

SDCRAA disparity study were tailored specifically to the contracts that SDCRAA awarded between 2003 and 2007. Those contracts differed in many respects from the contracts that ICTC awarded between 2008 and 2012.

Summary. Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study supports a step-2 adjustment as ICTC considers setting its overall DBE goal. As noted in USDOT's "Tips for Goal-Setting:"

If the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made.⁵

Based on information from the disparity study, there are reasons why ICTC might consider an upward adjustment to its base figure:

- ICTC might adjust its base figure upward to account for barriers that minorities and women face in owning businesses in the local transportation contracting industry. Such an adjustment would correspond to a "determination of the level of DBE participation you would expect absent the effects of discrimination."⁶
- Evidence of barriers that affect minorities, women, and MBE/WBEs in obtaining financing, bonding, and insurance, and evidence that certain groups of MBE/WBEs are less successful than comparable non-Hispanic white male-owned businesses also supports an upward adjustment to ICTC's base figure.

There are also reasons why ICTC might consider a downward adjustment to its base figure:

- ICTC must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. ICTC utilization reports for FFYs 2011 through 2013 indicated median annual DBE participation of 0 percent for those years, which is lower than its base figure. USDOT's "Tips for Goal-Setting" suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation.
- BBC's analysis of DBE participation on ICTC's FTA-funded transportation contracts also indicates DBE participation (0.5%) that is lower than the base figure. If ICTC were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 0.5 percent DBE participation.

USDOT regulations clearly state that an agency such as ICTC is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment, either upward or downward, to its base figure. However, *Tips for Goal-Setting* states that an agency such as ICTC is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

⁵ USDOT. "Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program."
<http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

⁶ 49 CFR Section 26.45 (b).

CHAPTER 9.

**Portion of DBE Goal to be Met through
Race- and Gender-neutral Means**

CHAPTER 9.

Portion of DBE Goal to be Met through Race- and Gender-Neutral Means

The Federal Disadvantaged Business Enterprise (DBE) Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.¹ Race- and gender-neutral measures are initiatives that encourage the participation of all businesses — or, all small businesses — in an agency's contracts. They are not specifically limited to minority- and women-owned business enterprises (MBE/WBEs) or to DBEs. Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet through race- and gender-neutral means and the portion that they expect to meet through race- and gender-conscious measures.

- If an agency determines that it can meet its overall DBE goal solely through race- and gender-neutral means, then the agency would propose using only neutral measures as part of its implementation of the Federal DBE Program. The agency would project that 100 percent of its overall DBE goal would be met through neutral means and that 0 percent would be met through race- and gender-conscious means.
- If an agency determines that a combination of race- and gender-neutral and race- and gender-conscious measures are needed to meet its overall DBE goal, then the agency would propose using a combination of neutral and conscious measures as part of its implementation of the program. The agency would project that some percentage of its overall DBE goal would be met through neutral means, and that the remainder would be met through race- and gender-conscious means.

The United States Department of Transportation (USDOT) offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that they will meet through race- and gender-neutral and race- and gender-conscious measures, including the following:

- “USDOT Questions and Answers about 49 CFR Part 26” addresses factors for federal aid recipients to consider when projecting the portion of their overall DBE goals that they will meet through race- and gender-neutral means.²
- USDOT's “Tips for Goal-Setting” also suggests factors for federal aid recipients to consider when making such projections.³

¹ 49 CFR Section 26.51.

² See <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>.

³ <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

- A Federal Highway Administration (FHWA) template for how the agency considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through neutral and conscious means. An excerpt from that template is provided in Figure 9-1.

Based on 49 CFR Part 26 and the resources above, general areas of questions that transportation agencies might ask related to making any projections include:

- A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?
- B. What has been the agency's past experience in meeting its overall DBE goal?
- C. What has DBE participation been when the agency did not use race- or gender-conscious measures?⁴
- D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

Chapter 9 is organized around each of those general areas of questions.

Figure 9-1.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State's race-neutral/race-conscious division and why it is the State's best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient's race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient's market, the race-neutral measures it employs and information on contracting in the recipient's contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient's contracts that do not have contract goals; past prime contractors' achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state's programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women's businesses participate in programs without goals.

Source: FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY [Year].
http://www.fhwa.dot.gov/civilrights/dbe_memo_a4.htm.

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?

As discussed in previous chapters, BBC examined conditions in the Imperial County Transportation Commission's (ICTC's) relevant geographic market area, including:⁵

- Entry and advancement;
- Business ownership;
- Access to capital, bonding, and insurance; and
- Success of businesses.

⁴ To assess that question, USDOT guidance suggests evaluating (a) DBE participation as prime contractors if DBE contract goals did not affect utilization, (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state/ local or private contracting where contract goals were not used.

⁵ ICTC's relevant geographic market area is defined as San Diego, Orange, and Imperial Counties.

Qualitative information that the study team collected through in-depth interviews, meetings with trade association and public meetings indicated some evidence of discrimination affecting the local marketplace. However, some minority and female interviewees indicated that discrimination did not affect the local marketplace today.

ICTC should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures.

B. What has been the agency's past experience in meeting its overall DBE goal?

Figure 9-2 presents the participation of certified DBEs on FTA-funded ICTC transportation contracts in recent years, as presented in ICTC reports to USDOT. Based on information about awards and commitments to DBE-certified businesses, ICTC and its subrecipients did not award any contract dollars to DBEs in federal fiscal years (FFYs) 2011 or 2012 and did not meet its overall DBE goal of 1.40 percent.

Figure 9-2.
ICTC reported past certified DBE participation on FTA-funded contracts, FFYs 2011 and 2012

FFY	DBE attainment	Annual DBE goal	Difference
2011	0.00 %	1.40 %	-1.40 %
2012	0.00	1.40	-1.40

Source: ICTC Transit DBE Program FY 2012-13.

C. What has DBE participation been when the agency did not use race- or gender-conscious measures?

ICTC did not apply DBE contract goals or any other race- or gender-conscious measures to any contracts that the agency awarded during the study period. Overall, certified DBEs received 0.5 percent of the dollars associated with those contracts. ICTC should consider that information when determining the percentage of its overall DBE goal that it can achieve through race- and gender-neutral measures.

D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

When determining the extent to which ICTC could meet its overall DBE goal through the use of race- and gender-neutral measures, the agency should review the neutral measures that it and other local organizations already have in place. ICTC should also review measures that it has planned or could consider for future implementation.

Current race- and gender-neutral measures. ICTC currently has a number of race- and gender-neutral measures in place to encourage the participation of all small businesses — including DBEs — in its transportation contracts. The agency plans on continuing the use of those measures in the future. ICTC's race- and gender-neutral efforts can be classified into three categories:

- Business outreach and communication;
- Technical assistance; and

- Improved contracting processes.

Business outreach and communication. ICTC conducts outreach and communication efforts across the ICTC relevant geographic market area to encourage the utilization and growth of small businesses and MBE/WBEs. Those efforts include providing information and communications in bilingual formats and coordinating with various, related resource agencies. Such resource agencies include:

- Chambers of commerce;
- Economic development centers;
- Small business alliances; and
- Workforce development centers.

Technical assistance. ICTC provides technical assistance that is available to all businesses, including DBEs. ICTC assists small businesses with the costs of bonds by simplifying the bonding process, reducing bonding requirements, and offering assistance for small businesses that are struggling to obtain bonding.

Improved contracting practices. ICTC engages in efforts to improve its contracting practices, making contracts more accessible to all businesses, including DBEs. ICTC makes efforts to unbundle large contracts to make them more accessible to businesses of all sizes and requires large prime contractors to subcontract portions of projects.

Potential race-and gender-neutral measures. There are several other organizations throughout California that are implementing efforts to encourage the participation of small businesses — including DBEs and many MBE/WBEs — in local contracting. ICTC might consider adopting some of those measures to encourage small business and DBE participation in its transportation contracts. Figure 9-3 provides examples of race- and gender-neutral programs that other organizations have in place. There may be several reasons why certain measures are not practicable for ICTC, and there may also be measures in addition to those presented in Figure 9-3 that ICTC might consider using.

Figure 9-3.
Examples of race- and gender-neutral programs that
other organizations in California have in place

Neutral measure	Description
Technical assistance	<p>Technical assistance programs are available throughout California. Those programs primarily provide general information and assistance for business start-ups and growing businesses. Industry-specific resources often take the form of checklists of issues of which businesses should be aware and easily accessible business forms. Examples of general support providers include SCORE and the California Small Business Development Center Network. Some large organizations that offer trade-specific classes and seminars are the Associated General Contractors and the American Council of Engineering Companies.</p> <p>Other programs focus on market development assistance and the use of electronic media and technology. Those programs are available through organizations such as The Foundation for the Advancement of Marketing Excellence in Entrepreneurs.</p>
Small business finance	<p>Small business financing is available through several local agencies within Southern California. For example, the Pace Business Development Center in Los Angeles supports start-ups with loan package preparation and capital acquisition through financial institutions guaranteed by the SBA. The Southern California Small Business Development Corporation also offers financing assistance with the support of the State of California with offices located in Glendale and Los Angeles. Other local organizations including minority and regional chambers provide training and support on how to obtain financing and prepare funding documents.</p>
Bonding programs	<p>Bonding programs offering bonding and finance assistance and training have become more popular. Programs such as the SBA Bond Guarantee Program provide bid, performance and payment bond guarantees for individual contracts. The USDOT Bonding Assistance Program also provides bonding assistance in the form of bonding fee cost reimbursements for DBEs performing transportation work.</p> <p>Training on how to obtain a bond is also provided by a number of different agencies including the Los Angeles Unified School District Small Business Bootcamp and Bond Works Program. The school district's program prepares contractors to manage cash flow and taxes and provides training on credit worthiness criteria in the bond approval process.</p>
Mentor-protégé programs	<p>The Associated General Contractors (AGC) of California with the Small Business Council and Caltrans have created a joint mentor-protégé program in an effort to increase diversity and develop new and emerging businesses in the construction industry.</p> <p>Calmentor supports mentor-protégé relationships in the architecture and engineering industries.</p> <p>SBA 8(a) Business Development Mentor-Protégé Program is an example of a mentor-protégé programs that pairs subcontractors with prime contractors to assist in management, financial and technical assistance and the exploration of joint venture and subcontractor opportunities for federal contracts.</p> <p>The University of Southern California has a mentor-protégé program assisting small businesses develop the capacity to perform as subcontractors and suppliers.</p>

Source: BBC Research & Consulting.

CHAPTER 10.

ICTC's Implementation of the Federal DBE Program

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ICTC's Implementation of the Federal DBE Program

Chapter 10 reviews information relevant to the Imperial County Transportation Commission's (ICTC's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for United States Department of Transportation (USDOT)-funded contracts. Regulations presented in 49 Code of Federal regulations (CFR) Part 26 and associated documents offer state and local agencies guidance related to implementing the Federal DBE Program. Key requirements of the program are described below in the order that they are presented in 49 CFR Part 26.¹

Reporting to DOT — 49 CFR Part 26.11 (b)

ICTC must periodically report DBE participation in its transportation-related construction and engineering contracts to the Federal Transit Administration (FTA). ICTC reports DBE participation quarterly, presenting information about payments actually made to DBEs on USDOT-funded contracts. ICTC should continue to do so.

Bidders List — 49 CFR Part 26.11 (c)

As part of its implementation of the Federal DBE Program, ICTC must develop a bidders list of businesses that are available for its transportation contracts. The bidders list must include the following information about each available business:

- Firm name;
- Address;
- DBE status;
- Age of firm; and
- Annual gross receipts.

ICTC currently maintains a bidders list that includes all of the above information for firms bidding or proposing on federally-funded prime contracts and subcontracts.

Use of 2013 availability interview information. Availability interviews that the study team conducted as part of the disparity study collected information about local businesses that are potentially available for different types of ICTC construction and engineering prime contracts and subcontracts. ICTC should consider using the availability interview database to supplement its current bidders list.

¹ Because only certain portions of the Federal DBE Program are discussed in Chapter 10, ICTC should refer to the complete federal regulations when considering its implementation of the program.

Further development and communication of the California Unified Certification Program (CUCP) DBE Database.

CUPC offers a database on its website of all DBE-certified businesses, searchable by business name, business description, SIC code, and NAICS code. Use of that database could help bidders identify qualified DBEs. Qualitative information that the study team collected through in-depth interviews, meetings with trade associations, and public meetings indicated that many business owners and managers are aware of existing subcontractor databases, but some are not. Most interviewees indicated that electronic lists of potential subcontractors would be helpful.

Further dissemination of information concerning bid and proposal awards.

ICTC currently publicizes bid and solicitation award information on its website. Qualitative information that the study team collected through in-depth interviews, meetings with trade associations, and public meetings indicated that many business owners are aware of online bid systems and are complimentary of them.

Maintaining comprehensive vendor data. In order to effectively track the utilization of minority- and women-owned business enterprises (MBE/WBEs) on transportation contracts, ICTC should consider continuing to improve the information that it collects on the ownership status of utilized businesses, including both prime contractors and subcontractors. Not only should ICTC consider collecting information about DBE status, but it should also consider obtaining information on the race/ethnicity and gender of business owners, regardless of certification status. ICTC can use business information that the study team collected as part of the 2014 disparity study to update and improve its vendor data.

Prompt Payment Mechanisms — 49 CFR Part 26.29

ICTC's prompt payment requirements for construction and engineering contracts appear to comply with California law and with federal regulations in 49 CFR Part 26.29. ICTC is required to make progress payments to prime contractors within 30 days of receiving an invoice. Prime contractors are then required to pay subcontractors within 30 days after the subcontractor's work is satisfactorily completed.

Qualitative information that the study team collected through in-depth interviews, meetings with trade associations, and public meetings revealed some dissatisfaction with how promptly businesses are paid by local agencies, but other business owners had favorable comments about timely payment.

DBE Directory — 49 CFR Part 26.31

ICTC maintains a DBE Directory of DBEs that are certified through CUCP. ICTC uses the DBE Directory as a resource in developing overall and DBE contract goals and for conducting outreach to DBEs. The DBE Directory is available online.

Overconcentration — 49 CFR Part 26.33

Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so overconcentrated in certain work areas as to unduly burden non-DBEs working in those areas. ICTC does not currently have a policy in place stating how such overconcentration would be identified or corrected. ICTC should develop such a policy

and obtain USDOT approval to develop appropriate measures to address overconcentration if it is identified in the future. Once approved, the measures would become part of ICTC's DBE program. Such measures may include, but are not limited to:

- Developing ways to assist DBEs to move into nontraditional areas of work;
- Varying the use of DBE contract goals; and
- Working with contractors to find and use DBEs in other industry areas.

BBC investigated potential overconcentration on ICTC contracts and found that there no subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars during the study period based on contract data that the study team received from ICTC and local agencies.² ICTC should continue to monitor work specializations for potential overconcentration in the future.

Business Development Programs — 49 CFR Part 26.35 and Mentor-Protégé Programs – 49 CFR Appendix D to Part 26

Business Development Programs (BDPs) are programs that are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program. As part of a BDP, or separately, agencies may establish a mentor-protégé program, in which a non-DBE or another DBE serves as a mentor and principal source of business development assistance to a protégé DBE. ICTC does not currently have an established BDP.

Many business owners and managers interviewed as part of the disparity study thought that mentor-protégé programs would be very useful. A few interviewees were critical of how such programs were structured, indicating shortages of mentors and lack of mentor commitment as potential issues.

ICTC might explore partnerships to implement BDPs, including implementing a mentor-protégé program for construction or engineering businesses. Such a program would provide specialized assistance that would be tailored to the needs of developing businesses.

Responsibilities for Monitoring the Performance of Other Program Participants — 49 CFR Part 26.37

The Final Rule effective February 28, 2011 revised requirements for monitoring and enforcing that the work that prime contractors commit to DBE subcontractors at contract award (or through contract modifications) is actually performed by those DBEs. USDOT describes the requirements in 49 CFR Part 26.37(b). The Final Rule states that prime contractors can only terminate DBEs for “good cause” and with written consent from the awarding agency.

Regarding DBE performance monitoring, ICTC regulations state that the work DBEs complete must fulfill commercially useful functions (CUFs) in order to count toward DBE goals. To monitor the performance of DBEs and the extent to which they fulfill CUFs, ICTC has established an extensive monitoring mechanism that includes:

² A subindustry was not included in the overconcentration analysis if less than ten subcontracts were awarded in that subindustry during the study period.

- Reporting to USDOT any false, fraudulent, or dishonest conduct in connection to the DBE program;
- Keeping a running tally of the dollars that DBEs attain on contracts and comparing attained dollars to commitment amounts; and
- Ensuring that work committed to DBEs is actually performed by the DBEs.

ICTC should consider reviewing the requirements set forth in 49 CFR Part 26.37(b) and in The Final Rule to ensure that its monitoring and enforcement mechanisms are appropriately implemented and consistent with federal regulations and best practices.

Fostering Small Business Participation — 49 CFR Part 26.39

When implementing the Federal DBE Program, ICTC must include a measure to structure contracting requirements to facilitate competition by small businesses, “taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.”³ The Final Rule effective February 28, 2011 added a requirement for transportation agencies to foster small business participation in their contracting. It required agencies to submit a plan for fostering small business participation to USDOT in early 2012. ICTC already has a small business program in place.

ICTC encourages and, when appropriate, may require prime contractors to specify work elements that small businesses can perform and to provide subcontracting opportunities for those work elements to DBEs and other small businesses. In addition, ICTC takes measures to ensure that a reasonable number of prime contracts are of an attainable size for small businesses.

USDOT also identifies the following potential strategies for fostering small business participation:

- Establishing a race- and gender-neutral small business set-aside for prime contracts under a stated amount (e.g., \$1 million).
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
- Unbundling large contracts to allow small businesses more opportunities to bid for smaller contracts.

Chapter 9 of the report outlines many of ICTC’s current and planned race- and gender-neutral measures and provides examples of neutral measures that other organizations in California have implemented. ICTC should review that information and consider implementing measures that the agency deems to be effective. ICTC should also review legal and budgetary issues in considering different measures.

³ 49 CFR Part 26.39(a).

Prohibition of DBE Quotas and Prohibition of Set-asides for DBEs Unless in Limited and Extreme Circumstances — 49 CFR Part 26.43

DBE quotas are prohibited under the Federal DBE Program. DBE set-asides are only to be used in extreme circumstances. The Federal DBE Program does allow for the implementation of a small business program for small businesses that are bidding or proposing as prime contractors. ICTC currently does not use quotas in any way in its administration of the Federal DBE Program.

Setting Overall DBE Goals — 49 CFR Part 26.45

In The Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall DBE goals. As discussed in Chapter 1, agencies such as ICTC now need to develop and submit overall DBE goals every three years. That change was effective as of March 5, 2010. Chapter 8 uses data and results from the disparity study to provide ICTC with information that could be useful in developing its next overall DBE goal submission.

Analysis of Reasons for not Meeting Overall DBE Goal — 49 CFR Part 26.47(c)

Another addition to the Federal DBE Program made under The Final Rule effective February 28, 2011, requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall goal for that year:

- Analyze in detail the reasons for the difference; and
- Establish specific steps and milestones to address the difference and enable the agency to meet the goal in the next fiscal year.

Based on information about awards and commitments to DBE-certified businesses, ICTC has not met its DBE goal in recent years. In federal fiscal years 2011 and 2012, DBE awards and commitments that ICTC made on FTA-funded contracts was below its overall DBE goal by an 1.4 percentage points each year.

Need for separate accounting for participation of potential DBEs. In accordance with guidance in the Federal DBE Program, BBC's analysis of the overall DBE goal in this study is based on DBEs that are currently certified and on MBE/WBEs that could *potentially* be DBE-certified (i.e., potential DBEs). Uncertified MBE/WBEs that ICTC or its subrecipient local agencies utilized during the study period or that are potentially available for ICTC work are counted in the overall DBE goal but are not counted in the participation reports that are used to measure whether ICTC has met its overall DBE goal.

Based on verbal communication with USDOT in Washington, D.C. in 2011, agencies can explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of uncertified MBE/WBEs that could be DBE-certified. USDOT might then expect an agency to explore ways to further encourage potential DBEs to become DBE-certified as one way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, ICTC should consider:

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses — not just certified DBEs — participating as prime contractors or subcontractors, for both FTA and non-FTA funded ICTC contracts;
- Developing internal participation reports for MBEs and WBEs (by race/ethnicity and gender) and for businesses currently and potentially DBE-certified (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the business has been denied DBE certification in the past) for ICTC contracts; and
- Continuing to track participation of certified DBEs on FTA-funded ICTC contracts, per USDOT reporting requirements.

Other steps to evaluate how ICTC might better meet its overall goal. Analyzing the utilization of uncertified MBE/WBEs that could be certified is one step among many that ICTC might consider taking when examining any differences between DBE utilization and its overall DBE goal. Based on its comprehensive review, ICTC must establish specific steps and milestones to correct the problems it identifies in its analysis and to enable it to better meet its overall DBE goal in the future, per 49 CFR Part 26.47(c)(2).

Maximum Feasible Portion of Goal Met through Neutral Program Measures — 49 CFR Part 26.51(a)

As discussed in Chapter 9, ICTC must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. ICTC must project the portion of its overall DBE goal that could be achieved through such means. The agency should consider the information and analytical approaches presented in Chapter 9 when making such projections.

Use of DBE Contract Goals— 49 CFR Part 26.51(d)

The Federal DBE Program requires agencies to establish DBE contract goals to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral program measures, as noted in 49 CFR Part 26.51(d). ICTC should assess whether the use of DBE contract goals is necessary to meet any portion of its overall DBE goal based on information from the disparity study and other available information.

USDOT guidance on DBE contract goals. USDOT regulations on the use of DBE contract goals, which are presented in 49 CFR Part 26.51(e), include the following guidance:

- Contract goals may only be used on contracts that have subcontracting possibilities;
- Agencies are not required to set a contract goal on every FTA-funded contract;
- Over the period covered by the overall DBE goal, an agency must set contract goals so that they will cumulatively result in meeting the portion of the overall goal that the agency projects being unable to meet through race- and gender-neutral means;
- An agency's contract goals must provide for participation by all DBE groups eligible for race- and gender-conscious measures and must not be subdivided into group-specific goals; and
- An agency must maintain and report data on DBE utilization separately for contracts that include and that do not include DBE goals.

ICTC does not currently use contract goals. If ICTC determines that it needs to use DBE contract goals in the future, then it should also evaluate which DBE groups should be considered eligible to participate in any goals that may apply to FTA-funded contracts (or other USDOT-funded contracts). If ICTC decides to include specific DBE groups (e.g., groups classified as underutilized DBEs) but not other groups in a contract goals program, it must submit a waiver request to FTA.

Some individuals participating in in-depth interviews, and public meetings made comments related to the use of DBE contract goals.

- Several MBE/WBEs commented that DBE contract goals help their firms get their “foot in the door” with prime contractors.
- Many interviewees indicated that they are aware of several fraudulent DBE firms that are taking advantage of DBE contract goals.

ICTC should consider those comments if it determines that it is appropriate to use DBE contract goals in the future.

Flexible Use of any Race- and Gender-conscious Measures — 49 CFR Part 26.51(f)

State and local agencies must exercise flexibility in any use of race- and gender-conscious measures such as DBE contract goals. For example, if ICTC determines that DBE utilization exceeds its overall DBE goal for a fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a fiscal year, then it must make appropriate modifications in the use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet the overall goal. If, after implementation of any additional neutral measures, ICTC observes improvements in its utilization of certain racial/ethnic and gender groups on contracts that do not include DBE goals (in comparison to the availability of those groups on such contracts), it might consider changing its projection of how much of its overall DBE goal it can achieve through race- and gender-neutral means in future years.

Good Faith Effort Procedures — 49 CFR Part 26.53

USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Part 26. ICTC’s current implementation of the Federal DBE Program outlines the good faith efforts process that it uses for DBE contract goals. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when agencies use DBE contract goals. ICTC should review 49 CFR Part 26.53 and The Final Rule to ensure that its good faith efforts procedures are consistent with federal regulations, particularly if the agency determines that the use of DBE contract goals is appropriate in the future.

Several individuals participating in in-depth interviews, and public meetings made comments related to good faith efforts. In general, many MBE/WBEs indicated that, in many cases, prime contractors do not make genuine efforts to utilize minority- and women-owned businesses.

- Several participants indicated that the current DBE contract goals program produces an incentive for prime contractors to use perfunctory good faith efforts processes to comply with the program rather than to seek meaningful participation of DBEs on a project.
- Several MBE/WBEs indicated that prime contractors have listed their firms on project bids — sometimes without their knowledge — with no intention of actually utilizing them on those projects.

ICTC might review such concerns further when evaluating ways to improve its current implementation of the Federal DBE Program. It should also review legal issues, including state contracting laws and whether certain program options would meet USDOT regulations.

Counting DBE and MBE/WBE Participation — 49 CFR Part 26.55

Section 26.55 of 49 CFR describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. Section 26.11 discusses the Uniform Report of DBE Awards or Commitments and Payments.

As discussed above, ICTC should consider developing procedures and databases to consistently track participation of MBE/WBEs and potential DBEs in FTA - and locally-funded contracts that the agency and its subrecipient local agency award. Such measures will help the agency track the effectiveness of race- and gender-neutral programs in encouraging DBE participation. If applicable, ICTC should also consider collecting important information regarding any shortfalls in annual DBE participation, including preparing utilization reports for all MBE/WBEs (not just those that are DBE-certified).⁴ ICTC should consider collecting and using the following information:

- Databases that BBC developed as part of the study to track MBE/WBE utilization;
- Contractor/consultant registration documents from businesses working with ICTC or its subrecipient as prime contractors or subcontractors, which should include information about the race/ethnicity and gender of their owners;
- Prime contractor and subcontractor utilization on both FTA- and locally-funded contracts;
- Reports on the participation of certified DBEs in FTA-funded contracts, as required under the Federal DBE Program;
- Subcontractor utilization data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or DBE-certification status;
- Invoices for prime contractors and subcontractors;
- Descriptions of the areas of the contract on which subcontractors worked; and
- Subcontractors' contact information and committed dollar amounts from prime contractors at the time of contract award.

⁴ Including self-identified MBE/WBEs.

ICTC should consider maintaining the information described above for some minimum amount of time (e.g., five years). ICTC should also consider establishing a training process for all staff that is responsible for managing and entering contract and vendor data. Training should convey data entry rules and standards and ensure consistency in the data entry process.

DBE certification — 49 CFR Part 26 Subpart D

CUCP is responsible for all DBE (as well as MBE/WBE) certifications in the state of California. CUCP also maintains all of the certification records for the State of California. Businesses interested in working with ICTC that are seeking DBE certification must obtain it through CUCP. CUCP is designed to comply with 49 CFR Part 26 Subpart D. As ICTC works with DBE-certified businesses, the agency should consider ensuring that CUCP continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations.

Many business owners and managers participating in in-depth interviews, and public hearings commented on the DBE certification process. Some business owners felt that the certification process was reasonable and relatively easy. However, several business owners were highly critical about the certification process. A number of business owners reported that the process was difficult to understand and very time consuming. Appendix J provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process.

ICTC might consider more effectively communicating information about the Federal DBE Program, particularly information about the benefits of DBE certification. It may be effective for ICTC to coordinate with other agencies that operate similar programs and to verify that the information that CUCP provides is accurate and current. ICTC should consider encouraging CUCP to examine its staffing, training, and information systems to improve its implementation of the DBE certification process as well as other aspects of the Federal DBE Program.

Although ICTC appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants, the agency might research other ways to make the certification process easier for potential DBEs.

Monitoring Changes to the Federal DBE Program

Federal regulations related to the Federal DBE Program change periodically, and USDOT also issues new guidance concerning implementation of the program. ICTC should continue to monitor such developments. Other transportation agencies' implementations of the Federal DBE Program are under review in federal district courts. ICTC should continue to monitor court decisions in those and other relevant cases.

ICTC's Locally-funded Contracts

Certain improvements to ICTC's implementation of the Federal DBE Program, especially concerning contract goals and tracking MBE/WBE participation, might also be implemented on a race- and gender-neutral basis for ICTC contracts that are entirely locally-funded. ICTC should review the opportunities on its locally-funded contracts to further encourage participation of small businesses, including many MBE/WBEs, as allowable under state law.

APPENDIX A.

Definition of Terms

APPENDIX A.

Definitions of Terms

Appendix A provides explanations and definitions useful to understanding the Imperial County Transportation Commission (ICTC) disparity study report. The following definitions are only relevant in the context of this report.

Anecdotal evidence. Anecdotal evidence includes personal accounts and perceptions of incidents — including any incidents of discrimination — told from individual interviewees’ or participants’ perspectives.

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

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

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

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

California Unified Certification Program (CUCP). The CUCP provides certification services to small-, minority-, and women-owned businesses seeking to participate in the USDOT DBE Program. The CUCP has the responsibility in California of overseeing the certification activities performed by various certifying agencies and compiling and maintaining a single statewide database of certified DBEs..

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

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

Contractor. A contractor is a business performing on one or more construction contracts.

Controlled. Control means exercising management and executive authority for a company, per federal regulations, including 49 CFR Part 26, Section 26.71.

Disadvantaged Business Enterprise (DBE). A DBE is a small business 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) and that is certified as such through the California Unified Certification Program (CUCP). Membership in certain race and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of socially and economically disadvantaged. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the gross revenues and the business owner’s personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. A business owned by a non-minority male can be certified as a DBE if the business meets the requirements in 49 CFR Part 26.

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

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

Disparity index. A disparity index is computed by dividing percent utilization by percent availability and then multiplying the result by 100. A disparity index of 100 indicates “parity.” Smaller disparity indices indicate larger disparities.

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

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

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

Establishment. See “business establishment.”

Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program was 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 promulgated for the Federal DBE Program are set forth in 49 CFR Part 26.

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, passenger ferry boats, and other forms of transportation.

Firm. See “business.”

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

Imperial County Transportation Commission (ICTC). The Imperial County Transportation Commission is an association of cities, counties, and other local governments in the Imperial Valley that is responsible for addressing regional transportation needs. ICTC oversees many transportation activities in the region including distributing funds for local transportation projects; planning, programming and administering regional transit services; and encouraging citizen participation in the development and implementation of various transportation-related plans and programs. ICTC also operates and manages several public transportation services, including the Imperial Valley Transit System.

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

Local agency. A local agency is any local government receiving FTA funds through ICTC. The local agencies involved in this study are the City of Brawley and the City of El Centro.

Locally-funded contract. A locally-funded contract is any contract or project that is wholly funded with local funds. Those contracts do not include USDOT funds.

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

MBE. See minority-owned business.

Minorities. Minorities are individuals who belong to one of the racial/ethnic groups identified in the federal regulations in 49 CFR Part 26:

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

Minority-owned business (MBE). A MBE is a business with at least 51 percent ownership and control by minorities. Minority groups are defined according to federal regulations, as outlined in 49 CFR Part 26, Section 26.5. For purposes of this study, a business need not be

certified by CUCP to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available).

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

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

Non-response bias. Non-response bias occurs when the observed responses to a survey question differ in systematic ways 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.

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

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

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and the end user, such as ICTC

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

Project. A project refers to a construction, engineering or other goods and services endeavor that ICTC bid out during the study period. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race-and gender-conscious measures are contracting measures that apply to businesses owned by some racial/ethnic groups but not others, or that apply to businesses owned by women but not men. A contract-specific DBE goal is one example of a race- and gender-conscious measure. Note that the term is more accurately “race-, ethnicity-, and gender-conscious measures.” However, for ease of communication, the study team has shortened 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 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 to which ICTC awards most of its contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to MBE/WBE programs requires disparity analyses to focus on the “relevant geographic market area.”¹

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

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

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

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

Subconsultant. A subconsultant is a professional services firm that performed services for a prime consultant as part of a larger contract.

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 a larger contract.

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

Subrecipient. A subrecipient is a local agency receiving financial assistance from USDOT through ICTC.

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

United States Departments of Transportation (USDOT). USDOT refers to the United States Department of Transportation, which includes FHWA and FTA.

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

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

WBE. See women-owned business.

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

APPENDIX B.

Legal Framework and Analysis

**HOLLAND & KNIGHT LLP
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**CONFIDENTIAL
FINAL REPORT**

SANDAG, NCTD, ICTC CONSORTIUM

**REPORT ON LEGAL FRAMEWORK
AND ANALYSIS**

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Table of Contents

TABLE OF CONTENTS	II
APPENDIX B REPORT ON LEGAL ANALYSIS	1
A. Introduction.....	1
B. U.S. Supreme Court Cases	4
1. <i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	4
2. <i>Adarand Constructors, Inc. v. Peña</i> (“ <i>Adarand I</i> ”), 515 U.S. 200 (1995)	5
C. The Legal Framework Applied to the Federal DBE Program and State and Local Government MBE/WBE Programs.....	6
1. The Federal DBE Program	6
2. Strict Scrutiny Analysis.....	13
3. Intermediate Scrutiny Analysis.	23
4. Pending Cases (at the time of this report).....	24
D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs In The Ninth Circuit.....	28
1. <i>Associated General Contractors of America, San Diego Chapter, Inc. v.</i> <i>California Department of Transportation, et al.</i> , 713 F.3d 1187 (9 th Cir. April 16, 2013)	28
2. <i>Associated General Contractors of America, San Diego Chapter, Inc. v.</i> <i>California Department of Transportation, et al.</i> , U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), <i>appeal dismissed based</i> <i>on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program</i> <i>constitutional, Associated General Contractors of America, San Diego Chapter,</i> <i>Inc. v. California Department of Transportation, et al.</i> , 713 F.3d 1187 (9 th Cir. April 16, 2013).....	35
3. <i>Western States Paving Co. v. Washington State DOT</i> , 407 F.3d 983 (9 th Cir. 2005), <i>cert. denied</i> , 546 U.S. 1170 (2006).....	38
4. <i>Western States Paving Co. v. Washington DOT, US DOT & FHWA</i> , 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion)	42
5. <i>M.K. Weeden Construction v. State of Montana, Montana Department of</i> <i>Transportation, et al.</i> , 2013 WL 4774517 (D. Mont.) (September 4, 2013).....	43
6. <i>Monterey Mechanical v. Wilson</i> , 125 F.3d 702 (9 th Cir. 1997)	46
7. <i>Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity</i> (<i>“AGCC”</i>), 950 F.2d 1401 (9 th Cir. 1991)	47
8. <i>Coral Construction Co. v. King County</i> , 941 F.2d 910 (9 th Cir. 1991)	50
E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions	55

1.	<i>Northern Contracting, Inc. v. Illinois</i> , 473 F.3d 715 (7 th Cir. 2007)	55
2.	<i>Northern Contracting, Inc. v. Illinois</i> , 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), <i>aff'd</i> 473 F.3d 715 (7 th Cir. 2007)	57
3.	<i>Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT</i> , 2004 WL 422704 (N.D. Ill. March 3, 2004)	62
4.	<i>Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Road</i> , 345 F.3d 964 (8 th Cir. 2003), <i>cert. denied</i> , 541 U.S. 1041 (2004)	65
5.	<i>Sherbrooke Turf, Inc. v. Minnesota DOT</i> , 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), <i>aff'd</i> 345 F.3d 964 (8 th Cir. 2003)	68
6.	<i>Gross Seed Co. v. Nebraska Department of Roads</i> , Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), <i>aff'd</i> 345 F.3d 964 (8 th Cir. 2003)	69
7.	<i>Adarand Constructors, Inc. v. Slater</i> , 228 F.3d 1147 (10 th Cir. 2000) <i>cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta</i> , 532 U.S. 941, 534 U.S. 103 (2001)	70
8.	<i>Geod Corporation v. New Jersey Transit Corporation, et. al.</i> , 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)	72
9.	<i>Geod Corporation v. New Jersey Transit Corporation, et. seq.</i> 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)	77
10.	<i>South Florida Chapter of the Associated General Contractors v. Broward County, Florida</i> , 544 F. Supp.2d 1336 (S.D. Fla. 2008)	81
11.	<i>Klaver Construction, Inc. v. Kansas DOT</i> , 211 F. Supp.2d 1296 (D. Kan. 2002)	83
F.	Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions	85
	<i>Recent Decisions in Federal Circuit Courts of Appeal</i>	85
1.	<i>H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.</i> , 615 F.3d 233 (4th Cir. 2010)	85
2.	<i>Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development</i> , 438 F.3d 195 (2d Cir. 2006)	96
3.	<i>Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.</i> , 460 F.3d 859 (7 th Cir. 2006)	97
4.	<i>Virdi v. DeKalb County School District</i> , 135 Fed. Appx. 262, 2005 WL 138942 (11 th Cir. 2005) (unpublished opinion)	98
5.	<i>Concrete Works of Colorado, Inc. v. City and County of Denver</i> , 321 F.3d 950 (10 th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)	100
6.	<i>Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services</i> , 140 F.Supp.2d 1232 (W.D. OK. 2001)	113
7.	<i>In re City of Memphis</i> , 293 F.3d 345 (6th Cir. 2002)	118
8.	<i>Builders Ass'n of Greater Chicago v. County of Cook, Chicago</i> , 256 F.3d 642 (7th Cir. 2001)	118

9.	<i>Associated Gen. Contractors v. Drabik</i> , 214 F.3d 730 (6th Cir. 2000), <i>affirming</i> Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998).....	120
10.	<i>W.H. Scott Constr. Co. v. City of Jackson</i> , 199 F.3d 206 (5th Cir. 1999)	120
11.	<i>Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County</i> , 122 F.3d 895 (11th Cir. 1997)	121
	Recent District Court Decisions	133
12.	<i>H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.</i> , 589 F. Supp.2d 587 (E.D.N.C. 2008), <i>affirmed in part, reversed in part, and remanded</i> , 615 F.3d 233 (4th Cir. 2010)	133
13.	<i>Thomas v. City of Saint Paul</i> , 526 F. Supp.2d 959 (D. Minn 2007), <i>affirmed</i> , 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), <i>cert. denied</i> , 130 S.Ct. 408 (2009).....	138
14.	<i>Thompson Building Wrecking Co. v. Augusta, Georgia</i> , No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)	140
15.	<i>Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County</i> , 333 F. Supp.2d 1305 (S.D. Fla. 2004)	142
16.	<i>Florida A.G.C. Council, Inc. v. State of Florida</i> , 303 F. Supp.2d 1307 (N.D. Fla. 2004)	147
17.	<i>The Builders Ass'n of Greater Chicago v. The City of Chicago</i> , 298 F. Supp.2d 725 (N.D. Ill. 2003)	148
18.	<i>Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore</i> , 218 F. Supp.2d 749 (D. Md. 2002).....	150
19.	<i>Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore</i> , 83 F. Supp.2d 613 (D. Md. 2000).....	151
20.	<i>Webster v. Fulton County</i> , 51 F. Supp.2d 1354 (N.D. Ga. 1999), <i>aff'd per curiam</i> 218 F.3d 1267 (11th Cir. 2000)	151
21.	<i>Associated Gen. Contractors v. Drabik</i> , 50 F. Supp.2d 741 (S.D. Ohio 1999)	154
22.	<i>Phillips & Jordan, Inc. v. Watts</i> , 13 F. Supp.2d 1308 (N.D. Fla. 1998)	154
G.	Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs.....	156
1.	<i>Rothe Development Corp. v. U.S. Department of Defense, et al.</i> , 545 F.3d 1023 (Fed. Cir. 2008).....	156
2.	<i>DynaLantic Corp. v. United States Dept. of Defense, et al.</i> , 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), <i>appeal pending</i> , United States Court of Appeals for the District of Columbia, Docket Number 12-5330	165
3.	<i>DynaLantic Corp. v. United States Dept. of Defense, et al.</i> , 503 F. Supp.2d 262 (D.D.C. 2007).....	174
4.	"Federal Procurement After Adarand" (USCCR Report September, 2005)	175

APPENDIX B

Report on Legal Analysis

A. Introduction

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

This section 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. Peña*,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 SANDAG Consortium's participation in the Federal DBE Program.

The legal framework then analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to SANDAG Consortium's disparity study and the strict scrutiny analysis. In particular, this analysis reviews the Ninth Circuit decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*⁵ and *Western States Paving Co. v. Washington State DOT*.⁶

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*, ("*AGC, SDC v. Caltrans*"), which is the most recent significant decision, the Ninth Circuit upheld the validity of the state DOT's implementation of the Federal DBE Program. In *Western States Paving*, the Ninth Circuit upheld the validity of the

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

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

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

⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013) (*AGC, SDC v. Caltrans*).

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

Federal DBE Program, but held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state's transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and a state government agency's or recipient's implementation of the DBE program, including *Northern Contracting, Inc. v. Illinois DOT*,⁷ *Sherbrooke Turf, Inc. v. Minn DOT* and *Gross Seed v. Nebraska Department of Roads*,⁸ *Adarand Construction, Inc. v. Slater*⁹ ("Adarand VII"), *Geod Corporation v. New Jersey Transit Corporation*¹⁰, and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹¹

The analyses of *AGC, SDC v. Caltrans*, *Western States Paving* and these other recent cases are instructive to a recipient of federal funds and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by recipients of federal financial assistance governed by 49 CFR Part 26.¹² They also are applicable in terms of the preparation of its DBE Program by recipient of federal funds submitted in compliance with the Federal DBE regulations.

Following *Western States Paving*, it is noteworthy that the USDOT, in particular for agencies in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of Federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.¹³ The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.¹⁴ The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.¹⁵ The USDOT's Guidance is recognized by the

⁷ 473 F.3d 715 (7th Cir. 2007).

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

⁹ 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII").

¹⁰ 766 F. Supp.2d 642, (D. N.J. 2010).

¹¹ 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹² See *AGC, SDC v. Caltrans*, 713 F.3d 1187 (9th Cir. 2013); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Western States Paving*, 407 F.3d 983 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII").

¹³ Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; see 49 CFR § 26.9; see also 49 C.F.R. Section 26.45.

¹⁴ DOT Guidance, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

¹⁵ *Id.*

federal regulations as “valid and binding, and constitutes the official position of the Department of Transportation”¹⁶ for states in the Ninth Circuit.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program’s facial constitutionality, and, according to the Court, stated “that [the Federal DBE Program’s] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.”¹⁷ Accordingly, the USDOT has advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.¹⁸

Most recently in the Ninth Circuit, the Ninth Circuit Court of Appeals in *AGC, SDC v. Caltrans* (April 2013), and the United States District Court for the Eastern District of California in *AGC, SDC v. Caltrans* (2011), which are fully discussed below, held that Caltrans’ current implementation of the Federal DBE Program is constitutional.¹⁹ The Ninth Circuit held that Caltrans’ DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being “narrowly tailored” to benefit only those groups that have actually suffered discrimination.

The District Court had held that the “Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry,” satisfied the strict scrutiny standard, and is “clearly constitutional” and “narrowly tailored” under *Western States Paving* and the Supreme Court cases.²⁰

¹⁶ *Id.*, 49 C.F.R. § 26.9.

¹⁷ *Western States Paving*, 407 F.3d at 996; see also Br. for the United States, at 28 (April 19, 2004).

¹⁸ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

¹⁹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT (Caltrans)*, 713 F. 3d 983 (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT (Caltrans)*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011), *appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT (Caltrans), et al.*, 713 F. 3d 1187 (9th Cir. April 16, 2013).

²⁰ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT (Caltrans)*, Slip Opinion (E.D. Cal. April 20, 2011), Transcript of U.S. District Court, Eastern Division of California, at 42-56.

B. U.S. Supreme Court Cases

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

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

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

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary." The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors. The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, ... [i]t could take affirmative steps to dismantle such a system." The Court held that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." The Supreme Court noted that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."

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

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

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

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

1. The Federal DBE Program

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.²¹ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 C.F.R. Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 ("SAFETEA"). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21").²²

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.²³

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

²¹ *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter "The Compelling Interest"); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

²² Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

²³ 49 C.F.R. § 26.51.

outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE program. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 C.F.R. § 26.45.

Provided in 49 C.F.R. § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.²⁴ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.²⁵ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.²⁶ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 C.F.R. § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.²⁷ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.²⁸

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.²⁹

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.³⁰ A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 C.F.R. § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 C.F.R. § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.³¹

²⁴ 49 C.F.R. § 26.45(a), (b), (c).

²⁵ *Id.*

²⁶ *Id.* at § 26.45(d).

²⁷ *Id.*

²⁸ 49 C.F.R. § 26.45(b)-(d).

²⁹ 49 C.F.R. § 26.51.

³⁰ 49 C.F.R. § 26.51(b).

³¹ 49 C.F.R. §§ 26.21-26.37.

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

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provides "Findings" that "discrimination and related barriers" "merit the continuation of the" Federal DBE Program.³² In MAP-21, Congress specifically finds as follows:

"(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets across the United States;

(B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

(C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business."³³

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is "a compelling need for the continuation of the" Federal DBE Program.³⁴

³² Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

³³ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

³⁴ *Id.*

U.S. DOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a new Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) ("Final Rule") amending the Federal DBE Program at 49 C.F.R. Part 26. According to the United States DOT, the Rule increases accountability for recipients with respect to meeting overall goals, modifies and updates certification requirements, adjusts the personal net worth threshold for inflation to \$1.32 million dollars, provides for expedited interstate certification, adds provisions to foster small business participation, provides for additional post-award oversight and monitoring, and addresses other matters.³⁵

In particular, the Final Rule provides that a recipient's DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.³⁶

In addition, the Final Rule adds a Section 26.39 to Subpart B to provide for fostering small business participation.³⁷ The recipient's DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval by February 28, 2012.³⁸ The new Final Rule provides a list of "strategies" that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient's overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.³⁹ The new Final Rule provides that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient's DBE program.⁴⁰

The Final Rule also provides that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.⁴¹ The Final Rule sets out what action the recipient must take in order to be regarded as implementing its DBE program in

³⁵ 76 F.R. 5083-5101.

³⁶ See 49 C.F.R. § 26.37, 76 F.R. at 5097.

³⁷ 76 F.R. at 5097, January 28, 2011.

³⁸ *Id.*

³⁹ *Id.* at 5097, amending 49 C.F.R. § 26.39(b)(1)-(5).

⁴⁰ *Id.* at 5097, amending 49 C.F.R. § 26.39(c).

⁴¹ 76 F.R. at 5098, amending 49 C.F.R. § 26.47(c).

good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.⁴² The Final Rule provides a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.⁴³

The Department states in the Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁴⁴

The United States DOT in the Final Rule states that there is a continuing compelling need for the DBE program.⁴⁵ The DOT concludes that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”⁴⁶ The DOT says that the “basis for the program has been established by Congress and applies on a nationwide basis...”, notes that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and references additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”⁴⁷ This information, the DOT states, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁴⁸

Notice of Proposed Rulemaking (NPRM) for the Disadvantaged Business Enterprise: Program Implementation Modifications for 49 CFR Part 26 (September 6, 2012)

On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, “Disadvantaged Business Enterprise: Program Implementation Modifications” in the Federal Register at 77 Fed. Reg. 54952.⁴⁹ On October 25, 2012, the USDOT issued an extension of time for the Comment Period to comment on the NPRM, by extending the

⁴² *Id.*, amending 49 C.F.R. § 26.47(c)(1)-(5).

⁴³ *Id.*, amending 49 C.F.R. § 26.47(c)(5).

⁴⁴ 76 F.R. at 5092.

⁴⁵ 76 F.R. at 5095.

⁴⁶ 76 F.R. at 5095.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 77 F.R. 54952-55024 (September 6, 2012).

Comment Period until December 24, 2012.⁵⁰ On September 18, 2013, the USDOT issued a Notice of Reopening Comment Period and a Public Listening Session, which provides another extension of time for the Comment Period by extending the Comment Period until October 30, 2013.⁵¹

This Notice of Proposed Rulemaking proposes three categories of changes that the Department indicates will improve implementation of the DOT's Federal DBE Program. First, the NPRM proposes revisions to personal net worth, application, and reporting forms. Second, the NPRM proposes modifications to certification-related provisions of the rule. Third, the NPRM would modify several other provisions of the rule, including concerning such subjects as good faith efforts, transit vehicle manufacturers and counting of trucking companies.⁵²

The USDOT notes the DBE Program was recently reauthorized in the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program and does not include any significant substantive changes to the Program.⁵³

The Notice of Proposed Rulemaking proposes changes to the Personal Net Worth Form and related requirements of 49 CFR 26.67; certification provisions at Section 26.65; what rules govern determinations of ownership at Section 26.69; what rules govern determinations concerning control at Section 26.71; what are other rules affecting certification at Section 26.73; what procedures do recipients follow in making certification decisions at Section 26.83; what rules govern recipients' denials of initial requests for certification at Section 26.86; what procedures does a recipient use to remove a DBE's eligibility at Section 26.87; summary suspension of certification at Section 26.88; and what is the process for certification appeals to the USDOT at Section 26.89.⁵⁴

In addition, other provisions that are proposed to be amended include: what are the objectives of this Part at Section 26.1; specific definitions at Section 26.5 adding eight new definitions for the following words or phrases: "assets;" "business, business concern, or business enterprise;" "contingent liability;" "days;" "immediate family member;" "liabilities;" "non-disadvantaged individual;" "principal place of business;" and "transit vehicle manufacturer (TVM)."⁵⁵

Also, additional provisions proposed to be amended include: what records do recipients keep and report at Section 26.11; who must have a DBE Program at Section 26.21; how are overall goals established for transit vehicle manufacturers at Section 26.49; what means do recipients

⁵⁰ 77 F.R. 65164 (October 25, 2012).

⁵¹ 78 F.R. 57336 (September 18, 2013). At the time of this report, the public listening session was cancelled on October 9, 2013, subject to rescheduling, and the comment period may be extended based on when the U.S. DOT reschedules the listening session.

⁵² 77 F.R. 54952.

⁵³ *Id.* at 54952.

⁵⁴ *Id.* at 54952-54960.

⁵⁵ *Id.* at 54960.

use to meet overall goals at Section 26.51; what are the rules governing information, confidentiality, cooperation, and intimidation or retaliation at Section 26.109.⁵⁶

The NPRM proposes adding language to Appendix A - Good Faith Efforts, including recommending that recipients scrutinize the documented good faith efforts by contractors, and at a minimum, review the performance of other bidders in meeting the contract goal; propose mirroring language added in Section 26.53 revisions that recipients require contractors to submit all subcontractor quotes in order to review whether DBE prices were substantially higher; require recipients to contact the DBEs listed on a contractor's solicitation to inquire as to whether they were, in fact, contacted by the prime; and language stating that pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.⁵⁷

The NPRM proposed various modifications of the DBE Program, including four proposed modifications to existing and/or new information collections, including modifications to the Uniform Report of DBE Commitment/Awards and Payments Form found in Appendix B of 49 CFR Part 26.⁵⁸

As part of the Rulemaking the Department intends to reinstate the information collection entitled, "Uniform Report of DBE Commitment/Rewards and Payments," consistent with the changes proposed in the NPRM.⁵⁹ This information collection requires that DOT Form 4630 be submitted by each recipient and is used to enable DOT to conduct program oversight and recipients' DBE Programs.⁶⁰ In this NPRM, the Department proposes to modify certain aspects of this information collection in response to issues raised by stakeholders, including: (1) Creating separate forms for routine DBE reporting and for transit vehicle manufacturers and mega projects; (2) amending and clarifying the report's instructions to better explain how to fill out the form; and (3) changing the forms to better capture the desired DBE data on a more continuous basis.⁶¹

It should be noted that because this is a Notice of Proposed Rulemaking, which the Comment Period has been extended to October 30, 2013, at the time of this report it is not known whether any or all of these proposed rules actually will be promulgated as a Final Rule, which most likely would occur in 2014. It also is possible, based on the comments received by the USDOT, that there will be changes to the proposed amended language to these rules when they are published in the Final Rule.

⁵⁶ *Id.* at 54960-54965.

⁵⁷ *Id.* at 54965-54966.

⁵⁸ *Id.* at 54976-54978.

⁵⁹ *Id.* at 54966-54967; 77 F.R. 65165 (October 25, 2012).

⁶⁰ *Id.*

⁶¹ 77 F.R. 65165 (October 25, 2012).

2. Strict Scrutiny Analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁶² Implementation of the Federal DBE Program by a recipient of federal funds also is subject to the strict scrutiny analysis if it utilizes race- and ethnicity-based efforts. The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.⁶³

a. The Compelling Governmental Interest Requirement

The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program. State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.⁶⁴ 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.⁶⁵

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁶⁶ The federal courts have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the

⁶² *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); *See, Fisher v. University of Texas*, ___ U.S. ___, 133 S.Ct. 2411 (June 24, 2013).

⁶³ *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176.; *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993).

⁶⁴ *See e.g., Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁶⁵ *Id.*

⁶⁶ *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176.

program (49 C.F.R. Part 26).⁶⁷ Specifically, the federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁶⁸ 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).⁶⁹ The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.⁷⁰
- **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

⁶⁷ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe*’s Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. Aug 10, 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision in *Rothe* below in Section G. See also the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012).

⁶⁸ *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.

⁶⁹ 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”).

⁷⁰ *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; see *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813.

subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.⁷¹

- 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.⁷²
- 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.⁷³
- MAP-21. Recently, in July 2012, Congress passed MAP-21 (see above), which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal DBE Program.⁷⁴ Congress also found that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal DBE Program.⁷⁵

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.⁷⁶ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁷⁷ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁷⁸

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

⁷¹ *Adarand VII*, at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813.

⁷² *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813.

⁷³ *Id.* at 1174-75.

⁷⁴ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁵ *Id.* at § 1101(b)(1).

⁷⁶ See *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater ("Adarand VII")*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁷⁷ *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916.

⁷⁸ 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.

recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.⁷⁹ “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.”⁸⁰

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.⁸¹ 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.⁸² However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁸³

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.⁸⁴ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,⁸⁵ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”⁸⁶
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.⁸⁷
- **Disparity index.** An important component of statistical evidence is the “disparity index.”⁸⁸ 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 or

⁷⁹ See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

⁸⁰ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

⁸¹ *Croson*, 448 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* (“*Concrete Works II*”), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736.

⁸² See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see *Western States Paving*, 407 F.3d at 1001.

⁸³ *Western States Paving*, 407 F.3d at 1001.

⁸⁴ See, e.g., *Croson*, 448 U.S. at 509; 49 C.F.R. § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

⁸⁵ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* (“*CAEP II*”), 91 F.3d 586, 603 (3d Cir. 1996).

⁸⁶ *Id.*

⁸⁷ See, e.g. *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

⁸⁸ *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).

an inference of discrimination. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”⁸⁹

- **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.⁹⁰

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.⁹¹ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.⁹² 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.⁹³

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.⁹⁴

⁸⁹ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

⁹⁰ *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.

⁹¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

⁹² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

⁹³ *Concrete Works I*, 36 F.3d at 1520.

⁹⁴ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional

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.⁹⁵

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 program is limited to those groups that actually suffered discrimination;
- 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.⁹⁶

In connection with the implementation of the Federal DBE Program by recipients of federal funds, the courts hold that strict scrutiny requires the recipient's DBE Program be “narrowly tailored” to remedy identified discrimination in the particular recipient's contracting and procurement market.⁹⁷

It should be pointed out that in the *Northern Contracting* decision (2007), the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program.”⁹⁸ The Seventh Circuit Court of Appeals distinguished both the

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, 2012 WL 3356813; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

⁹⁵ See, e.g., *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

⁹⁶ See, e.g., *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted).

⁹⁷ *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

⁹⁸ 473 F.3d at 722.

Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.⁹⁹ The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.¹⁰⁰ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 C.F.R. Part 26).¹⁰¹ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁰² See the discussion of the *Northern Contracting* decision below in Section E.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁰³ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁰⁴

In *Western States Paving*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.¹⁰⁵

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;

⁹⁹ *Id.* at 722.

¹⁰⁰ *Id.* at 723-24.

¹⁰¹ *Id.*

¹⁰² *Id.*; See, e.g., *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹⁰³ *Western States Paving*, 407 F.3d at 997-98, 1002-03.

¹⁰⁴ *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

¹⁰⁵ 407 F.3d at 996-1000.

- 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.¹⁰⁶

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.”¹⁰⁷ 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.”¹⁰⁸

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.’”¹⁰⁹

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹¹⁰ 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.”¹¹¹ The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve DBEs and implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

Race-, ethnicity-, and gender-neutral measures. To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a

¹⁰⁶ See, e.g., *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

¹⁰⁷ *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).

¹⁰⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; see also *Adarand I*, 515 U.S. at 237-38.

¹⁰⁹ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

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

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

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.¹¹² 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.¹¹³

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."¹¹⁴

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 C.F.R. Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.¹¹⁵ The courts have also found "the regulations require a state to 'meet the maximum feasible portion of [its] overall goal by using race neutral means.'¹¹⁶

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;

¹¹² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

¹¹³ 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.

¹¹⁴ *Croson*, 488 U.S. at 509-510.

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

¹¹⁶ See, e.g., *Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (citing 49 C.F.R. § 26.51(a)).

- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹¹⁷

49 C.F.R. § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹¹⁸

In *AGC, SDC v. Caltrans*, the Ninth Circuit rejected the assertion that the state DOT's DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race conscious goals, and said the law imposes no such requirement.¹¹⁹ The court held states are not required to independently meet this aspect of narrow tailoring, and instead concludes *Western States Paving* focuses on whether the federal statute sufficiently considered race-neutral alternatives.¹²⁰ In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”¹²¹

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-

¹¹⁷ See 49 C.F.R. § 26.51(b); see, e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 C.F.R. § 26.51(b); *Eng’g Contractors Ass’n*, 122 F.3d at 927-29.

¹¹⁸ *Western States Paving*, 407 F.3d at 993.

¹¹⁹ *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹²⁰ *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹²¹ *AGC, SDC v. Caltrans*, 713 F.3d at 1199; citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

neutral efforts), the courts require evaluation of additional factors as listed above.¹²² For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹²³ (2) good faith efforts provisions;¹²⁴ (3) waiver provisions;¹²⁵ (4) a rational basis for goals;¹²⁶ (5) graduation provisions;¹²⁷ (6) remedies only for groups for which there were findings of discrimination;¹²⁸ (7) sunset provisions;¹²⁹ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹³⁰

3. Intermediate Scrutiny Analysis.

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹³¹ The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹³²

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.¹³³

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

¹²² *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹²³ *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).

¹²⁴ *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹²⁵ *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417.

¹²⁹ *Peightal*, 26 F.3d at 1559.

¹³⁰ *Coral Constr.*, 941 F.2d at 925.

¹³¹ See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹³² *Id.*

¹³³ *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*.

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.¹³⁴ And the Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort... . Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹³⁵

4. Pending Cases (at the time of this report).

There are pending cases in the federal courts, at the time of this report, that may potentially impact and be instructive to SANDAG Consortium as a recipient of federal funding under the Federal DBE Program, including the following:

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. 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 is challenging the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenges the IDOT's 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 Toll Highway Authority's separate DBE Program.

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

Midwest Fence in its Third Amended Complaint challenges the constitutionality of the Federal DBE Program on its face and as applied, and challenges the IDOT's implementation of the Federal DBE Program. Midwest Fence also seeks a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence seeks 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 seek 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

¹³⁴ *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng'g Contractors Ass'n*, 122 F.3d at 910.

¹³⁵ 122 F.3d at 929 (internal citations omitted.)

on September 27, 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

This case, at the time of this report, is currently in the final expert witness discovery stage of the litigation to be followed by the dispositive motions and pretrial stage of the litigation.

Geyer Signal, Inc., et al. v. Minnesota DOT, the United States DOT, the Federal Highway Administration, et al. In *Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the Plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT 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 seeks 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.

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

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

At the time of this report, the case is pending in the Federal District Court of the District of Minnesota and currently is in the dispositive motions and pretrial stage of the litigation. Dispositive Motions for Summary Judgment by Defendant US DOT and Minnesota DOT have been filed and are pending. The Court held a hearing on the motions on September 23, 2013, and has taken the motions "Under Advisement."

Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT. In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, Case No. 3:10-CV-3051, in the United States District Court for the Central District of Illinois, Springfield

Division, plaintiff Dunnet Bay Construction Company brought a lawsuit against the Secretary of the IDOT in its official capacity and the IDOT challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and that the IDOT's program is not narrowly tailored. The IDOT filed a Motion to Dismiss certain Counts of the Complaint. In an Order from the United States District Court, the Court granted the Motion to Dismiss Counts I, II and III against the 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 the IDOT in his official capacity remain pending.

In addition, there are other Counts of the Complaint that remain in the case that are not subject to the Motion to Dismiss, which seek injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by the IDOT. Plaintiff Dunnet Bay alleges 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.

This case is currently pending in the discovery stage with dispositive Motions and a pretrial conference, at the time of this report, scheduled for December 2013. *See, Dunnet Bay Construction Company v. Hannig*, (Text Order by the Court dated October 4, 2013). A date for the jury trial will be set at the final pretrial conference. (Text Order, October 4, 2013). *See also, Dunnet Bay*, 2011 WL 5417123 (C.D. Ill. November 9, 2011) (Court Order denying Dunnet Bay's Motion to Compel Production).

Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, Plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleges 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, 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.

According to the First Amended Complaint, the State of Montana commissioned a disparity study in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts.

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

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly over-utilized 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.

The case, recently filed, is currently in the early discovery stage of litigation at this time with dispositive motions scheduled to be filed by the end of September 2014.

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

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

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

- 1. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 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 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 & 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.

Western States Paving Co. v. Washington State DOT. 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 & Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: “Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5% of contract 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% for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5% goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the U.S. DOT 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 U.S. DOT 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%, of which 9.5% will be achieved through race- and gender-conscious measures. *Id.* The U.S. DOT 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 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 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 1196 (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 1197. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ole boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198., *citing Western States*, 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. These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the US DOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

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

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

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

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

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

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

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

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

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

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals

be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

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

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

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

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

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

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation

contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id.*

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

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

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

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar

concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau’s Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent “to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period].” *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

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

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

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against

DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

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

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

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

4. *Western States Paving Co. v. Washington DOT, US DOT & FHWA*, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. v. Washington DOT, US DOT, and FHWA*, 407 F.3d 983 (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. WSDOT argued that even if sovereign immunity did not bar plaintiff’s §2000d claim, WSDOT could not be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff’s race when calculating the annual utilization goal. The court held that since the policy was not “facially neutral” — and was in fact “specifically race conscious” — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT’s program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT’s Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation ("DOT") and others, to the DBE Program adopted by Montana DOT implementing the Federal DBE Program at 49 C.F.R. Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the Montana DOT.

Factual Background and Claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the U.S. DOT's DBE Program. 2013 WL 4774517 at *1. Montana DOT had established an overall goal of 5.83% DBE participation in Montana's highway

construction projects. On the Arrow Creek Slide Project, Montana DOT established a DBE goal of 2%. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2% DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87% DBE subcontractors (although the court points out that Weeden's bid actually identified only .81% DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2% DBE goal. The other five bidders exceeded the 2% goal, with bids ranging from 2.19% DBE participation to 6.98% DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. Montana DOT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the Montana DOT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

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

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

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that Montana DOT and U.S. DOT 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% DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No Standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge Montana DOT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

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

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

supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

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

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

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

6. *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.

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

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity* ("AGCC"), the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an

older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

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

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

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of City contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing

minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

8. *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 governments, such as states or counties, exhaust race-neutral measures that

the government is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

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

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

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

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

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

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

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

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

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

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

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

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*,

126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that “[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.” *Id.* at 721, *quoting Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 C.F.R. § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT

contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

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

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

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"),

the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

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

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

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

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

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate

amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

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

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

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

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

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

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

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

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

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

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

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

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ...

registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

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

The court further found:

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

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

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

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

[M]ore importantly, Plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but

pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

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

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

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

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

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

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of

the Federal DBE Program (TEA-21 and 49 C.F.R. Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the 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 C.F.R. § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing and quoting Sherbooke 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 C.F.R. § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 C.F.R. § 26.51(e)(f). Recipients also administering a DBE Program in good faith can not be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 C.F.R. § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 C.F.R. § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 C.F.R. § 26.43.

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

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

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 C.F.R. § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 C.F.R. § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

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

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

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

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are

unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

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

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

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

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

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

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

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 C.F.R.

Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 C.F.R. Part 26 and TEA-21 were constitutional.

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

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

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

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Peña*, 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 C.F.R. Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

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

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

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

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

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

New Jersey Transit Program and Disparity Study

NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

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

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

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the

consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

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

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

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

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

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

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

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

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (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 C.F.R. § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

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

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

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

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 C.F.R. § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant

stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

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

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

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

Applying *Western States Paving*

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

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

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

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

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

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

9. *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 C.F.R. Part 26.

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

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

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

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(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 lead 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 C.F.R. § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT’s DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs’ argument that the data used in the disparity study were stale, was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court

stated that “perhaps more importantly, NJT’s DBE goal was approved by the USDOT every year from 2002 until 2008.” *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 C.F.R. § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

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

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

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

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

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

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of

material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

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

10. *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.

11. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 C.F.R. Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct

constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

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

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, 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. Estep*, 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 C.F.R. § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

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

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

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

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

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

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

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

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

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector

disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was “the result of mere chance.” *Id.* at 255. The Court found troubling the “evidentiary gap” that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

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

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

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

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

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

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

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

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

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 C.F.R. § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent

assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *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 Viridi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Viridi to lose a contract that he would have otherwise received. *Id.* Thus, because Viridi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

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

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

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

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation

goals for racial minorities and women on certain City construction and professional design projects. *Id.*

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

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

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

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

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

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

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

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

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

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

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than

majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and

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

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

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

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

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

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

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

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

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

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

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

exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

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

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

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

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

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

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

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

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

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for

MBE/WBEs and concluded that the resulting disparities, “suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms.” *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

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

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

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

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

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

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden

by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

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

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

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

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

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

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

1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden. *Id.* at 989-90, *citing Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

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

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

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

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

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

6. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, citing *Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v.*

Drabik, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the

Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining

government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the

10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

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

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

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or

socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

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

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

This case is instructive to the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage. The district court had ruled that the City could not introduce the post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue.

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

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

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("VMI"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend

gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

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

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

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

nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

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

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

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

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts. The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

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

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

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

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

11. *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 C.F.R. § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

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

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

The Eleventh Circuit then explained the burden of proof:

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

Id. (internal citations omitted).

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

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

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

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

The Eleventh Circuit then summarized:

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

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

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression

analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

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

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

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

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

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding

that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

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

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

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

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

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

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the

Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

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

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

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

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

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

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

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

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

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

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

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from

non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

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

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

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

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519

(Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

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

The Eleventh Circuit

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

Id. at 927.

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

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County

employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

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

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

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

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

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

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

Recent District Court Decisions

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

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

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

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT’s MWBE Program “largely mirrors” the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT’s MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that

NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A § 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in

Croson made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F.3d 233 (4th Cir. 2010), discussed above.

13. *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 plaintiffs 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.

14. *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.

15. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313.

However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against

women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed

to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (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.

16. *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.

17. *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).

18. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

19. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

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

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

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

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

The court next considered the County's post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation

analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, citing *Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

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

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

This opinion underscored that governments must show four factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

22. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. *Rothe Development Corp. v. U.S. Department of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 C.F.R. Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of

Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by Rothe regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny

analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a "bright-line rule for determining staleness." *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id.* at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the

federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, *quoting 61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the Appendix to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit

in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson*’s emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity

percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, quoting *W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, citing to *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, quoting *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts

awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — *i.e.*, whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

2. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeal pending, United States Court of Appeals for the District of Columbia, Docket Number 12-5330

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. 885 F.Supp. 2d at 242, 279. The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at 242. 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 242. 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), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 C.F.R. § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 C.F.R. § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 885 F.Supp. 2d at 243-244.

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 244 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 C.F.R. § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. *Id.* at 244-245; *see* 13 C.F.R. § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at 244-245. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at 245. 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 245; 13 C.F.R. 124.501(b).

Plaintiff's Business and the Simulation and Training Industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic*, at 246.

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 250. 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 250, quoting *Sherbrooke*, 345 F.3d at 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 251 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 251, 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 252. 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 251. 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 251, 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 251-252 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 252, 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 252, 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 255-257. 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 257-258. 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 Tenth 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 258.

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 258-262. 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 262-265. 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 266-270. 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 267. 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 267.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at 267-268. 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 267. 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 267, 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 271-280. 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 271.

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 272-273. 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 273. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at 273. 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 273, 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 *273-274. The Court also found that

the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at 273, 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 274. 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 274-279.

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 276. 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 276, 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 *Crowson*, 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 276-277.

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 277. 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 277, 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 277. 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 277.

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 278. 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 279.

Facial Challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. *DynaLantic*, at 279. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at 279. 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 280. 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 280. 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 280.

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 280. 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 280. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at 280. 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 281, citing *Croson*, 488 U.S. at 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 281-282.

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 282, 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 282. 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 282.

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 282, 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 282. 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 283.

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 283. 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. *DynaLantic*, at 283

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at 283-291. 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 283-285. 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 285-286. 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 286.

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 286. 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 286.

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 287. 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 287-288.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at 288-289. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* at 289. 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 289.

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 289-290. 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.* at 290. 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 293. 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.

Appeal Pending. A Notice of Appeal by the federal defendants and Notice of Cross Appeal by DynaLantic were filed in this case to the United States Court of Appeals for the District of Columbia: Docket Numbers 12-5329 and 12-5330. The federal defendants subsequently dismissed their appeal (Number 5329). DynaLantic's cross-appeal (Number 12-5330) challenging the ruling on the facial constitutionality of Section 8(a) remains pending at the time of this report.

3. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involves 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.

4. "Federal Procurement After Adarand" (USCCR Report September, 2005)

In September of 2005, the United States Commission on Civil Rights ("Commission") issued its report entitled "Federal Procurement After *Adarand*" setting forth its findings pertaining to federal agencies' compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>, citing *Adarand*, 515 U.S. at 237-38. The following is a brief summary of the report.

In 1995, the United States Supreme Court decided *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), which set forth the constitutional standard for evaluating race-conscious programs in federal contracting. The Commission states in its report that the court in *Adarand* held that racial classifications imposed by federal, state and local governments are subject to strict scrutiny and the burden is upon the government entity to show that the racial classification is the least restrictive way to serve a "compelling public interest;" the government program must be narrowly tailored to meet that interest. The court held that narrow tailoring requires, among other things, that "agencies must first consider race-neutral alternatives before using race conscious measures." [p. ix]

Scope and methodology of the Commission’s report. The purpose of the Commission’s study was to examine the race-neutral programs and strategies implemented by agencies to meet the requirements set forth in *Adarand*. Accordingly, the study considered the following questions:

- Do agencies seriously consider workable race-neutral alternatives, as required by *Adarand*?
- Do agencies sufficiently promote and participate in race-neutral practices such as mentor-protégé programs, outreach, and financial and technical assistance?
- Do agencies employ and disclose to each other specific best practices for consideration of race-neutral alternatives?
- How do agencies measure the effects of race-neutral programs on federal contracting?
- What race-neutral mechanisms exist to ensure government contracting is not discriminatory?

The Commission’s staff conducted background research, reviewing government documents, federal procurement and economic data, federal contracting literature, and pertinent statutes, regulations and court decisions. The Commission selected seven agencies to study in depth and submitted interrogatories to assess the agencies’ procurement methods. The agencies selected for evaluation procure relatively large amounts of goods and services, have high numbers of contracts with small businesses, SDBs, or HUBZone firms, or play a significant support or enforcement role: the Small Business Administration (SBA), and the Departments of Defense (DOD), Transportation (DOT), Education (DOEd), Energy (DOEn), Housing and Urban Development (HUD), and State (DOS).

The report did not evaluate existing disparity studies or assess the validity of data suggesting the persistence of discrimination. It also did not seek to identify whether, or which, aspects of the contracting process disparately affect minority-owned firms.

Findings and recommendations. The Commission concluded that “among other requirements, agencies must consider race-neutral strategies before adopting any that allow eligibility based, even in part, on race.” [p. ix] The Commission further found “that federal agencies have not complied with their constitutional obligation, according to the Supreme Court, to narrowly tailor programs that use racial classifications by considering race-neutral alternatives to redress discrimination.” [p. ix]

The Commission found that “agencies have largely failed to apply the Supreme Court’s requirements, or [the U.S. Department of Justice’s (“DOJ”)] guidelines, to their contracting programs.” [p. 70] The Commission found that agencies “have not seriously considered race-neutral alternatives, relying instead on SBA-run programs, without developing new initiatives or properly assessing the results of existing programs.” [p. 70]

The Commission identified four elements that underlie “serious consideration” of race-neutral efforts, ensure an inclusive and fair race-neutral system, and tailor race-conscious programs to

meet a documented need: “Element 1: Standards — Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives; Element 2: Implementation — Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic government-wide programs; Element 3: Evaluation — Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks; Element 4: Communication — Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency government-wide.” [p. xi]

The Commission found that “despite the requirements that *Adarand* imposed, federal agencies fail to consider race-neutral alternatives in the manner required by the Supreme Court’s decision.” [p. xiii] The Commission also concluded that “[a]gencies engage in few race-neutral strategies designed to make federal contracting more inclusive, but do not exert the effort associated with serious consideration that the Equal Protection Clause requires. Moreover, they do not integrate race-neutral strategies into a comprehensive procurement approach for small and disadvantaged businesses.” [p. xiii]

Serious consideration [P. 71]

Finding: Most agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs. Due to the lack of specific guidance from the DOJ, “agencies appear to give little thought to their legal obligations and disagree both about what the law requires and about the legal ramifications of their actions.”

Recommendation: Agencies must adopt and follow guidelines to ensure consideration of race-neutral alternatives, which system could include: (1) identifying and evaluating a wide range of alternatives; (2) articulating the underlying facts that demonstrate whether race-neutral plans work; (3) collecting empirical research to evaluate success; (4) ensuring such assessments are based on current, competent and comprehensive data; (5) periodically reviewing race conscious plans to determine their continuing need; and (6) establishing causal relationships before concluding that a race-neutral plan is ineffective. Best practices could include: (1) statistical standards by which agencies would determine when to abandon race race-conscious efforts; (2) ongoing data collection, including racial and ethnic information, by which agencies would assess effectiveness; and (3) policies for reviewing what constitutes disadvantaged status and the continued necessity for strategies to increase inclusiveness.

Antidiscrimination policy and enforcement [P. 72]

Finding: The federal government lacks an appropriate framework for enforcing nondiscrimination in procurement. Limited causes of action are available to contractors and subcontractors, but the most accessible mechanisms are restricted to procedural complaints about bidding processes.

Recommendation: The enactment of legislation expressly prohibiting discrimination based on race, color, religion, sex, national origin, age, and disability, in federal contracting and procurement. Such legislation should include protections for both contractors and

subcontractors and establish clear sanctions, remedies and compliance standards. Enforcement authority should be delegated to each agency with contracting capabilities.

Finding: Most agencies do not have policies or procedures to prevent discrimination in contracting. Generally, agencies are either unaware of or confused about whether federal law protects government contractors from discrimination.

Recommendation: The facilitation of agency development and implementation of civil rights enforcement policies for contracting. Agencies must establish strong enforcement systems to provide individuals a means to file and resolve complaints of discriminatory conduct. Agencies must also adopt clear compliance review standards and delegate authority for these functions to a specific, high-level component. Once agencies adopt nondiscrimination policies, they should conduct regular compliance reviews of prime and other large contract recipients, such as state and local agencies. Agencies should widely publicize complaint procedures, include them with bid solicitations, and codify them in acquisition regulations. Civil rights personnel in each agency should work with procurement officers to ensure that contractors understand their rights and responsibilities and implement additional policies upon legislative action.

Finding: Agencies generally employ systems for reviewing compliance with subcontracting goals made at the bidding stage, but do not establish norms for the number of reviews they will conduct, nor the frequency with which they will do so.

Recommendation: Good faith effort policies should be rooted in race-neutral outreach. Agencies should set standards for and carry out regular on-site audits and formal compliance reviews of SDB subcontracting plans to make determinations of contractors' good faith efforts to achieve established goals. Agencies should develop and disseminate clear regulations for what constitutes a good faith effort, specific to individual procurement goals and procedures. Agencies should also require that all prime contractors be subject to audits, and require prime contractors to demonstrate all measures taken to ensure equal opportunity for SDBs to compete, paying particular attention to contractors that have not achieved goals expressed in their offers.

Ongoing review [P. 73]

Finding: Narrow tailoring requires regular review of race-conscious programs to determine their continued necessity and to ensure that they are focused enough to serve their intended purpose. However, no agency reported policies, procedures, or statistical standards for when to use race-conscious instead of race-neutral strategies, nor had agencies established procedures to reassess presumptions of disadvantage.

Recommendation: Agencies must engage in regular, systematic reviews (perhaps biennial) of race-conscious programs, including those that presume race-based disadvantage. They should develop and document clear policies, standards and justifications for when race-conscious programs are in effect. Agencies should develop and implement standards for the quality of data they collect and use to analyze race-conscious and race-neutral programs and apply these criteria when deciding effectiveness. Agencies should also evaluate whether race-neutral

alternatives could reasonably generate the same or similar outcomes, and should implement such alternatives whenever possible.

Data and measurement [P. 73-75]

Finding: Agencies have neither conducted race disparity studies nor collected empirical data to assess the effects of procurement programs on minority-owned firms.

Recommendation: Agencies should conduct regular benchmark studies which should be tailored to each agency's specific contracting needs; and the results of the studies should be used in setting procurement goals.

Finding: The current procurement data does not evaluate the effectiveness or continuing need for race-neutral and/or race-conscious programs.

Recommendation: A task force should determine what data is necessary to implement narrow tailoring and assess whether (1) race-conscious programs are still necessary, and (2) the extent to which race-neutral strategies are effective as an alternative to race-conscious programs.

Finding: Agencies do not assess the effectiveness of individual race-neutral strategies (e.g., whether contract unbundling is a successful race-neutral strategy).

Recommendation: Agencies should measure the success of race-neutral strategies independently so they can determine viability as alternatives to race-conscious measures (e.g., agencies could track the number and dollar value of contracts broken apart, firms to which smaller contracts are awarded, and the effect of such efforts on traditionally excluded firms).

Communication and collaboration [P. 75]

Finding: Agencies do not communicate effectively with each other about efforts to strengthen procurement practices (e.g., there is no exchange of race-neutral best practices).

Recommendation: Agencies should engage in regular meetings with each other to share information and best practices, coordinate outreach, and develop measurement strategies.

Outreach [P. 76]

Finding: Even though agencies engage in outreach efforts, there is little evidence that their efforts to reach small and disadvantaged businesses are successful. They do not produce planning or reporting documents on outreach activities, nor do they apply methods for tracking activities, expenditures, or the number and types of beneficiaries.

Recommendation: Widely broadcast information on the Internet and in popular media is only one of several steps necessary for a comprehensive and effective outreach program. Agencies can use a variety of formats — conferences, meetings, forums, targeted media, Internet, printed materials, ad campaigns, and public service announcements — to reach appropriate audiences. In addition, agencies should capitalize on technological capabilities, such as listservs, text

messaging, audio subscription services, and new technologies associated with portable listening devices, to circulate information about contracting opportunities. Agencies should include outreach in budget and planning documents, establish goals for conducting outreach activities, track the events and diversity of the audience, and train staff in outreach strategies and skills.

Conclusion

The Commission found that 10 years after the Supreme Court's *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral decisions that would effectively redress discrimination. Although some agencies employ some race-neutral strategies, the agencies fail "to engage in the basic activities that are the hallmarks of serious consideration," including program evaluation, outcomes measurement, reliable empirical research and data collection, and periodic review.

The Commission found that most federal agencies have not implemented "even the most basic race-neutral strategy to ensure equal access, *i.e.*, the development, dissemination, and enforcement of clear, effective antidiscrimination policies. Significantly, most agencies do not provide clear recourse for contractors who are victims of discrimination or guidelines for enforcement."

One Commission member, Michael Yaki, filed an extensive Dissenting Statement to the Report. [pp. 79-170]. This Dissenting Statement by Commissioner Yaki was referred to and discussed by the district court in *Rothe Development Corp. v. US DOD*, 499 F.Supp.2d 775, 864-65 (W.D. Tex. August 10, 2007), **reversed** on appeal, *Rothe*, 545 F.3d 1023 (Fed.Cir 2008), (*see* discussion of *Rothe* above. In his dissent, Commissioner Yaki criticized the Majority Opinion, including noting that his statistical data was "*deleted*" from the original version of the draft Majority Opinion that was received by all Commissioners. The district court in *Rothe* considered the data discussed by Yaki.

APPENDIX C.

Utilization Analysis Methodology

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Utilization Analysis Methodology

The utilization analysis examined the percentage of contract dollars that went to minority- and women-owned business enterprises (MBE/WBES) on transportation-related construction; engineering; and goods and services contracts that the Imperial County Transportation Commission (ICTC) awarded during the study period. The study team included the participation of *all* MBE/WBES in its calculations of MBE/WBE utilization, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs), MBEs, or WBES. The study team also calculated the utilization of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).

The study team compiled and analyzed the most comprehensive set of data that were available on prime contracts and subcontracts that ICTC awarded during the study period. BBC sought sources of ICTC contract and vendor data that consistently included information about prime contractors and subcontractors, regardless of ownership or DBE certification status. All transportation-related ICTC contracts during the study period were (USDOT)-funded.

Appendix C describes the study team's utilization data collection and review processes in three parts:

- A. Collection of ICTC contract data;
- B. Collection of vendor information; and
- C. ICTC review.

A. Collection of ICTC Contract Data

The study team collected contract data on transportation-related construction; engineering; and goods and services contracts that ICTC awarded during the study period (calendar years 2008, 2009, 2010 and 2011)¹. The cities of El Centro and Brawley received funds through ICTC as subrecipients of USDOT funds. USDOT-funded contracts awarded by those two cities are also included in the utilization analysis. BBC collected prime and subcontract data from ICTC's Contracts and Procurement Department, representatives of the city of El Centro, and representatives from the city of Brawley.

BBC collected the following information about each relevant construction; engineering; and goods and services contract:

- Contract number;
- Description of work;

¹ ICTC was established in January 2010. ICTC acquired Imperial Valley Association of Governments (IVAG) contracts in March, 2010. IVAG's contract records were kept by Imperial County staff. As such, contracts included in the study from 2008 and 2009 were those that ICTC acquired at its formation.

- Award date;
- Award amount;
- Whether the contract included USDOT funding; and
- Prime contractor name and identification number.

BBC also collected the following information about associated subcontracts:

- Associated prime contract number;
- Subcontract amount (paid to date);
- Description of work; and
- Subcontractor name and identification number.

B. Collection of Vendor Information

ICTC provided contact and other information on businesses that they utilized as prime contractors and subcontractors on transportation-related construction; engineering; and goods and services contracts during the study period. Those data were included in the electronic data that ICTC provided.

The study team also used information from the California Unified Certification System's (CUCP's) directory of certified firms to identify utilized businesses that were certified as DBEs, MBEs, or WBEs. The directory includes data on the race/ethnicity and gender of the owners of certified businesses. The study team calculated the certified DBE utilization data that are reported throughout this report using data from the CUCP.

ICTC provided the following information about each utilized business:

- Firm name;
- Addresses and phone numbers; and
- DBE/MBE/WBE certification status (when available).

BBC obtained additional information about utilized firms from business lists that the study team purchased from Dun & Bradstreet (D&B) and from telephone interviews that the study team conducted with prime contractors and subcontractors. BBC obtained the following additional information about utilized firms:

- Primary line of work;
- Firm size;
- Establishment year; and
- Additional contact information.

BBC relied on several sources of information to determine whether firms were owned by minorities or women and whether MBE/WBEs were DBE-certified, including:

- Telephone interviews with firm owners and managers;
- Information from the CUCP;
- ICTC vendor data;
- ICTC staff review; and
- Information from D&B and other sources.

For the purposes of the study, BBC relied on definitions that the Federal DBE Program uses to specify minority groups that are presumed to be disadvantaged:

- Black American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Hispanic American; and
- Native American.

C. ICTC Review

Representatives of ICTC, the city of El Centro, and the city of Brawley reviewed BBC's utilization data during several stages of the study process. The BBC study team met with ICTC staff to review the data collection process, information that the study team gathered, and summary results. ICTC and subrecipient staff also reviewed contract and vendor information. BBC incorporated ICTC feedback in the final contract and vendor data that the study team used in the disparity study.

APPENDIX D.

General Approach to Availability Analysis

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General Approach to Availability Analysis

The study team used a custom census approach to analyze the availability of minority- and women-owned business enterprises (MBE/WBEs) for transportation-related construction, engineering, and goods and services prime contracts and subcontracts that SANDAG, ICTC and NCTD awarded between 2008 and 2012. Appendix D expands on the results and discussion presented in Chapter 5 by describing the following:

- A. General approach to collecting availability information;
- B. Development of the business establishments list;
- C. Development of the interview instrument;
- D. Execution of interviews; and
- E. Additional considerations related to measuring availability.

A. General Approach to Collecting Availability Information

BBC contracted with Customer Research International (CRI) to conduct telephone interviews with hundreds of business establishments in the relevant geographic market area. Business establishments that CRI interviewed were businesses with locations in the relevant geographic market area that the study team identified as doing work in fields closely related to the types of transportation-related construction, engineering, and goods and services contracts that SANDAG, ICTC and NCTD awarded during the study period. The study team began the interview process by determining the “subindustries,” or specific work types, for each relevant contract element and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.¹ The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations. Rather than drawing a sample of business listings from D&B, the study team attempted to contact every business establishment listed under relevant work specialization codes.²

A portion of the telephone interviews that BBC conducted for the availability analysis were originally conducted in connection with a recent availability analysis for Caltrans. BBC included interview data from the Caltrans study from businesses that:

¹ D&B has developed 8-digit industry codes that provide more precise definitions of firm specializations than the 4-digit Standard Industrial Classification (SIC) codes or the North American Industry Classification System (NAICS) codes that the federal government has prepared.

² Because D&B organizes its database by “business establishment” and not by “business” or “firm,” BBC purchased business listings in that fashion. Therefore, in many cases, the study team purchased information about multiple locations of a single business and called all of those locations. BBC’s method for consolidating information for different establishments that were related to the same business is described later in Appendix D.

- Had locations in the relevant geographic area (i.e., San Diego, Orange, and Imperial Counties);
- Reported working within subindustries relevant to SANDAG, ICTC and NCTD contracts; and
- Indicated that they were qualified and interested in performing transportation-related work for local agencies.

Businesses meeting those criteria were included in the database of companies potentially available for SANDAG, ICTC and NCTD work. Businesses also had to meet other criteria — which are described later in this appendix — for the study team to consider them available for specific SANDAG, ICTC or NCTD prime contracts or subcontracts of certain types and sizes.

Between the two telephone interview efforts, the study team attempted to contact 11,903 business establishments in the local marketplace relevant to SANDAG, ICTC and NCTD transportation contracting. That total included 6,954 construction establishments, 4,228 engineering establishments, and 721 goods and services establishments. The study team was able to successfully contact 4,321 of those establishments — about 50 percent of the establishments with valid phone listings (3,294 business establishments did not have valid phone listings). Of business establishments that the study team successfully contacted, 2,617 establishments completed availability interviews.

B. Development of the Business Establishments List

The study team did not expect every business establishment that it contacted to be potentially available for SANDAG, ICTC and NCTD work. The study team's goal was to develop — with a high degree of precision — unbiased estimates of the availability of MBE/WBEs for the types of transportation-related construction, engineering, and goods and services contracts that SANDAG, ICTC and NCTD awarded during the study period. In fact, for some subindustries, BBC anticipated that few businesses would be available to perform that type of work for SANDAG, ICTC or NCTD.

In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction, engineering, or goods and services work. To do so would have required the study team to include subindustries that are only marginally related or unrelated to the types of transportation-related construction, engineering, and goods and services contracts that SANDAG, ICTC and NCTD awarded during the study period. In addition, some business establishments working in relevant subindustries may have been missing from corresponding D&B listings.

BBC determined the types of work involved in SANDAG, ICTC and NCTD contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure D-1 lists the 8-digit work specialization codes within construction, engineering, and goods and services that the study team determined were most related to the contract dollars that SANDAG, ICTC and NCTD awarded during the study period and that BBC considered as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure D-1.

Figure D-1.
Construction, engineering, and goods and services work specializations and subindustries included in the availability analysis

Industry code	Industry description	Industry code	Industry description
Construction			
Heavy Construction		Landscape services	
1611-0000	Highway and street construction	0181-0103	Mats, presseded: soil erosion, growing of
1611-0200	Surfacing and paving	0711-0000	Soil Preparation Services
1611-0202	Concrete construction: roads, highways, sidewalks, etc.	0781-0200	Landscape services
1611-0203	Grading	0782-0000	Lawn and garden services
1611-0204	Highway and street paving contractor	0782-9903	Landscape contractors
1611-0205	Resurfacing contractor	0783-0100	Planting, pruning, and trimming services
1611-9901	General contractor, highway and street construction	2499-1300	Mulch or sawdust products, wood
1611-9902	Highway and street maintenance	5261-0000	Retail nurseries and garden stores
1622-0000	Bridge, tunnel, and elevated highway construction		
1622-9901	Bridge construction	Other construction supplies	
1622-9903	Tunnel construction	1442-0000	Construction sand and gravel
1629-0105	Draining System Construction	1711-0403	Solar energy contractor
1629-9903	Land Clearing Contractor	3272-0300	Precast terrazo or concrete products
1721-0303	Pavement marking contractor	3444-0000	Sheet metalwork
1771-0000	Concrete work	3669-0203	Pedestrian traffic control equipment
1771-0103	Guniting contractor	5032-9907	Sand, construction
1771-0300	Driveway, parking lot, and blacktop contractors	5039-0000	Construction materials, nec
1771-0301	Blacktop (asphalt) work	5039-9912	Soil erosion control fabrics
1771-9901	Concrete pumping	5082-0102	Road construction and maintenance machinery
1771-9902	Concrete repair	5211-0500	Masonry materials and supplies
Wrecking and demolition		Structural Steel Erection	
1795-0000	Wrecking and demolition work	1791-0000	Structural steel erection
1795-9901	Concrete breaking for streets and highways	1791-9902	Concrete reinforcement, placing of
1795-9902	Demolition, buildings and other structures		

Figure D-1.
Construction, engineering, and goods and services work specializations and subindustries included in the availability analysis (continued)

Industry code	Industry description	Industry code	Industry description
Construction (continued)			
Electrical Work		Asphalt and concrete supply	
1731-0000	Electrical work	2951-0000	Asphalt paving mixtures and blocks
1731-0100	Electric power systems contractors	2951-0201	Asphalt and asphaltic paving mixtures (not from refineries)
1731-0103	Standby or emergency power specialization	2951-0203	Concrete, asphaltic
1731-0300	Communications specialization	3272-0000	Concrete products, nec
1731-0302	Fiber optic cable installation	3272-0303	Concrete products, precast, nec
1731-9903	General electrical contractor	3272-9903	Paving materials, prefabricated concrete
1731-9904	Lighting contractor	3273-0000	Ready-mixed concrete
Fencing, guardrails and signs		5032-0101	Asphalt mixture
1799-9912	Fence construction	5211-0502	Cement
1799-9929	Sign installation and maintenance	Water, sewer and utility lines	
Excavation and drilling		1623-0000	Water, sewer, and utility lines
1741-0100	Foundation and retaining wall construction	1623-0203	Telephone and communication line construction
1794-0000	Excavation work	1623-0300	Water and sewer line construction
1794-9901	Excavation and grading, building construction	1623-9904	Pipeline construction, nsk
Masonry and other stonework		1623-9906	Underground utilities contractor
3531-0412	Pavers	Other construction	
Steel building materials		1522-0000	Residential construction, nec
3446-0201	Gratings, open steel flooring	1721-0000	Painting and paper hanging
Heavy construction equipment rental		1721-0300	Industrial painting
7353-0000	Heavy construction equipment rental	1771-9903	Flooring contractor
Flagging services		1799-0202	Coating of concrete structures with plastic
7359-9912	Work zone traffic equipment (flags, cones, barrels, etc.)	1799-0801	Asbestos removal and encapsulation
7389-9921	Flagging service (traffic control)	7349-0000	Building maintenance services, nec
		Trucking	
		4212-0000	Local trucking, without storage
		7513-0000	Truck rental and leasing, no drivers

Figure D-1.
Construction, engineering, and goods and services work specializations and subindustries included in the availability analysis (continued)

Industry code	Industry description	Industry code	Industry description
Construction (continued)			
Building construction		Plumbing and HVAC	
1541-0000	Industrial buildings and warehouses	1711-0000	Plumbing, heating, air-conditioning
1542-0000	Nonresidential construction, nec	1711-0100	Boiler and furnace contractors
1542-0100	Commercial and office building contractors	1711-0200	Plumbing contractors
5039-9902	Architectural metalwork		
Engineering			
Engineering		Surveying and mapmaking	
8711-0000	Engineering services	7389-0801	Mapmaking or drafting, including aerial
8711-0400	Construction and civil engineering	8713-0000	Surveying services
8711-0402	Civil engineering		
8711-0404	Structural engineering	Transportation consulting	
8711-9903	Consulting engineer	4013-0000	Switching and terminal services
8711-9905	Electrical or electronic engineering	8742-0410	Transportation consultant
8712-0000	Architectural services	8748-0200	Urban planning and consulting services
8712-0101	Architectural engineering	8748-0204	Traffic consultant
Landscape architecture		Environmental research and consulting	
0781-0000	Landscape counseling and planning	8744-9904	Environmental remediation
0781-0201	Landscape architects	8748-9905	Environmental consultant
		8999-0702	Geophysical Consultant
Testing services		Archeological expeditions	
7389-0200	Inspection and testing services	8733-0201	Archeological expeditions
7389-0203	Building inspection service		
8734-0000	Testing laboratories	Construction management	
8734-0300	Pollution testing	8741-9902	Construction management
8734-9909	Soil analysis		

Figure D-1.
Construction, engineering, and goods and services work specializations and subindustries included in the availability analysis (continued)

Goods and services			
Transit Services		Towing Services	
4111-0000	Local and suburban transit	7549-0301	Towing service, automotive
		7549-0300	Towing services
Security Services		Petroleum Products	
1731-0400	Safety and Security Specialization	5541-0000	Gasoline Service Stations
7381-0100	Guard Services	5172-0000	Petroleum product wholesalers,except bulk stations/terminals
7381-0105	Security Guard Service		

Source: BBC Research & Consulting

C. Development of the Interview Instrument

BBC drafted an availability interview instrument to collect business information from construction, engineering, and goods and services business establishments in the relevant geographic market area. SANDAG, ICTC and NCTD staff reviewed the interview instrument before the study team used it in the field. As an example, the interview instrument that the study team used with construction establishments is presented at the end of Appendix D. The study team modified the construction interview instrument slightly for use with engineering and goods and services establishments in order to reflect terms more commonly used in the engineering and goods and services industries (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when interviewing engineering establishments).³

Interview structure. The availability interview included 15 sections, and CRI attempted to cover all sections with each business establishment that they successfully contacted and that was willing to complete an interview. Interviewers did not know the race/ethnicity or gender of business owners when calling business establishments.

1. Identification of purpose. The interviews began by identifying SANDAG, ICTC and NCTD as the interview sponsors and describing the purpose of the study (i.e., “developing a list of companies involved in construction, maintenance, or design work on a wide range of highway and other state or local government transportation-related projects”).

2. Verification of correct business name. The interviewer verified that he or she had reached the correct business, and if not, inquired about the correct contact information for the correct business. When the business name was not correct, interviewers asked if the respondent knew how to contact the business. CRI followed up with the desired company based on the new contact information (see areas “X” and “Y” of the Availability Interview Instrument at the end of Appendix D).

3. Verification of work related to transportation-related projects. The interviewer asked whether the organization does work or provides materials related to construction, maintenance, or design on transportation-related projects (Question A1). Goods and services firms were not asked Question A1. Interviewers continued the interview with businesses that responded “yes” to that question.

4. Verification of for-profit business status. The interviewer asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity (Question A2). Interviewers continued the interview with businesses that responded “yes” to that question.

5. Confirmation of main lines of business. The interviewer asked all businesses to confirm their main lines of business according to D&B (Question A3). If D&B’s work specialization codes were incorrect, businesses then described their main lines of business (Question A4). After the

³ BBC also developed a fax and e-mail version of the interview instrument for business establishments that reported a preference to complete the interview in those formats.

interview was complete, BBC coded new information on main lines of business into appropriate 8-digit D&B work specialization codes.

6. Sole location or multiple locations. Because the study team interviewed business establishments and not businesses or firms, the interviewer asked business owners or managers if their businesses had other locations (Question A5), and whether their establishments were affiliates or subsidiaries of other firms (Questions A8 and A9).

7. Past bids or work with government agencies and private sector organizations. The interviewer asked about bids and work on past government and private sector contracts. CRI asked those questions in connection with both prime contracts and subcontracts for construction and engineering firms (Questions B1 through B8). Goods and services firms were asked if they had provided goods and services for government or private sector contracts.

8. Qualifications and interest in future transportation work. The interviewer asked about businesses' qualifications and interest in future work with SANDAG, ICTC and NCTD. CRI asked those questions in connection with both prime contracts and subcontracts for construction and engineering firms (Questions B10 and B12). Goods and services firms were not asked to differentiate between prime contracts and subcontracts.

9. Geographic areas. The interviewer asked businesses about their willingness to do work in the San Diego Region, which extends from San Diego and Oceanside east to the Arizona border (Question C1a).

10. Year established. The interviewer asked businesses to identify the approximate year in which they were established (Question D1).

11. Largest contracts. The study team asked businesses to identify the value of the largest contract on which they had bid on or had been awarded in California during the past five years. CRI asked those questions for both prime contracts and subcontracts (Questions D2 through D4). Goods and services firms were asked about their largest order rather than largest contract.

12. Ownership. The interviewer asked whether businesses were at least 51 percent owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of ownership (Questions E1 through E3). The study team confirmed that information through several other data sources, including:

- Information from the California Unified Certification Program (CUCP) Disadvantaged Business Enterprise directory;
- SANDAG, ICTC and NCTD vendor data;
- SANDAG, ICTC and NCTD staff review; and
- Information from D&B and other sources.

When information about race/ethnicity or gender of ownership conflicted between sources, the study team reconciled that information through follow-up telephone calls with the businesses.

13. Business size. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, the

Business Size section also asked about their revenues and number of employees across all locations (Questions F1 through F6).

14. Potential barriers in the marketplace. The interviewer asked a series of questions concerning general insights about the marketplace and SANDAG, ICTC and NCTD contracting practices (Questions G1a through G1j). Goods and services firms were not asked about difficulties obtaining bonds for projects (Questions G1b and G1c), nor were they asked about difficulties learning about subcontracting opportunities (Question G1j). The interview also included an open-ended question about the local marketplace (Question G2). In addition, the interview included a question asking whether interviewees would be willing to participate in a follow-up interview about marketplace conditions (Question G3).

15. Contact information. The interview concluded by collecting complete contact information for the establishment and the individual who completed the interview (Questions H1 through H6).

D. Execution of Interviews

BBC held planning and training sessions both in person and via telephone with CRI executives and interviewers prior to conducting the availability interviews. CRI conducted availability interviews in 2013. The portion of interviews from the Caltrans availability analysis were conducted in late 2011 and early 2012. CRI programmed the interviews, conducted them via telephone, and provided BBC with weekly data reports.

To minimize non-response, CRI made at least five attempts on different times of day and on different days of the week to successfully reach each business establishment. CRI identified and attempted to interview an available company representative such as the owner, manager, chief financial officer, or other key official who could provide accurate and detailed responses to the questions included in the interview. Interviews were offered in both English and Spanish.

Establishments that the study team successfully contacted. Figure D-2 presents the disposition of the 11,903 business establishments that the study team attempted to contact for availability interviews and how that number resulted in the 4,321 establishments that the study team was able to successfully contact.

**Figure D-2.
Disposition of
attempts to interview
business
establishments**

Source:
BBC Research & Consulting from
2011-2013 availability interviews.

	Number of firms	Percent of business listings
Beginning list	11,903	
Less duplicate numbers	257	
Less non-working phone numbers	2,361	
Less wrong number/business	676	
Unique business listings with working phone numbers	8,609	100.0 %
Less no answer	1,918	22.3
Less could not reach responsible staff member	1,938	22.5
Less unreturned fax/email	432	5.0
Establishments successfully contacted	4,321	50.2 %

Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that CRI attempted to contact were:

- Duplicate phone numbers (257 listings);
- Non-working phone numbers (2,361 listings); or
- Wrong numbers for the desired businesses (676 listings).

Some non-working phone numbers and wrong numbers reflected firms going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

Working phone numbers. As shown in Figure D-2, there were 8,609 business establishments with working phone numbers that CRI attempted to contact. CRI was unsuccessful in contacting many of those businesses for various reasons:

- CRI could not reach anyone after five attempts at different times of the day and on different days of the week for 1,918 establishments.
- CRI could not reach a responsible staff member after five attempts at different times of the day on different days of the week for 1,938 establishments.⁴
- CRI sent hardcopy fax or e-mail availability interviews upon request but did not ultimately receive completed interviews from 432 establishments.

After taking those unsuccessful attempts into account, CRI was able to successfully contact 4,321 business establishments, or about 50 percent of establishments with valid phone listings.

⁴ Business representatives were given the opportunity to complete the interview in English and Spanish.

Establishments included in the availability database. Figure D-3 presents the disposition of the 4,321 business establishments that CRI successfully contacted and how that number resulted in the 964 businesses that the study team included in the availability database.

**Figure D-3.
Disposition of
successfully
contacted business
establishments**

Source:
BBC Research & Consulting from
2011-2013 availability
interviews.

	Number of firms
Establishments successfully contacted	4,321
Less establishments not interested in discussing availability for local public agency work	1,704
Establishments that completed interviews about firm characteristics	2,617
Less no road and highway related work	1,180
Less not a for-profit business	45
Less line of work outside scope	30
Less no past bid/award	110
Less no interest in future work	16
Less established after the study period (2012)	0
Less multiple establishments	248
Less unwilling to work in San Diego	24
Firms available for SANDAG work	964

Establishments not interested in discussing availability for SANDAG, ICTC and NCTD work. Of the 4,321 business establishments that the study team successfully contacted, 1,704 establishments were not interested in discussing their availability for SANDAG, ICTC and NCTD work. In total, 2,617 (61%) successfully-contacted business establishments completed availability interviews.

Establishments available for SANDAG, ICTC and NCTD work. The study team only deemed a portion of the business establishments that completed availability interviews as potentially available for the transportation-related construction, engineering, and goods and services contracts and subcontracts that SANDAG, ICTC and NCTD awarded during the study period. The study team excluded many of the businesses that completed interviews from the availability database for various reasons:

- BBC excluded 1,180 establishments that indicated that their businesses were not involved in transportation contracting work.
- Of the establishments that completed availability interviews, 45 indicated that they were not a for-profit business. The interview ended when respondents reported that their establishments were not for-profit businesses.
- BBC excluded 30 establishments that indicated that their businesses were involved in construction, engineering, or goods and services work but reported that their main lines of business were outside of the study scope.
- BBC excluded 110 establishments that reported not having bid on or been awarded contracts in California within the past five years.

- BBC excluded 16 established that reported not being qualified or interested in either prime contracting or subcontracting opportunities with SANDAG, ICTC, NCTD or other local agencies.
- BBC did not need to exclude any businesses for being established after 2012.
- Two-hundred and forty-eight establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.
- BBC excluded 24 establishments that indicated they were unable to do work in the San Diego Region, encompassing all of San Diego and Imperial Counties.

After those exclusions, the interview effort produced a database of 964 businesses that are potentially available for SANDAG, ICTC and NCTD work.

Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single, summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work that establishments of the same business reported (i.e., prime contractor or subcontractor) into a single response, again corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.
- Except when there were large discrepancies among individual responses regarding establishment dates, BBC used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, BBC followed up with the business establishments to obtain accurate establishment date information.
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC considered the largest revenue total that any establishments of the same business reported as the business' revenue cap (for purposes of determining its status as a potential Disadvantaged Business Enterprises).
- BBC determined the number of employees for businesses by taking the largest response from its establishments.
- BBC coded businesses as minority- or women-owned if the majority of its establishments reported such status.

E. Additional Considerations Related to Measuring Availability

The study team made several additional considerations related to its approach to measuring availability, particularly as those considerations related to SANDAG, ICTC and NCTD's implementation of the Federal DBE program.

Not providing a count of all businesses available for SANDAG, ICTC and NCTD work.

The purpose of the availability interviews was to provide precise and representative estimates of the percentage of MBE/WBEs potentially available for SANDAG, ICTC and NCTD work. The availability analysis did not provide a comprehensive listing of every business that could be available for SANDAG, ICTC and NCTD work and should not be used in that way. Federal courts have approved the custom census approach to measuring availability that BBC 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.⁵

Not basing the availability analysis on MBE/WBE or DBE directories, prequalification lists, or bidders lists. USDOT guidance for determining MBE/WBE availability recommends dividing the number of businesses in an agency's DBE directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of MBE/WBEs for an agency's prime contracts and subcontracts.

The primary reason why the study team rejected such approaches when measuring MBE/WBE availability for SANDAG, ICTC and NCTD work is that dividing a simple count of certified DBEs by the total number of businesses does not provide the data on business characteristics that the study team desired for the disparity study. The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the interviews provide data on qualifications, relative capacity, and interest in SANDAG, ICTC and NCTD work for each business, which allowed the study team to take a more refined approach to measuring availability. Court cases involving implementation of the Federal DBE Program have approved the use of a custom census approach to measuring availability.

Note that BBC used MBE/WBE and DBE directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability interviews.

⁵ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>

Using D&B lists as the sample frame. BBC began its custom census approach to measuring availability with D&B business lists. 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 relevant geographic market area:

- There can be a lag between formation of a new business and inclusion in D&B, meaning that the newest businesses may be underrepresented in the sample frame. Based on information from BBC's interview effort, newly formed businesses are more likely to be minority- or women-owned, suggesting that MBE/WBEs might be underrepresented in the final availability database.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.

BBC is not able to quantify how much, if any, underrepresentation of MBE/WBEs exists in the final availability database. However, BBC concludes that any such underrepresentation would be minor and would not have a meaningful effect on the availability and disparity analyses presented in this report. In addition, there are no alternative business listings that would better address such issues.

Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., NAICS, SIC, or D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be interviewed. For example, it was not possible for BBC to include all businesses possibly doing work in the transportation contracting industry without conducting interviews with nearly every business in the relevant geographic market area.

In addition, some industry codes are imprecise and overlap with other business specialties, and D&B does not maintain an 8-digit level of detail for each firm in its database. Some businesses span several types of work, even at the 4-digit level of specificity. That overlap can make classifying firms into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed many of the work specialization codes into broader subindustries to more accurately classify firms in the availability database.

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully interviewed are systematically different from those that were successfully interviewed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship; and

- Work specializations.

Research sponsorship. Interviewers introduced themselves by identifying SANDAG, ICTC and NCTD as the interview sponsors because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor. In past interview efforts — particularly those related to availability studies — BBC has found that identifying the sponsor substantially increases businesses' willingness to participate in interviews.

Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability interviews than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all interviewed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone.

However, work specialization as a potential source of bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete an interview is less important, because the percentage of MBE/WBE availability is calculated within trucking before being combined with information from other work fields in a dollar-weighted fashion. In this example, work specialization would be a greater source of non-response bias if particular subsets of trucking firms were less likely than other subsets to be easily contacted by telephone.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and number of employees. Rather, they were given ranges of dollar figures and employment levels.

BBC explored the reliability of interview responses in a number of ways. For example:

- BBC reviewed data from the availability interviews in light of information from other sources such as the CUCP Disadvantaged Business Enterprise directory and vendor information that the study team collected from SANDAG, ICTC and NCTD. For example, the CUCP Disadvantaged Business Enterprise directory includes data on the race/ethnicity and gender of the owners of DBE-certified businesses. The study team compared interview responses concerning business ownership with CUCP data.
- BBC examined SANDAG, ICTC and NCTD contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability interviews. BBC compared interview responses about the largest contracts that businesses won during the past five years with actual SANDAG, ICTC and NCTD contract data.
- SANDAG, ICTC and NCTD reviewed vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

SANDAG Disparity Study — Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Customer Research International. We are calling on behalf of the San Diego Association of Governments (SANDAG), the Imperial County Transportation Commission (ICTC), and the North County Transit District (NCTD).

This is not a sales call. SANDAG, ICTC and NCTD are working together to develop a list of companies involved in construction, maintenance, or design on a wide range of transportation-related projects. Who can I speak with to get the information we need from your firm?

[After reaching an appropriately senior staff member, the interviewer should re-introduce the purpose of the survey and begin with questions]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO SANDAG, ICTC and NCTD's EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE agencies]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=RIGHT COMPANY – *SKIP TO A1*

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – *TERMINATE*

Y1. Can you give me any information about [firm name]?

1=Yes, same owner doing business under a different name – *SKIP TO Y4*

2=Yes, can give information about named company

3=Company bought/sold/changed ownership – *SKIP TO Y4*

98=No, does not have information – *TERMINATE*

99=Refused to give information – *TERMINATE*

Y3. Can you give me the complete address or city for [firm name]? – SKIP TO Y5

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

Y4. And what is the new name of the business that used to be [firm name]?

(ENTER UPDATED NAME)

1=VERBATIM

Y5. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y6. Can I have a telephone number for him/her?

(ENTER UPDATED PHONE)

1=VERBATIM

Y7. Can you give me the complete address or city for [new firm name]?

1=VERBATIM

Y8. Do you work for this new company?

1=YES

2=NO – *TERMINATE*

A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design on transportation-related projects. Is this correct?

(NOTE TO INTERVIEWER – includes any work related to CONSTRUCTION, MAINTENANCE OR DESIGN such as building and parking facilities, paving and concrete, tunnels, bridges and ROADS AND OTHER TRANSPORTATION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING)

(NOTE TO INTERVIEWER - includes having done work, trying to sell this work, or providing materials)

1=Yes

2=No - *TERMINATE*

A2. Let me confirm that [firm name / new firm name] is a business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other - *TERMINATE*

A3. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is this correct?

(NOTE TO INTERVIEWER - IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY)

1=Yes – *SKIP TO A5*

2=No

98=(DON'T KNOW)

99=(REFUSED)

A4. What would you say is the main line of business at [firm name / new firm name]?

(NOTE TO INTERVIEWER: IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO INDUSTRIAL BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.)

(ENTER VERBATIM RESPONSE)

1=VERBATIM

A5. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A8. Is your company a subsidiary or affiliate of another firm?

1=Independent – *SKIP TO B1*

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – *SKIP TO B1*

99=(REFUSED) – *SKIP TO B1*

A9. What is the name of your parent company?

1=ENTER NAME

98=(DON'T KNOW)

99=(REFUSED)

A9. ENTER NAME OF PARENT COMPANY

1=VERBATIM

B1. Next, I have a few questions about your company's role in transportation-related construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in California?

1=Yes

2=No – *SKIP TO B3*

98=(DON'T KNOW) – *SKIP TO B3*

99=(REFUSED) – *SKIP TO B3*

B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

B3. During the past five years, has your company received an award for work on any part of a contract for a state or local government agency in California?

1=Yes

2=No – *SKIP TO B5*

98=(DON'T KNOW) – *SKIP TO B5*

99=(REFUSED) – *SKIP TO B5*

B4. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

B5. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in California?

1=Yes

2=No – *SKIP TO B7*

98=(DON'T KNOW) – *SKIP TO B7*

99=(REFUSED) – *SKIP TO B7*

B6. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

B7. During the past five years, has your company received an award for work on any part of a contract for a private sector organization in California?

1=Yes

2=No – *SKIP TO B9*

98=(DON'T KNOW) – *SKIP TO B9*

99=(REFUSED) – *SKIP TO B9*

B8. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

B10. Please think about future transportation-related work as you answer the following few questions. Is your company qualified and interested in working with SANDAG, NCTD, or ICTC as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B12. Is your company qualified and interested in working with SANDAG, NCTD, or ICTC as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1j. Now I want to ask you about the geographic areas your company serves within California. As you answer, think about whether your company could be involved in potential transportation-related projects in that region.

Could your company do work in the San Diego Region, extending from San Diego and Oceanside east to the Arizona border?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN DIEGO AREA IS CALTRANS DISTRICT 11, WHICH INCLUDES SAN DIEGO AND IMPERIAL COUNTIES.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

(RECORD FOUR-DIGIT YEAR, e.g., '1977')

9998 = (DON'T KNOW)

9999 = (REFUSED)

1=NUMERIC (1600-2008)

D2. In rough dollar terms, what was the largest transportation-related contract or subcontract your company was awarded in California during the past five years?

(NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR)

(NOTE TO INTERVIEWER - INCLUDES CONTRACTS NOT YET COMPLETE)

(NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY)

- | | |
|--------------------------------------|--------------------------------------|
| 1=\$100,000 or less | 8=More than \$20 to \$50 million |
| 2=More than \$100,000 to \$500,000 | 9=More than \$50 to \$100 million |
| 3=More than \$500,000 to \$1 million | 10= More than \$100 to \$200 million |
| 4=More than \$1 to \$2 million | 11=\$200 million or greater |
| 5=More than \$2 to \$5 million | 97=(NONE) |
| 6=More than \$5 to \$10 million | 98=(DON'T KNOW) |
| 7=More than \$10 to \$20 million | 99=(REFUSED) |

D3. Was that the largest transportation-related contract or subcontract that your company bid on or submitted quotes for in California during the past five years?

- 1=Yes – *SKIP TO E1*
- 2=No
- 98=(DON'T KNOW) – *SKIP TO E1*
- 99=(REFUSED) – *SKIP TO E1*

D4. What was the largest transportation-related contract or subcontract that your company bid on or submitted quotes for in California during the past five years?

(NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR)

(NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY)

1=\$100,000 or less	8=More than \$20 to \$50 million
2=More than \$100,000 to \$500,000	9=More than \$50 to \$100 million
3=More than \$500,000 to \$1 million	10= More than \$100 to \$200 million
4=More than \$1 to \$2 million	11=\$200 million or greater
5=More than \$2 to \$5 million	97=(NONE)
6=More than \$5 to \$10 million	98=(DON'T KNOW)
7=More than \$10 to \$20 million	99=(REFUSED)

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is [firm name / new firm name] a woman-owned business?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

E2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is Black American, Asian, Hispanic, Native American or another minority group. By this definition, is [firm name || new firm name] a minority-owned business?

- 1=Yes
- 2=No – *SKIP TO F1*
- 3=(OTHER GROUP - SPECIFY)
- 98=(DON'T KNOW) – *SKIP TO F1*
- 99=(REFUSED) – *SKIP TO F1*

E2. OTHER GROUP - SPECIFY

1=VERBATIM

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=Black-American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY)

98=(DON'T KNOW)

99=(REFUSED)

E3. OTHER - SPECIFY

1=VERBATIM

F1. Dun & Bradstreet indicates that your company has about [number] employees working out of just your location. Is that an accurate estimate of your company's average employees over the last three years?

(NOTE TO INTERVIEWER - INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION)

1=Yes – SKIP TO F3

2=No

98=(DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

F2. About how many employees did you have working out of just your location, on average, over the last three years?

(RECORD NUMBER OF EMPLOYEES)

1=NUMERIC (1-999999999)

F3. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?

1=Yes – *SKIP TO F5*

2=No

98=(DON'T KNOW) – *SKIP TO F5*

99=(REFUSED) – *SKIP TO F5*

F4. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . . (READ LIST)

1=Less than \$1 Million

6=\$16.6 Million - \$18.5 Million

2=\$1 Million - \$4.5 Million

7=\$18.6 Million - \$22.4 Million

3=\$4.6 Million - \$7 Million

8=\$22.5 Million or more

4=\$7.1 Million - \$12 Million

98= (DON'T KNOW)

5=\$12.1 Million - \$16.5 Million

99= (REFUSED)

F5. [ONLY IF A5 = 2] About how many employees did you have, on average, for all of your locations over the last three years?

1=(ENTER RESPONSE)

98=(DON'T KNOW)

99=(REFUSED)

F6. [ONLY IF A5 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .
(READ LIST)

- | | |
|-----------------------------------|-----------------------------------|
| 1=Less than \$1 Million | 6=\$16.6 Million - \$18.5 Million |
| 2=\$1 Million - \$4.5 Million | 7=\$18.6 Million - \$22.4 Million |
| 3=\$4.6 Million - \$7 Million | 8=\$22.5 Million or more |
| 4=\$7.1 Million - \$12 Million | 98= (DON'T KNOW) |
| 5=\$12.1 Million - \$16.5 Million | 99= (REFUSED) |

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 in California within the past five years as we ask you these questions.

G1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

- 1=Yes
- 2=No
- 98=(Don't know)
- 99=(Does not apply)

G1b. Has your company obtained or tried to obtain a bond for a project?

- 1=Yes
- 2=No - *SKIP TO G1d*
- 98=(Don't know) - *SKIP TO G1d*
- 99=(Does not apply) - *SKIP TO G1d*

G1c. Has your company experienced any difficulties obtaining bonds needed for a project?

- 1=Yes
- 2=No
- 98=(Don't know)
- 99=(Does not apply)

G1d. Have any insurance requirements on projects presented a barrier to bidding?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G1e. Has the size of projects presented a barrier to bidding?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G1f. Has your company experienced any difficulties learning about bid opportunities with SANDAG, NCTD or ICTC?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G1g. Has your company experienced any difficulties learning about bid opportunities with other state or local government agencies in California?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G1h. Has your company experienced any difficulties with learning about bid opportunities in the private sector in California?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G1i. Has your company experienced any difficulties learning about subcontracting opportunities in California?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G1j. Has your company experienced any difficulties receiving payment in a timely manner?

1=Yes

2=No

98=(Don't know)

99=(Does not apply)

G2. Finally, we're asking for general insights on starting and expanding a business in your industry or winning work in the San Diego Region. Do you have any thoughts to offer on these topics?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G3. Would you be willing to participate in a follow-up interview about any of these issues?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

(RECORD FULL NAME)

1=VERBATIM

H2. What is your position at [firm name / new firm name]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY)

99=(REFUSED)

H2. OTHER - SPECIFY

1=VERBATIM

H3. For purposes of receiving information from SANDAG, ICTC and NCTD, is your mailing address [firm address]:

1=Yes – *SKIP TO H5*

2=No

98=(DON'T KNOW)

99=(REFUSED)

H4. What mailing address should they use to get any materials to you?

1=VERBATIM

H5. What fax number could they use to fax any materials to you?

1=NUMERIC (1000000000-9999999999)

H6. What e-mail address could they use to get any materials to you?

1=ENTER E-MAIL

97=(NO EMAIL ADDRESS)

98=(DON'T KNOW)

99=(REFUSED)

(RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com)

1=VERBATIM

Thank you very much for your participation. If you have any questions, please contact Randall Stevens or Elaine Richardson at SANDAG. Mr. Stevens' phone number is (619) 699-6990. Ms. Richardson's phone number is (619) 699-6956. Mr. Stevens email address is rst@sandag.org. Ms. Richardson's email address is eri@sandag.org.

APPENDIX E.

**Entry and Advancement in the SANDAG
Consortium Study Area Construction,
Engineering, and Goods and Services Industries**

APPENDIX E.

Entry and Advancement in the Construction, Engineering, and Goods and Services Industries in the Relevant Geographic Market Area

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. Appendix E uses 1990 and 2000 Census data as well as 2009-2011 American Community Survey (ACS) data to analyze education, employment, and workplace advancement—all factors that may influence whether individuals form construction, engineering, or transportation-related goods and services businesses.^{1, 2} BBC studied barriers to entry into each industry separately, because entrance requirements and opportunities for advancement differ for those industries.

Construction Industry

BBC examined how education, training, employment, and advancement may affect the number of businesses that individuals of different races/ethnicities and genders owned in the construction industry in the relevant geographic market area in 1990, 2000, and 2009 through 2011.

Education. Formal education beyond high school is not a prerequisite for most construction jobs. For that reason, the construction industry often attracts individuals who have relatively low levels of educational attainment. Most construction industry employees in the relevant geographic market area do not have a four-year college degree. Based on the 2009-2011 ACS, 30 percent of workers in the construction industry in the relevant geographic market area were high school graduates with no post-secondary education and 25 percent had not finished high school. Only 13 percent of those working in the construction industry in the relevant geographic market area had a four-year college degree or higher, compared to 34 percent of all workers.

Race/ethnicity. Hispanic Americans represented an especially large pool of workers in the relevant geographic market area with no post-secondary education. In 2009 through 2011, only 15 percent of all Hispanic American workers 25 and older who worked in the relevant geographic market area held at least a four-year college degree, far below the figure for non-Hispanic whites working in the region (48%). The percentage of Black American (31%) and

¹ In Appendix E and other appendices that present information about local marketplace conditions, information for “engineering” refers to architectural, engineering and related services. Each reference to “engineering” work pertains to those types of services. In the 2000 Census industrial classification system, “Architectural, engineering and related services” was coded as 729. In the 2009-2011 ACS, the same industry was coded as 7290.

² In Appendix E and other appendices that present information about local marketplace conditions, “goods and services” refers to petroleum wholesalers, bus service and urban transit, and investigation and security services. These are the industries that most closely identify the petroleum, transit and security goods and services related to transportation contracting.

Native American (30%) workers in the region with a four-year college degree was also substantially lower than that of non-Hispanic whites in 2009 through 2011. Based on educational requirements of entry-level jobs and the limited education beyond high school for many Black Americans, Native Americans, and Hispanic Americans in the relevant geographic market area, one would expect a relatively high representation of those groups in the construction industry, especially in entry-level positions.

In contrast to Black Americans, Hispanic Americans, and Native Americans, a substantial proportion of Asian-Pacific American workers 25 and older (51%) and Subcontinent Asian American workers 25 and older (81%) in the relevant geographic market area had four-year college degrees in 2009 through 2011. Given the relatively high levels of education for Asian-Pacific Americans and Subcontinent Asian Americans in the area, the representation of those groups in the local construction industry might be similar to or lower than that of non-Hispanic whites.

Gender. In the relevant geographic market area, female workers age 25 or older achieve a similar level of education, on average, as men. Based on 2009 through 2011 data, 39 percent of female workers and 38 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 employer-provided training program. Apprenticeship programs can be developed by employers, trade associations, trade unions, or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.³ Opportunities for those programs across race/ethnicity are discussed later in Appendix E.

Employment. With educational attainment for minorities and women as context, the study team examined employment in the construction industry in the relevant geographic market area. Figure E-1 presents data from 1990, 2000, and 2009 through 2011 to compare the demographic composition of the construction industry with the total workforce in both the relevant geographic market area and in the United States.

Race/ethnicity. In 2009 through 2011, 51 percent of people working in the construction industry in the relevant geographic market area were minorities, up from 42 percent in 2000. Much of that increase was due to growth in the number of Hispanic American construction workers. An examination of the relevant geographic market area construction workforce in 2009 through 2011 shows that:

³ Bureau of Labor Statistics, U.S. Department of Labor. 2006-07. "Construction." *Career Guide to Industries*. <http://www.bls.gov/oco/cg/cgs003.htm> (accessed February 15, 2007)

- 44 percent was made up of Hispanic Americans;
- 4 percent was made up of Asian-Pacific Americans;
- 1 percent was made up of Black Americans;
- 1 percent was made up of Native Americans; and
- Less than 1 percent was made up of Subcontinent Asian Americans and other minorities.

In the relevant geographic market area, Hispanic Americans made up a much larger percentage of workers in construction (44%) than in the entire workforce as a whole (32%). In contrast, Black Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and Native Americans made up smaller percentages of workers in the construction industry than in the entire workforce.

Average educational attainment of Black Americans and Native Americans is consistent with requirements for construction jobs, so education does not explain the relatively low number of Black American and Native American workers in the study area construction industry. Several studies throughout the United States have argued that race discrimination by construction unions has contributed to the low employment of Black Americans in construction trades.⁴ The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced in unions).

Asian-Pacific Americans made up 4 percent of the construction workforce and 14 percent of all workers in the relevant geographic market area in 2009 through 2011. Subcontinent Asian Americans made up less than 1 percent of the construction workforce and 1 percent of all workers. The fact that Asian-Pacific Americans and Subcontinent Asian Americans were more likely than other groups to go to college in 2009 through 2011 may explain part of that difference.

Overall, the percentage of construction workers who are minorities has increased over the past decade (42% in 2000 and 51% in 2009 through 2011), as has the percentage of all workers who are minorities (42% in 2000 and 52% in 2009 through 2011) in the relevant geographic market area.

Gender. There were large differences between the percentage of all workers who were women and the percentage of construction workers who were women in the relevant geographic market area in 2009 through 2011. During those years, women represented 45 percent of all workers in the relevant geographic market area but only 10 percent of construction workers. That difference was similar to differences shown for the United States as a whole.

⁴ Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

Figure E-1.
Demographics of workers in construction and all industries, 1990, 2000, and 2009 through 2011

Consortium Study Area: San Diego, Orange and Imperial counties	All industries			Construction		
	1990 (n= 134,670)	2000 (n=141,990)	2009-11 (n=95,318)	1990 (n=9,597)	2000 (n=8,705)	2009-11 (n=5,527)
Race/ethnicity						
Black American	3.7 %	3.9 %	3.7 %	1.7 % **	1.8 % **	1.3 % **
Asian-Pacific American	7.6	11.3	13.9	3.1 **	4.3 **	4.5 **
Subcontinent Asian American	0.5	0.8	1.3	0.1 **	0.1	0.4 **
Hispanic American	20.2	24.7	31.6	26.1 **	33.4 **	43.7 **
Native American	0.7	1.1	0.9	0.8	1.3	1.1
Other minority group	0.1	0.8	0.2	0.1	0.6	0.2
Total minority	32.8 %	42.5 %	51.6 %	31.8 %	41.6 %	51.3 %
Non-Hispanic white	67.2	57.5	48.4	68.2	58.4	48.7
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	42.4 %	44.2 %	44.9 %	11.5 % **	10.7 % **	10.3 % **
Male	57.6	55.8	55.1	88.5 **	89.3 **	89.7 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
United States	All industries			Construction		
	1990 (n=6,186,952)	2000 (n=6,832,970)	2009-11 (n=1,521,561)	1990 (n=410,004)	2000 (n=480,280)	2009-11 (n=98,508)
Race/ethnicity						
Black American	10.5 %	10.9 %	11.9 %	7.1 % **	6.2 % **	6.0 % **
Asian-Pacific American	2.4	3.4	4.3	1.0 **	1.2 **	1.6 **
Subcontinent Asian American	0.4	0.7	1.1	0.2 **	0.2 **	0.3 **
Hispanic American	8.1	10.7	15.4	9.5 **	15.0 **	23.8 **
Native American	0.7	1.2	1.1	1.0 **	1.6 **	1.3 **
Other minority group	0.1	0.4	0.2	0.1	0.4	0.2
Total minority	22.1 %	27.3 %	34.1 %	18.9 %	24.5 %	33.2 %
Non-Hispanic white	77.9	72.7	65.9	81.1 **	75.5 **	66.8 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	45.3 %	46.5 %	47.2 %	9.7 % **	9.9 % **	9.0 % **
Male	54.7	53.5	52.8	90.3 **	90.1 **	91.0 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in the construction industry and all industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Academic research concerning the affect of race- and gender-based discrimination. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination does affect opportunities for minorities and women in the construction industry. The literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender

discrimination and sexual harassment.⁵ 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.⁶

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.⁷ The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have claimed that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.⁸ Unable to integrate themselves into traditionally white social networks, Black Americans and other minorities faced long-standing historical barriers to entering the industry.⁹

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 Black 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.¹⁰ Some researchers argue that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.¹¹

⁵ 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.

⁶ 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.

⁷ Applebaum, Herbert. 1999. *Construction Workers, U.S.A.* Westport: Greenwood Press.

⁸ Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

⁹ Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41(4): 562-584.

¹⁰ U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042.

¹¹ *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).

- 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 Black Americans from those programs has severely limited their access to skilled occupations in the construction industry.¹²
- 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.¹³
- Traditionally, white unions have been successful in resisting policies designed to increase Black American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of Black Americans in the industry.¹⁴
- 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.¹⁵
- According to testimony from Black 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.¹⁶

However, more recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males:

- Glover and Bilginsoy (2005) analyzed apprenticeship programs in the U.S. construction industry during the period 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited

¹² Applebaum. 1999. *Construction Workers, U.S.A.*

¹³ *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.

¹⁴ Waldinger and Bailey. 1991. “The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction.”

¹⁵ 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).

¹⁶ Feagin and Imani. 1994. “Racial Barriers to African American Entrepreneurship: An Exploratory Study.” *Social Problems*. 41 (4): 562-584.

“markedly better performance for all groups on rates of attrition and completion” compared to employer-run programs.¹⁷

- In a similar analysis focusing on female apprentices, Bilginsoy and Berik (2006) found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for Black American women than for white women.¹⁸
- A recent study on the presence of Black Americans and Hispanic Americans in apprenticeship programs found that Black 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.¹⁹ Those data suggest that Hispanic Americans may be more likely than Black Americans to enter the construction industry without the support of a union.

Other data also indicate a more productive relationship between unions and minority workers than that which may have prevailed in the past. For example, 2012 Current Population Survey (CPS) data indicate that union membership rates for Black Americans is slightly higher than for non-Hispanic whites and union membership rates for Hispanic Americans are similar to those of non-Hispanic whites.²⁰ 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 Black 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 Black American workers and non-Hispanic white workers is 17 percent but the rate for Hispanic construction workers is only 8 percent.

Although union membership and union program participation varies based on race/ethnicity, the causes of those differences and their effects on construction industry employment are unresolved. Research is especially limited on the impact of unions on Asian American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in the relevant geographic market area are different from other parts of the country. In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups.

Advancement. To research opportunities for advancement in the construction industry in the relevant geographic market area, the study team examined the representation of minorities and

¹⁷ Glover, Robert and Bilginsoy, Cihan. 2005. “Registered Apprenticeship Training in the U.S. Construction Industry.” *Education & Training*, Vol. 47, 4/5, p 337.

¹⁸ 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.

¹⁹ Bilginsoy, Cihan. 2005. “How Unions Affect Minority Representation in Building Trades Apprenticeship Programs.” *Journal of Labor Research*, 57(1).

²⁰ 2012 Current Population Survey (CPS), Merged Outgoing Rotation Groups, U.S. Census Bureau and Bureau of Labor Statistics.

women in construction occupations defined by the U.S. Bureau of Labor Statistics.²¹ Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2000 Census and 2009-2011 ACS for the study team to analyze.

Racial/ethnic composition of construction occupations. Figures E-2 and E-3 present the race/ethnicity of workers in select construction-related occupations in the relevant geographic market area, including low-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians), and supervisory roles. Figures E-2 and E-3 present those data for 2000 and 2009 through 2011, respectively.

Based on 2000 Census and 2009-2011 ACS data, there are large differences in the racial/ethnic makeup of workers in various trades related to construction in the relevant geographic market area. Overall, minorities comprised 42 percent of construction workers in 2000 and 51 percent in 2009 through 2011. Minorities comprised a relatively large percentage of laborers working as:

- Plasterers (75% in 2000 and 90% in 2009 through 2011);
- Roofers (69% in 2000 and 83% in 2009 through 2011);
- Drywall installers (61% in 2000 and 80% in 2009 through 2011);
- Painters (64% in 2000 and 79% in 2009 through 2011);
- Brickmasons (64% in 2000 and 76% in 2009 through 2011);
- Cement masons (73% in 2000 and 75% in 2009 through 2011);
- Construction laborers (67% in 2000 and 69% in 2009 through 2011);
- Carpet, floor and tile installers (50% in 2000 and 68% in 2009 through 2011); and
- Carpenters (46% in 2000 and 61% in 2009 through 2011).

Some occupations had relatively low representations of minorities:

- Electricians (33% in 2000 and 44% in 2009 through 2011);
- Pipelayers (36% in 2000 and 44% in 2009 through 2011); and
- Machine operators (35% in 2000 and 40% in 2009 through 2011).

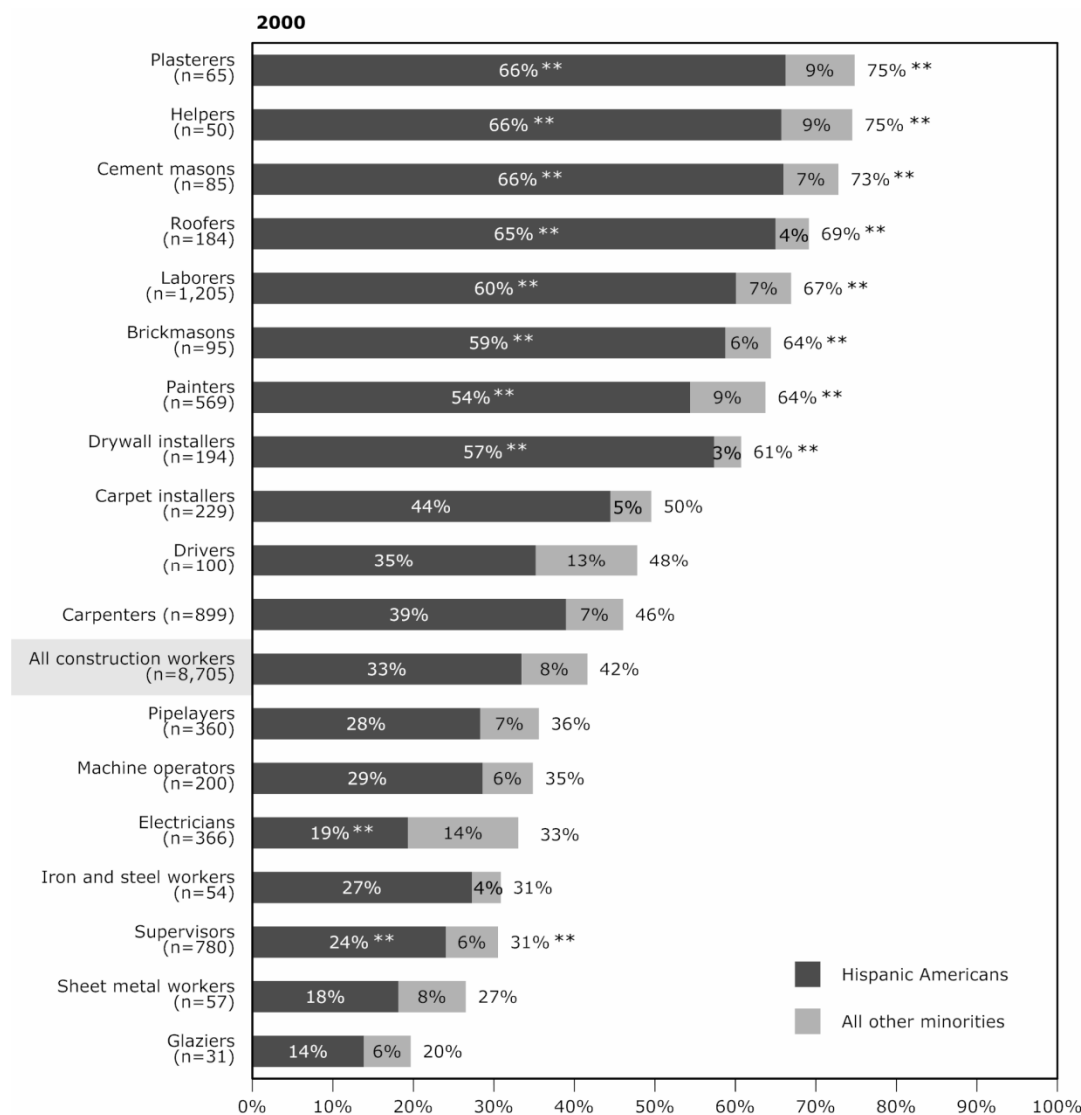
About 31 percent of first-line supervisors were minorities in 2000, less than the total percentage of study area workers who were minorities (42%). Minorities made up a larger percentage of first-line supervisors (35%) in 2009 through 2011, but that percentage was still much less than the total percentage of construction workers who were minorities during those years (51%).

Most minorities working in the construction industry in the relevant geographic market area in 2009 through 2011 were Hispanic Americans. The representation of Hispanic Americans was substantially larger among plasterers (90%), roofers (80%), drywall installers (80%), cement

²¹ Bureau of Labor Statistics, U.S. Department of Labor. 2001. "Standard Occupational Classification Major Groups." http://www.bls.gov/soc/soc_majo.htm (accessed February 15, 2007).

masons (75%), painters (74%), brickmasons (71%), carpet installers (64%), construction laborers (63%), iron and steel workers (57%) and carpenters (55%) than among all construction workers (44%). Those occupations tend to be low-skill occupations. Only 30 percent of first-line supervisors were Hispanic American in the relevant geographic market area in 2009 through 2011.

Figure E-2.
Minorities as a percentage of selected construction occupations in the relevant geographic market area, 2000

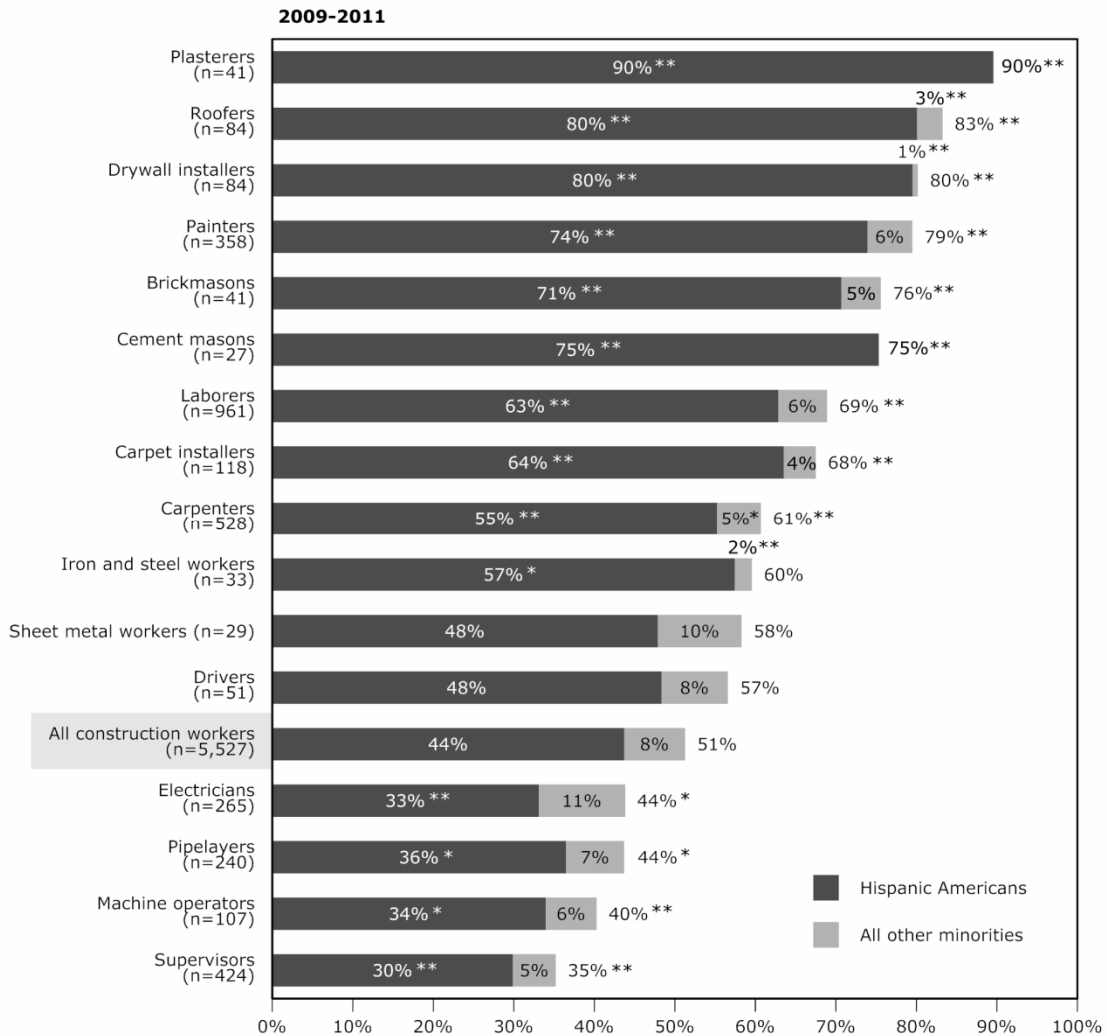


Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure E-3.

Minorities as a percentage of selected construction occupations in the relevant geographic market area, 2009-2011



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2009-2011 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender composition of construction occupations. The study team also analyzed the proportion of women in construction-related occupations. Figures E-4 and E-5 summarize the gender of workers in select construction-related occupations for 2000 and 2009 through 2011, respectively. Overall, only 11 percent of construction workers in the relevant geographic market area were women in 2000 and 10% were women in 2009 through 2011.

In both 2000 and 2009 through 2011, less than 2 percent of workers were women in the following trades:

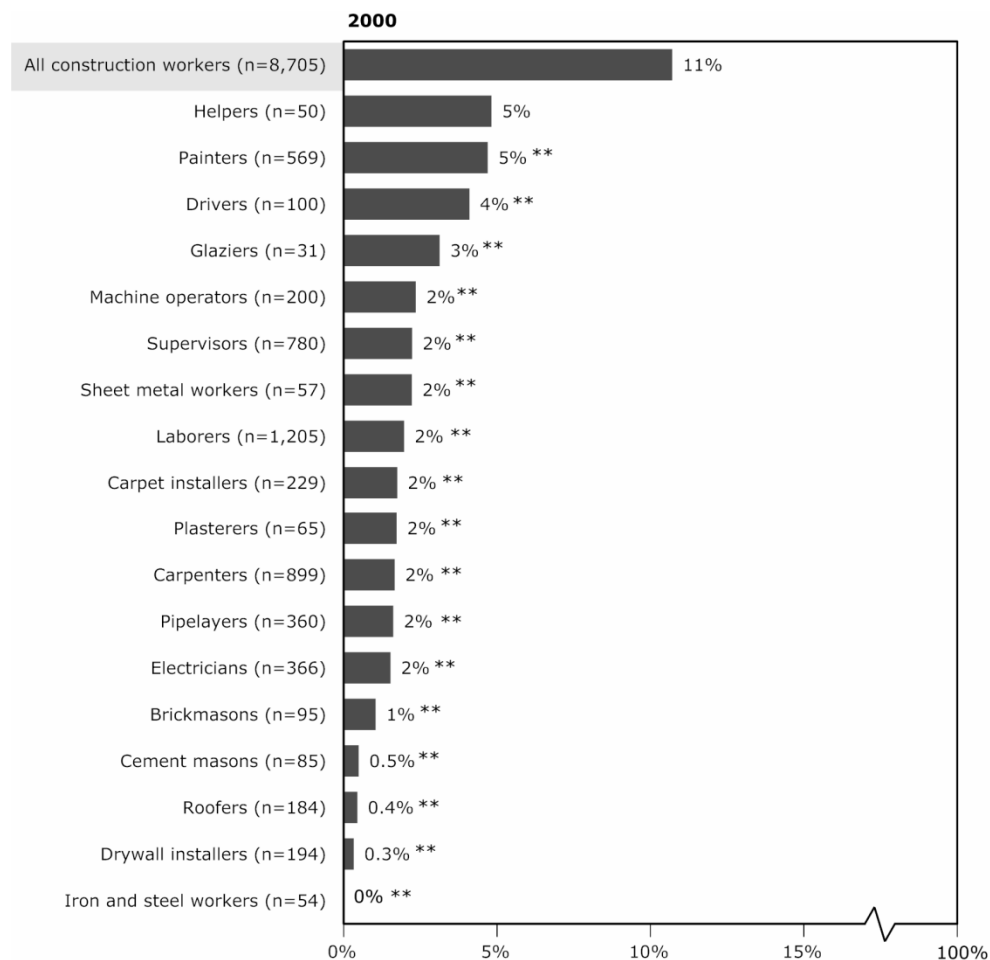
- Carpenters;
- Carpet, floor and tile installers;

- Electricians;
- Pipelayers;
- Brickmasons;
- Cement masons;
- Plasterers; and
- Iron and steel workers.

Among the individual occupations listed in Figures E-4 and E-5, drywall installers, laborers and roofers showed an increase in the representation of women between 2000 and 2009 through 2011. The proportion of first-line supervisors who were women also increased—from 2 percent in 2000 to 3 percent in 2009 through 2011.

Figure E-4.

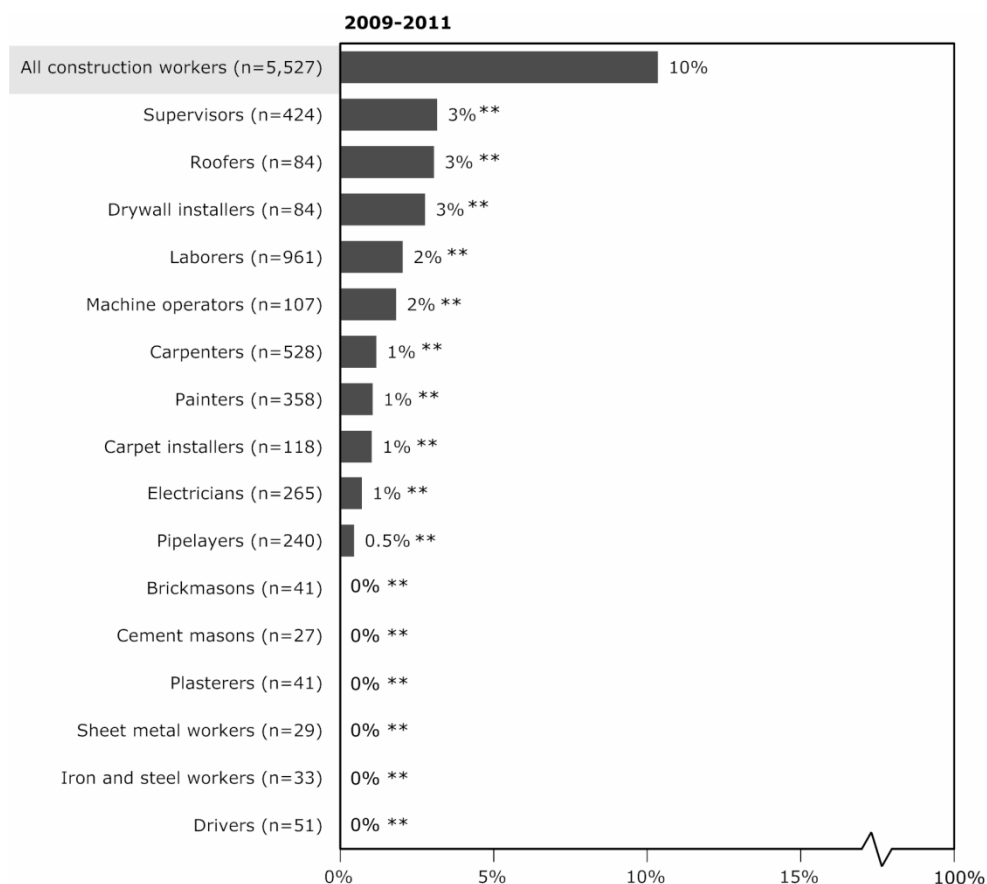
Women as a percentage of selected construction occupations in the relevant geographic market area, 2000



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure E-5.
Women as a percentage of selected construction occupations in the relevant geographic market area, 2009-2011



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2009-2011 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Percentage of minorities and women who are managers. To further assess advancement opportunities for minorities and women in the construction industry in the relevant geographic market area, the study team examined differences between demographic groups in the proportion of construction workers who reported being managers. Figure E-6 presents the percentage of construction workers who reported being construction managers in 1990, 2000 and 2009 through 2011 for the relevant geographic market area and the nation, by racial/ethnic and gender group.

**Figure E-6.
Percentage of
construction workers who
worked as a manager,
1990, 2000
and 2009 through 2011**

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Consortium Study Area: San Diego, Orange and Imperial counties			
	1990	2000	2009-2011
Race/ethnicity			
Black American	5.6 % **	4.6 % **	2.2 % **
Asian-Pacific American	12.2	6.9	8.5 **
Subcontinent Asian American	37.0	9.2	10.1
Hispanic American	3.3 **	2.3 **	2.5 **
Native American	10.5	8.7	4.9 **
Other minority	9.3	9.3	17.3
Non-Hispanic white	14.7	12.7	12.7
Gender			
Female	14.9 % **	3.7 % **	5.4 % **
Male	11.0	9.3	8.1
All individuals	11.5 %	8.7 %	7.8 %

United States			
	1990	2000	2009-2011
Race/ethnicity			
Black American	3.0 % **	3.1 % **	4.2 % **
Asian-Pacific American	8.5	7.7	7.4 **
Subcontinent Asian American	11.8	11.7	8.1
Hispanic American	3.2 **	2.5 **	2.7 **
Native American	4.8 **	4.6 **	5.7 **
Other minority	5.3 **	6.2	5.2
Non-Hispanic white	9.3	7.5	8.7
Gender			
Female	10.8 % **	4.1 % **	5.0 % **
Male	8.0	6.7	7.1
All individuals	8.2 %	6.5 %	6.9 %

Racial/ethnic composition of managers. In 2009 through 2011, about 13 percent of non-Hispanic whites in the construction industry in the relevant geographic market area were managers. A smaller percentage of all minority groups except Subcontinent Asian Americans were managers in the construction industry in the relevant geographic market area:

- About 2 percent of Black Americans working in the study area construction industry were managers;
- About 2 percent of Hispanic Americans were managers;
- About 5 percent of Native Americans were managers;
- About 8 percent of Asian-Pacific Americans were managers; and
- About 10 percent of Subcontinent Americans were managers (not a statistically significant difference from non-Hispanic whites).

Gender composition of managers. Female construction workers in the relevant geographic market area were significantly less likely than their male counterparts to be managers in both 2000 and in 2009 through 2011. Similar trends were evident in the United States as a whole.

Engineering Industry

BBC also examined how education and employment may potentially influence the number of minority and female entrepreneurs working in the engineering industry in the relevant geographic market area.

Education. In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the engineering industry because many occupations require at least a four-year college degree and some require licensure. According to the 2009-2011 ACS, 69 percent of individuals working in the engineering industry in the relevant geographic market area had at least a four-year college degree. Eighty-nine percent of civil engineers had at least a four-year college degree. Therefore, barriers to education can restrict employment opportunities, advancement opportunities, and, ultimately, business ownership. Any disparities in business ownership rates in engineering-related work could have resulted from the lack of sufficient education for particular race/ethnicity and gender groups.²²

Based on 2000 Census data and 2009-2011 ACS data, Figure E-7 presents the percentage of workers age 25 and older with at least a four-year college degree in the relevant geographic market area and the United States. The level of education necessary to work in the engineering industry may partially restrict employment opportunities for Black Americans, Hispanic Americans, and Native Americans. For each of those groups, the percentage of workers age 25 or older with a bachelor's degree or higher was substantially lower than that of non-Hispanic whites in the relevant geographic market area and in the United States for 2000 and 2009 through 2011.

Race/ethnicity. In the relevant geographic market area, about 48 percent of all non-Hispanic white workers age 25 and older had at least a four-year degree in 2009 through 2011. For other racial/ethnic groups, the data for the relevant geographic market area indicated that:

- About 31 percent of Black Americans had at least a four-year college degree;
- About 30 percent of Native Americans had at least a four-year college degree; and
- Only 15 percent of Hispanic Americans had at least a four-year college degree.

Asian Pacific Americans and Subcontinent Asian Americans in the relevant geographic market area were more likely than non-Hispanic whites to be college graduates in 2009 through 2011.

All minority groups and non-Hispanic whites showed an increase between 2000 and 2009 through 2011 in the proportion of workers with a bachelor's degree both in the relevant geographic market area and in United States as a whole.

Gender. In the relevant geographic market area in 2000, about 33 percent of women and 36 percent of men had at least a four-year college degree. In 2009 through 2011, 39 percent of women and 38 percent of men had a bachelor's degree.

²² Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 42 (4): 562-584.

Figure E-7.
Percentage of all workers 25 and older
with at least a four-year degree, 2000
and 2009 through 2011

Note:

** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male gender groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2000 U.S. Census 5% sample and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Consortium Study Area: San Diego, Orange and Imperial counties			2000	2009-2011
Race/ethnicity				
Black American			23.7 % **	30.8 % **
Asian-Pacific American			44.1 **	50.7 **
Subcontinent Asian American			74.8 **	81.0 **
Hispanic American			12.1 **	15.2 **
Native American			24.2 **	29.7 **
Other minority group			37.8	43.0
Non-Hispanic white			41.8	48.3
Gender				
Female			33.3 % **	39.2 % **
Male			35.8	37.9
United States			2000	2009-2011
Race/ethnicity				
Black American			19.1 % **	23.1 % **
Asian-Pacific American			45.4 **	48.9 **
Subcontinent Asian American			68.4 **	74.2 **
Hispanic American			13.4 **	15.5 **
Native American			17.3 **	20.6 **
Other minority group			30.0 **	37.2
Non-Hispanic white			32.5	36.9
Gender				
Female			29.3 % **	34.2 % **
Male			30.2	31.9

Additional indices of educational attainment. A 2010 report by the National Center for Education Statistics examined the educational attainment and performance of students in the United States by race/ethnicity. Despite increases in the number of minority students who have completed high school and have pursued a postsecondary education, disparities persist in a number of key performance indicators among non-Hispanic whites, Asian Americans, Black Americans, Hispanic Americans, and Native Americans.

Some of the results from the report that were related to high school student achievement include the following:

- **Reading.** On the 2007 National Assessment of Educational Progress (NAEP) reading assessment, 40 percent of non-Hispanic white 8th graders scored at or above “proficient,” compared to only 13 percent of Black American, 15 percent of Hispanic American, and 18 percent of Native American 8th grade students. The percentage of Asian American 8th graders who exhibited “proficient” scores (41%) was similar to that of non-Hispanic whites. Results for 12th graders were similar—higher percentages of non-Hispanic white (43%) and Asian American (36%) students scored at or above “proficient” compared with their Black American (16%), Hispanic American (20%) and Native American (26%) peers.
- **Mathematics.** On the NAEP mathematics assessment conducted in 2009 (for 8th graders) and 2005 (for 12th graders), a higher proportion of Asian American students in both 8th and

12th grade scored at or above “proficient” than all other racial/ethnic groups. Among 8th graders, 54 percent of Asian American students met the proficiency benchmark compared to 44 percent of non-Hispanic white, 12 percent of Black American, 17 percent of Hispanic, and 18 percent of Native American students. Proficiency was lower for all groups in 12th grade but disparities were similar.

- **College readiness.** Diversity among SAT and ACT college entrance exam test-takers increased substantially between 1998 and 2008 but differences in performance on those exams persisted. Average scores for non-Hispanic whites and Asian Americans were substantially higher than scores for Black Americans, Hispanic Americans, and Native Americans. The same organization that administers the ACT also measures “college readiness” in English, Mathematics, Reading, and Science using a benchmark score—the minimum score in each subject area that indicates a 50 percent chance of obtaining a “B” or higher or a 75 percent chance of obtaining a “C” or higher in corresponding college-level courses. A higher percentage of Asian Americans (33%) and non-Hispanic whites (27%) who took the ACT in 2008 met the benchmark score in all four subject areas than any other racial/ethnic group. Only 3 percent of Black Americans, 10 percent of Hispanic Americans, and 11 percent of Native Americans taking the ACT met the college readiness benchmark in all four subjects.²³

The report also considered trends in postsecondary education among different racial/ethnic groups:

- **College participation.** The college participation rate, defined as the percentage of 18 to 24 year olds enrolled in 2-year or 4-year colleges or universities, increased between 1980 and 2008 for Black Americans and Hispanic Americans, as well as for non-Hispanic whites. Even so, the participation rate in 2008 for non-Hispanic whites (44%) was substantially higher than for Black Americans (32%), Hispanic Americans (26%), and Native Americans (22%). Although there was no measurable increase in the college participation rate for Asian Americans between 1990 and 2008, that group maintained the highest overall college participation rate at 58 percent.²⁴
- **Engineering-related degrees.** Approximately 5 percent of all bachelor’s degrees awarded in 2007 through 2008 were in engineering and engineering technologies. Asian Americans exhibited the highest percentage of bachelor’s degrees awarded in engineering (9%) and Black Americans exhibited the lowest (3%). Four percent of bachelor’s degrees awarded to Hispanic Americans and Native Americans and 5 percent of bachelor’s degrees awarded to non-Hispanic whites were in engineering and engineering technologies. Those trends were similar for masters and doctoral degrees.

Employment. After consideration of educational opportunities and attainment for minorities and women, the study team examined the racial/ethnic and gender composition of workers in the engineering industry in the relevant geographic market area. Figure E-8 compares the

²³ BBC Research & Consulting examined college readiness benchmarks for 2012 high school graduates in California who took the ACT in their sophomore, junior or senior year and results were similar.

²⁴ College participation data for Asian Americans were not available for 1980.

demographic composition of engineering industry workers to that of all workers who are 25 years or older and have a college degree.

Race/ethnicity. In 2009 through 2011, about 37 percent of the workforce in the engineering industry in the relevant geographic market area was made up of minorities. Of that workforce:

- About 3 percent was made up of Black Americans;
- About 18 percent was made up of Asian-Pacific Americans;
- About 2 percent was made up of Subcontinent Asian Americans;
- About 13 percent was made up of Hispanic Americans; and
- Just over 1 percent was made up of Native Americans.

Other minorities comprised less than one-half of one percent of the engineering workforce in the relevant geographic market area in 2009 through 2011.

In 2009 through 2011, all minorities considered together comprised a similar percentage of workers in engineering-related industries (37%) and all workers 25 and older with a four-year college degree (38%). The only statistically significant difference in representation was for Subcontinent Asian Americans, who comprise 3 percent of workers 25 and older with a college degree and 2 percent of the engineering workforce.

In United States as a whole, differences for most minority groups were statistically significant:

- Black Americans, Asian Pacific Americans and Subcontinent Asian Americans comprised a smaller percentage of workers in engineering-related industries than of all workers 25 and older with a four-year college degree;
- Hispanic Americans had a higher representation among engineering workers than all workers 25 and older with a college degree; and
- Native Americans comprised a similar percentage of workers in the engineering industry and of workers with a college degree in all industries.

Gender. Compared to their representation among workers 25 and older with a college degree in all industries, relatively few women work in the engineering industry. In 2009 through 2011, women represented about 25 percent of engineering-related workers in the relevant geographic market area but 46 percent of workers with a four-year college degree.

Figure E-8.

Demographic distribution of engineering-related workers and workers age 25 and older with a four-year college degree in all industries, 2000 and 2009 through 2011

Consortium Study Area: San Diego, Orange and Imperial counties	Workers 25+ with college degree			Engineering industry workforce		
	1990 (n=32,668)	2000 (n=40,026)	2009-11 (n=33,601)	1990 (n=1,131)	2000 (n=1,810)	2009-11 (n=1,578)
Race/ethnicity						
Black American	2.1 %	2.5 %	2.8 %	1.3 %	1.7 %	2.6 %
Asian-Pacific American	10.0	14.5	19.2	8.5	13.4	18.3
Subcontinent Asian American	1.0	1.7	3.0	1.3	1.3	2.0 **
Hispanic American	6.1	7.8	11.8	7.9 **	9.7	12.7
Native American	0.3	0.8	0.6	0.9	0.8	1.1
Other minority group	0.1	0.8	0.2	0.0	0.8	0.4
Total minority	19.5 %	28.1 %	37.7 %	19.9 %	27.7 %	37.1 %
Non-Hispanic white	80.5	71.9	62.3	80.1	72.3	62.9
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	38.3 %	42.6 %	45.7 %	24.0 % **	27.5 % **	25.0 % **
Male	61.7	57.4	54.3	76.0 **	72.5 **	75.0 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

United States	Workers 25+ with college degree			Engineering industry workforce		
	1990 (n=1,259,268)	2000 (n=1,631,919)	2009-11 (n=452,049)	1990 (n=28,869)	2000 (n=58,221)	2009-11 (n=15,919)
Race/ethnicity						
Black American	6.1 %	6.8 %	8.1 %	3.3 % **	4.2 % **	4.7 % **
Asian-Pacific American	3.9	5.2	6.6	3.8	4.6 **	6.0 **
Subcontinent Asian American	1.0	1.7	2.7	1.1	1.3 **	1.8 **
Hispanic American	3.3	4.4	6.9	4.4 **	5.5 **	7.6 **
Native American	0.3	0.7	0.7	0.4	0.8	0.8
Other minority group	0.0	0.4	0.2	0.1	0.4	0.2
Total minority	14.7 %	19.1 %	25.2 %	13.1 %	16.7 %	21.3 %
Non-Hispanic white	85.3	80.9	74.8	86.9 **	83.3 **	78.7 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	41.6 %	45.6 %	48.8 %	23.9 % **	26.0 % **	27.1 % **
Male	58.4	54.4	51.2	76.1 **	74.0 **	72.9 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between engineers and workers in all industry groups for the given Census/ACS year is statistically significant at the 95% confidence level.

The engineering –related industry in 2000 and 2009-2011 is “architectural, engineering, and related services,” and in 1980 is “engineering, architectural and surveying services.” Though closely related, the groups are not exactly comparable.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Civil engineers. The study team also examined the number of minorities and women among civil engineers in the relevant geographic market area in 1990, 2000 and 2009 through 2011. Figure E-9 presents those results. Overall, in 2009 through 2011, the percentage of civil engineers who were minorities (42%) was slightly higher than the percentage college-educated workers in all industries who were minorities (38%). In the relevant geographic market area there were not statistically significant differences for any individual minority groups between their representation among workers 25 and older with a college degree and civil engineers.

There was, however, a statistically significant difference for women: only 11 percent of civil engineers in the area were women in 2009 through 2011, compared to 46 percent of all workers with college degrees that were women.

Figure E-9.

Demographics of civil engineers and workers 25 and older with a college degree, 1990, 2000 and 2009 through 2011

Consortium Study Area: San Diego, Orange and Imperial counties	Workers 25+ with college degree			Civil engineering workforce		
	1990 (n=32,668)	2000 (n=40,026)	2009-11 (n=33,601)	1990 (n=391)	2000 (n=436)	2009-11 (n=327)
Race/ethnicity						
Black American	2.1 %	2.5 %	2.8 %	1.5 %	2.3 %	2.2 %
Asian-Pacific American	10.0	14.5	19.2	13.2	16.3	20.9
Subcontinent Asian American	1.0	1.7	3.0	2.4	1.9	4.1
Hispanic American	6.1	7.8	11.8	6.7	7.9	12.7
Native American	0.3	0.8	0.6	0.6	0.3	0.3
Other minority group	0.1	0.8	0.2	0.4	0.8	1.5
Total minority	19.5 %	28.1 %	37.7 %	24.8 %	29.5 %	41.6 %
Non-Hispanic white	80.5	71.9	62.3	75.2 **	70.5	58.4
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	38.3 %	42.6 %	45.7 %	8.3 % **	11.6 % **	11.5 % **
Male	61.7	57.4	54.3	91.7 **	88.4 **	88.5 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

United States	Workers 25+ with college degree			Civil engineering workforce		
	1990 (n=1,259,268)	2000 (n=1,631,919)	2009-11 (n=452,049)	1990 (n=12,142)	2000 (n=12,912)	2009-11 (n=3,295)
Race/ethnicity						
Black American	6.1 %	6.8 %	8.1 %	3.2 % **	3.7 % **	4.4 % **
Asian-Pacific American	3.9	5.2	6.6	5.4 **	6.2 **	8.6 **
Subcontinent Asian American	1.0	1.7	2.7	2.6 **	2.6 **	3.1
Hispanic American	3.3	4.4	6.9	4.0 **	4.4	6.0
Native American	0.3	0.7	0.7	0.5	0.8	0.8
Other minority group	0.0	0.4	0.2	0.1	0.4	0.7 **
Total minority	14.7 %	19.1 %	25.2 %	15.8 %	18.2 %	23.7 %
Non-Hispanic white	85.3	80.9	74.8	84.2 **	81.8	76.3
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	41.6 %	45.6 %	48.8 %	6.9 % **	10.3 % **	13.5 % **
Male	58.4	54.4	51.2	93.1 **	89.7 **	86.5 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between civil engineers and workers 25+ with a college degree for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Goods and Services Industries

BBC also examined how employment may potentially influence the number of minority and female entrepreneurs working in goods and services related to the transportation contracting industry. For this analysis, and throughout the marketplace appendices, “goods and services” includes petroleum wholesalers, bus service and urban transit, and investigation and security services. These are the industries that most closely identify the petroleum, transit, and security goods and services related to transportation contracting.

Figure E-8 compares the racial/ethnic and gender composition of goods and services workers to that of workers in all industries.

Race/ethnicity. In 2009 through 2011, about 55 percent of the workforce in the relevant geographic market area goods and services industry was made up of minorities. Of that workforce:

- About 11 percent was made up of Black Americans;
- About 13 percent was made up of Asian-Pacific Americans;
- About 2 percent was made up of Subcontinent Asian Americans;
- About 29 percent was made up of Hispanic Americans; and
- Just under 1 percent was made up of Native Americans.

Other minorities comprised about one-half of one percent of the relevant geographic market area goods and services workforce in 2009 through 2011.

In 2009 through 2011, most minority groups comprised a similar percentage of workers in goods and services and all workers. The only statistically significant difference in representation was for Black Americans, who comprise 4 percent of all workers and 11 percent of the goods and services workforce.

In United States as a whole, differences for most minority groups were statistically significant and showed slight underrepresentation for most minority groups but an overrepresentation of Black Americans in the goods and services industry.

Gender. Compared to their representation among workers in all industries, relatively few women work in the goods and services industry. In 2009 through 2011, women represented about 23 percent of goods and services workers in the relevant geographic market area but 45 percent of workers in all industries.

Figure E-10.
Demographics of workers in the goods and services industries and all industries,
1990, 2000, and 2009 through 2011

Consortium Study Area: San Diego, Orange and Imperial counties	All industries			Goods and Services		
	1990 (n= 134,670)	2000 (n=141,990)	2009-11 (n=95,318)	1990 (n=928)	2000 (n=1,057)	2009-11 (n=778)
Race/ethnicity						
Black American	3.7 %	3.9 %	3.7 %	7.9 % **	11.0 % **	11.0 % **
Asian-Pacific American	7.6	11.3	13.9	3.7 **	8.9	12.9
Subcontinent Asian American	0.5	0.8	1.3	0.7	0.3	1.5
Hispanic American	20.2	24.7	31.6	12.9 **	24.1	28.6
Native American	0.7	1.1	0.9	1.3	1.8	0.8
Other minority group	0.1	0.8	0.2	0.4	1.2	0.6
Total minority	32.8 %	42.5 %	51.6 %	26.9 %	47.2 %	55.2 %
Non-Hispanic white	67.2	57.5	48.4	73.1 **	52.8	44.8
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	42.4 %	44.2 %	44.9 %	24.1 % **	21.7 % **	23.2 % **
Male	57.6	55.8	55.1	75.9 **	78.3 **	76.8 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

United States	All industries			Goods and Services		
	1990 (n=6,186,952)	2000 (n=6,832,970)	2009-11 (n=1,521,561)	1990 (n=49,830)	2000 (n=56,734)	2009-11 (n=14,140)
Race/ethnicity						
Black American	10.5 %	10.9 %	11.9 %	19.3 % **	23.3 % **	25.8 % **
Asian-Pacific American	2.4	3.4	4.3	1.5 **	2.4 **	3.2 **
Subcontinent Asian American	0.4	0.7	1.1	0.5	0.6	0.9 **
Hispanic American	8.1	10.7	15.4	8.1	10.4	14.2 **
Native American	0.7	1.2	1.1	0.8	1.3	1.0
Other minority group	0.1	0.4	0.2	0.1	0.6	0.4 **
Total minority	22.1 %	27.3 %	34.1 %	30.3 %	38.6 %	45.4 %
Non-Hispanic white	77.9	72.7	65.9	69.7 **	61.4 **	54.6 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Female	45.3 %	46.5 %	47.2 %	27.5 % **	30.1 % **	30.0 % **
Male	54.7	53.5	52.8	72.5 **	69.9 **	70.0 **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in the goods and services industries and all industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Summary

BBC's analyses suggest that there are barriers to entry for certain minority groups and for women in the construction, engineering, and goods and services industries in the relevant geographic market area.

- Fewer Black Americans, Asian-Pacific Americans and Subcontinent Asian Americans worked in the construction industry in the relevant geographic market area than what might be expected based on their representation in the overall workforce.
- Fewer Subcontinent Asian Americans worked in the engineering industry in the relevant geographic market area than what might be expected based on their representation among workers 25 and older with a college degree.
- Women accounted for particularly few workers in the construction, engineering, and goods and services industries in the relevant geographic market area.
- Lack of education appears to be a barrier to entry into the engineering industry in the relevant geographic market area for Black Americans, Hispanic Americans, and Native Americans. Workers in each of those groups were less likely to have a four-year college degree compared to non-Hispanic whites.

Barriers to advancement for certain minority groups and for women are also evident in the construction industry in the relevant geographic market area.

- Representation of minorities and women was much lower in certain construction trades (including first-line supervisors) compared with overall industry representation.
- Black Americans, Asian-Pacific Americans, Hispanic Americans and Native Americans were less likely to be managers in the local construction industry than non-Hispanic whites.

APPENDIX F.

**Business Ownership in the SANDAG
Consortium Study Area Construction,
Engineering, and Goods and Services Industries**

APPENDIX F.

Business Ownership in the SANDAG Construction, Engineering, and Goods and Services Industries in the Relevant Geographic Market Area

About one in five construction workers in the relevant geographic market area (San Diego, Orange and Imperial counties) was a self-employed business owner in 2009 through 2011. About one in eight workers in the local engineering industry was a self-employed business owner. About one in fourteen workers in the local transportation related goods and services industry was a self-employed business owner.¹ Focusing on those three industries, BBC examined business ownership for different racial/ethnic and gender groups in the study area. BBC used Public Use Microdata Samples (PUMS) from the 1990 and 2000 Census and from the 2009 through 2011 American Community Survey (ACS) to study business ownership rates in the construction, engineering, and goods and services industries. Note that “self-employment” and “business ownership” are used interchangeably in Appendix F.

Business Ownership Rates

Many studies have explored differences between minority and non-minority business ownership at the national level.² Although overall self-employment rates have increased for minorities and women over time, a number of studies indicate that race/ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and from state to state.

Construction industry. Compared to other industries, construction has a large number of business owners. In 2009 through 2011, 22 percent of workers in the construction industry in the relevant geographic market area were self-employed (in incorporated or unincorporated businesses) compared with only 11 percent of workers across all industries. However, rates of self-employment in the local construction industry vary by race/ethnicity and gender. Figure F-1 shows the percentage of workers who were self-employed in the construction industry by group

¹ In Appendix F and other marketplace appendices, information for “engineering” refers to architectural, engineering and related services. “Goods and services” refers to petroleum wholesalers, bus service and urban transit, and investigation and security services, as these are the industries that most closely identify the petroleum, transit and security goods and services related to transportation contracting.

² 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.

for 1990, 2000 and 2009 through 2011 in the relevant geographic market area and the United States as a whole. Due to small sample sizes, Subcontinent Asian Americans are included in the “other minority” category.

Figure F-1.

Percentage of workers in the construction industry who were self-employed, 1990, 2000 and 2009-2011

Consortium Study Area: San Diego, Orange and Imperial counties	Self-Employment Rate			Sample Size		
	1990	2000	2009-2011	1990	2000	2009-2011
Race/ethnicity						
Black American	7.8 % **	9.0 % **	18.2 % *	138	145	60
Asian-Pacific American	21.6	23.8	25.9	280	382	278
Hispanic American	8.2 **	10.6 **	13.6 **	2,531	3,058	2,132
Native American	20.4	27.3	27.3	89	123	68
Other minority†	30.8	25.4	11.9 **	21	67	35
Non-Hispanic white	21.1	24.5	29.3	6,538	4,932	2,954
Gender						
Female	12.6 % **	12.6 % **	12.9 % **	1,125	935	645
Male	18.2	20.4	23.0	8,472	7,772	4,882
All individuals	17.5 %	19.6 %	22.0 %	9,597	8,707	5,527

United States	Self-Employment Rate			Sample Size		
	1990	2000	2009-2011	1990	2000	2009-2011
Race/ethnicity						
Black American	10.5 % **	15.2 % **	18.9 % **	25,166	26,752	4,847
Asian-Pacific American	14.5 **	21.3 **	25.0 *	3,889	5,297	1,488
Hispanic American	11.1 **	12.2 **	17.4 **	36,411	66,531	18,084
Native American	12.6 **	19.2 **	18.0 **	4,397	8,089	1,580
Other minority†	11.3 **	22.2 *	24.7	844	2,648	416
Non-Hispanic white	21.0	25.4	27.5	339,345	371,152	72,093
Gender						
Female	13.5 % **	16.8 % **	16.4 % **	39,376	46,791	9,567
Male	19.7	23.3	25.2	370,676	433,678	88,941
All individuals	19.1 %	22.6 %	24.4 %	410,052	480,469	98,508

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

† Other minority includes Subcontinent Asian Americans.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Business ownership rates in 2000. The 2000 Census provides information on the largest sample of construction workers of any of the data sets examined. In 2000, 24 percent of non-Hispanic whites working in the construction industry in the relevant geographic market area were self-employed. Business ownership rates were significantly lower for Black Americans and Hispanic Americans.

- Black Americans in the local construction industry owned businesses at a rate of only 9 percent, or about one-third of the rate for non-Hispanic whites.
- About 11 percent of Hispanic Americans in the construction industry owned businesses, less than half of the rate for non-Hispanic whites.

National trends also indicate disparities between minority and non-Hispanic white ownership rates in the construction industry but the disparities for both Black Americans and Hispanic Americans is greater in the relevant geographic market area.

Thirteen percent of women working in the construction industry in the relevant geographic market area were self-employed in 2000, compared with about 20 percent of men. That difference was consistent with gender trends observed for the entire nation.

Business ownership rates in 2009 through 2011. Between 2000 and 2009 through 2011 the business ownership rate for most racial/ethnic groups increased but disparities for Black Americans and Hispanic Americans when compared to non-Hispanic whites persisted.

- The business ownership rate for Black Americans doubled between 2000 and 2009 through 2011. However, a significant disparity remained between the ownership rates for Black American construction workers (19%) and non-Hispanic whites (29%) in the relevant geographic market area.
- About 14 percent of Hispanic Americans in the construction industry owned their businesses in 2009 through 2011, up from 11 percent in 2000 but still less than half the rate for non-Hispanic whites in the relevant geographic market area.
- The business ownership rate for “other minority” groups was 12 percent in 2009 through 2011, much lower than the rate for non-Hispanic whites in the area.

The gender disparity in the relevant geographic market area’s self-employment rate increased between 2000 and 2009 through 2011. The ownership rate for women remained about the same (13%), while the ownership rate for men increased (from 20% to 23%).

Engineering industry. BBC also examined business ownership rates in the engineering industry. Figure F-2 presents the percentage of workers who were self-employed in the engineering industry in 1990, 2000 and 2009 through 2011. Due to small sample sizes, Subcontinent Asian Americans are included in the “other minority” category.

Business ownership rates in 2000. In 2000, about 15 percent of non-Hispanic whites working in the engineering industry in the relevant geographic market area were self-employed. Minorities appear to have lower rates of business ownership than non-Hispanic whites but those differences were not statistically significant. In the United States as a whole, Black Americans, Hispanic Americans, and other minorities were significantly less likely to own engineering businesses than non-Hispanic whites.

Sixteen percent of men and 8 percent of women working in the study area engineering industry were self employed—a statistically significant difference.

Figure F-2.
Percentage of workers in the engineering industry who were self-employed, 1990, 2000 and 2009-2011

Consortium Study Area: San Diego, Orange and Imperial counties	Self-Employment Rate			Sample Size		
	1990	2000	2009-2011	1990	2000	2009-2011
Race/ethnicity						
Black American	0.0 %	9.2 %	7.5 %	10	29	28
Asian-Pacific American	7.2 **	8.8	4.5 **	100	236	279
Hispanic American	2.4 **	12.8	8.3 **	80	180	171
Native American	16.1	30.0	50.5	11	15	15
Other minority†	10.9	13.4	13.2	13	40	37
Non-Hispanic white	21.7	14.9	15.5	917	1,310	1,048
Gender						
Female	10.5 % **	7.7 % **	7.0 % **	278	505	395
Male	21.0	16.2	14.6	853	1,305	1,183
All individuals	18.5 %	13.9 %	12.7 %	1,131	1,810	1,578

United States	Self-Employment Rate			Sample Size		
	1990	2000	2009-2011	1990	2000	2009-2011
Race/ethnicity						
Black American	5.8 % **	5.2 % **	5.4 % **	927	2,206	643
Asian-Pacific American	10.0 **	8.5 **	7.0 **	1,249	2,620	906
Hispanic American	12.0 **	8.9 **	9.2 **	1,406	3,123	1,049
Native American	12.9	11.8	13.1	137	474	134
Other minority†	12.9	7.5 **	5.5 **	376	978	293
Non-Hispanic white	15.8	14.2	12.8	28,944	48,823	12,894
Gender						
Female	6.8 % **	7.5 % **	7.1 % **	7,901	15,191	4,306
Male	17.7	15.1	13.3	25,138	43,033	11,613
All individuals	15.1 %	13.2 %	11.6 %	33,039	58,224	15,919

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

† Other minority includes Subcontinent Asian Americans.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Business ownership rates in 2009 through 2011. As shown in Figure F-2, the rate of business ownership for non-Hispanic whites increased slightly in 2009 through 2011 (from 15% to 16%) while the business ownership rates for most minority groups decreased.

- The business ownership rate for Asian-Pacific Americans fell to 5 percent, about one-third the rate for non-Hispanic whites and a statistically significant difference.
- The business ownership rate for Hispanic Americans dropped to 8 percent, significantly lower than the rate for non-Hispanic whites.

The rate of business ownership rate for women (7%) working in the engineering industry in the relevant geographic market area was about half that of men (15%) in 2009 through 2011.

Goods and services industry. BBC also examined business ownership rates in the transportation contracting goods and services industry (petroleum wholesalers, bus service and urban transit, and investigation and security services). Figure F-3 presents the percentage of workers who were self-employed in the goods and services industry in 1990, 2000 and 2009 through 2011. Due to small sample sizes, Native Americans and Subcontinent Asian Americans are included in the “other minority” category.

Business ownership rates in 2000. In 2000, about 8 percent of non-Hispanic whites working in the goods and services industry in the relevant geographic market area were self-employed. Minorities appear to have lower rates of business ownership than non-Hispanic whites but those differences were not statistically significant. In the United States as a whole, all minority groups evaluated were significantly less likely to own engineering businesses than non-Hispanic whites.

Seven percent of men and 2 percent of women working in the study area engineering industry were self employed—a statistically significant difference.

Business ownership rates in 2009 through 2011. As shown in Figure F-3, the rate of business ownership for non-Hispanic whites increased to 13 percent in 2009 through 2011, significantly higher than most minority groups.

- The business ownership rate for Hispanic Americans was 4 percent or about one-third the rate for non-Hispanic whites.
- The rate of business ownership for Asian-Pacific Americans increased (from 1.9% to 3.5%) but was still below that of non-Hispanic whites.
- Of the 80 Black American goods and services industry workers in the dataset, none were business owners.

The rate of business ownership rate for women (5%) working in the goods and services industry in the relevant geographic market area appears lower than for men (8%) in 2009 through 2011, but that was not a statistically significant difference.

Figure F-3.
Percentage of workers in the goods and services industry who were self-employed, 1990, 2000 and 2009-2011

Consortium Study Area: San Diego, Orange and Imperial counties	Self-Employment Rate			Sample Size		
	1990	2000	2009-2011	1990	2000	2009-2011
Race/ethnicity						
Black American	1.1 % **	3.6 %	0.0 % **	67	109	80
Asian-Pacific American	3.3 *	1.9	3.5 **	38	103	110
Hispanic American	5.4 *	3.5	2.7 **	116	259	201
Other minority†	5.6	6.0	3.5	21	30	20
Non-Hispanic white	10.1	7.8	13.1	686	556	367
Gender						
Female	9.0 %	2.4 % **	4.9 %	231	232	199
Male	8.2	6.6	7.9	697	825	579
All individuals	8.4 %	5.7 %	7.2 %	928	1,057	778

United States	Self-Employment Rate			Sample Size		
	1990	2000	2009-2011	1990	2000	2009-2011
Race/ethnicity						
Black American	1.8 % **	1.3 % **	1.5 % **	7,956	11,853	3,133
Asian-Pacific American	5.4	2.9 **	2.3 **	758	1,340	452
Hispanic American	4.2 **	3.4 **	2.6 **	3,850	5,676	1,780
Other minority†	4.4 **	3.1 **	2.7 **	723	1,432	335
Non-Hispanic white	6.4	6.8	6.8	36,548	36,448	8,440
Gender						
Female	3.7 % **	3.2 % **	2.9 % **	14,107	17,410	4,279
Male	5.8	5.7	5.3	35,728	39,339	9,861
All individuals	5.3 %	5.0 %	4.6 %	49,835	56,749	14,140

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

† Other minority includes Native Americans and Subcontinent Asian Americans.

Source: BBC Research & Consulting from 1990 and 2000 U.S. Census 5% samples and 2009-2011 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Potential causes of differences in business ownership rates. Researchers have examined whether there are disparities in business ownership rates after considering business owners' race- and gender-neutral personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such race- and gender-neutral factors.

- Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found a positive relationship between start-up capital and business formation, expansion, and survival.³ In addition, one study

³ 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

found that housing appreciation measured at the Metropolitan Statistical Area level is a positive determinant of becoming self-employed.⁴ However, unexplained differences still exist when statistically controlling for those factors.⁵ Access to capital is discussed in more detail in Appendix G.

- Education has a positive effect on the probability of business ownership in most industries. However, findings from multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.⁶
- 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
- 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 individuals' race- and gender-neutral personal characteristics such as education, age, and familial status. To further examine business ownership, BBC developed multivariate regression models to explore patterns of business ownership in the relevant geographic market area. Those models estimate the effect of race/ethnicity and gender on the probability of business ownership while statistically controlling for other factors.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age, and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity analyses. For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women

M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses*. Russell Sage Foundation.

⁴ Fairlie, Robert W. and Harry A. Krashinsky. 2006. *Liquidity Constraints, Household Wealth and Entrepreneurship Revisited*.

⁵ 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).

⁶ See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. *The Journal of Human Resources*, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment*. *Sociological Perspectives*. 79-94.

⁷ 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.

working in the construction and engineering industries persist after statistically controlling race- and gender-neutral personal characteristics.^{9, 10} Those studies have incorporated probit econometric models using PUMS data from the 2000 Census and have been among materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

BBC used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables.¹¹ Independent variables included:

- Personal characteristics that are potentially linked to the likelihood of business ownership—age, age-squared, disability, marital status, number of children in the household, number of elderly people in the household, and English-speaking ability;
- Indicators of educational attainment;
- Measures and indicators related to personal financial resources and constraints—home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Variables representing the race/ethnicity and gender of the individuals included in the analysis along with interaction variables to represent the combined effect of being a minority and being female.

BBC developed six models using PUMS data from the 2000 Census and 2009 through 2011 ACS:

- A probit regression model for the construction industry in the relevant geographic market area in 2000 that included 7,291 observations;
- A probit regression model for the construction industry in the relevant geographic market area in 2009 through 2011 that included 5,164 observations;
- A probit regression model for the engineering industry in the relevant geographic market area in 2000 that included 1,612 observations;
- A probit regression model for the engineering industry in the relevant geographic market area in 2009 through 2011 that included 1,514 observations;
- A probit regression model for the goods and services industry in the relevant geographic market area in 2000 that included 883 observations; and

⁹ National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

¹⁰ National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

¹¹ Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed; “0” for individuals who are not self-employed. The model enables estimation of the probability that a worker in a given estimation sample is self-employed. The study team excluded observations where the Census Bureau had imputed values for the dependent variable, business ownership.

- A probit regression model for the goods and services industry in the relevant geographic market area in 2009 through 2011 that included 724 observations.

Results specific to the construction industry in the relevant geographic market area in 2000. Figure F-4 presents the coefficients for the probit model for individuals working in the construction industry in the relevant geographic market area in 2000. The model indicates that several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the construction industry:

- Older individuals were more likely to be business owners but the marginal effect was lower for the oldest individuals;
- An increase in the number of people 65 and older living in the worker's household decreased workers' likelihood of owning a business;
- Owning a home decreased the likelihood of owning a business but for those who did own a home, higher home values were associated with a higher likelihood of business ownership;
- Speaking English well increased workers' likelihood of owning a business; and
- Having an advanced degree was associated with a lower likelihood of business ownership.

After controlling for race- and gender-neutral factors, statistically significant disparities in rates of business ownership remained for Black Americans, Hispanic Americans, and women working in the construction industry in the relevant geographic market area.

Figure F-4.
Relevant geographic market area
construction industry business
ownership model, 2000

Note:

The minority-female interaction terms measure the combined effect of belonging to a particular minority group and being female.

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

† Other minority includes Subcontinent Asian Americans.

The Black American-female interaction term was excluded because there were no construction business owners who were both Black American and female in the dataset.

Source:

BBC Research & Consulting from 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.9260 **
Age	0.0618 **
Age-squared	-0.0004 **
Married	0.0282
Disabled	0.0713
Number of children in household	0.0056
Number of people over 65 in household	-0.0985 *
Owens home	-0.1149 *
Home value (\$000s)	0.0011 **
Monthly mortgage payment (\$000s)	-0.0103
Interest and dividend income (\$000s)	0.0000
Income of spouse or partner (\$000s)	0.0008
Speaks English well	0.3550 **
Less than high school education	-0.0987
Some college	0.0235
Four-year degree	-0.1011
Advanced degree	-0.3668 **
Black American	-0.5731 **
Asian-Pacific American	0.1486
Hispanic American	-0.2032 **
Native American	0.0794
Other minority†	0.0615
Female	-0.5267 **
Black American-female interaction term	excluded
Hispanic American-female interaction term	0.3031
Asian-Pacific American-female interaction term	-0.1155
Native American-female interaction term	-0.0629
Other minority-female interaction term†	0.6847

Simulations of business ownership rates. Probit modeling allowed for simulations of business ownership rates for minorities and women as if they had the same probability of business ownership as similarly situated non-Hispanic whites and non-Hispanic white males, respectively. To conduct those simulations, BBC took the following steps:

1. BBC performed a probit regression analysis predicting business ownership using only non-Hispanic white (or non-Hispanic white male) construction workers in the dataset.¹²
2. The study team then used the coefficients from that model and the mean personal, financial, and educational characteristics of individual minority groups (or women) working in the study area construction industry to estimate the probability of business ownership of such a group.

The results of those simulations yielded estimates of business ownership rates for non-Hispanic whites (or non-Hispanic white males) who shared the same characteristics of minorities (or

¹² That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all those variables would be the same (i.e., 0).

women) working in the construction industry in the relevant geographic market area. Simulated rates that are higher than actual rates of business ownership indicate that, in reality, race/ethnicity or gender makes it less likely for a minority or female worker to own a business than would be expected for a similarly-situated non-Hispanic white (or non-Hispanic white male) worker. BBC performed simulation calculations for only those groups for which race/ethnicity or gender was a statistically significant negative factor in business ownership (i.e., Black Americans, Hispanic Americans, and women; see Figure F-4).

Figure F-5 presents simulated business ownership rates (i.e., “benchmark”) for Black Americans, Hispanic Americans, and non-Hispanic white women, and compares them to the actual, observed mean probabilities of business ownership for those groups. The disparity index was calculated by taking the actual business ownership rate for each group, dividing it by each group’s benchmark, and then multiplying the result by 100. Values less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for similarly-situated non-Hispanic whites (or non-Hispanic white males)—in other words, that race/ethnicity (or gender) affects the likelihood of those groups owning businesses in the local construction industry. Similar simulation approaches have been incorporated in other disparity studies that courts have reviewed.

Figure F-5.
Comparison of actual business ownership rates to simulated rates
for relevant geographic market area construction workers, 2000

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Black American	8.6%	20.9%	41
Hispanic American	11.3%	16.0%	71
Non-Hispanic white female	14.0%	26.6%	52

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: BBC Research & Consulting from statistical models of 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Simulation results indicate that Black Americans in the construction industry in the relevant geographic market area own businesses at just 41 percent of the rate that would be expected of non-Hispanic white construction workers who share the same personal, financial, and educational characteristics. Hispanic Americans (disparity index of 71) also owned businesses well below the rate that would be expected for similarly-situated non-Hispanic white construction workers.

Non-Hispanic white women (disparity index of 52) owned businesses at just over half the rate that would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers.

Results specific to the construction industry in the relevant geographic market area in 2009 through 2011. Figure F-6 presents the coefficients from the probit model predicting

business ownership in the construction industry in the relevant geographic market area in 2009 through 2011.

Many of the same neutral factors important in predicting business ownership in the 2000 model also had an impact in 2009 through 2011. Increased age and higher home value were associated with a greater likelihood of self-employment and home ownership was associated with a lower likelihood of self-employment. Unlike the 2000 model, the 2009 through 2011 model indicates that higher monthly mortgage payments and higher interest and dividend income are associated with an increased likelihood of business ownership.

After controlling for race- and gender-neutral factors, a statistically significant difference persisted in the rates of business ownership for Hispanic American and female construction workers in the relevant geographic market area.

The Hispanic American-female interaction term was statistically significant and positive, indicating that the combined effect of being both Hispanic and female partially offsets the negative effects of being Hispanic American and of being female. However, the magnitude of the coefficient indicates that Hispanic American women are still significantly less likely than non-Hispanic white men to be construction business owners in the relevant geographic market area.

Figure F-6.
Relevant geographic market area
construction industry business
ownership model, 2009 through
2011

Note:

The minority-female interaction terms measure the combined effect of belonging to a particular minority group and being female.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

† Other minority includes Subcontinent Asian Americans.

The Black American-female interaction term was excluded because there were no construction business owners who were both Black American and female in the dataset.

Source:

BBC Research & Consulting from 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.0573 **
Age	0.0400 **
Age-squared	-0.0002
Married	-0.0033
Disabled	-0.0611
Number of children in household	0.0031
Number of people over 65 in household	-0.0027
Owens home	-0.1860 *
Home value (\$000s)	0.0001 *
Monthly mortgage payment (\$000s)	0.1018 **
Interest and dividend income (\$000s)	0.0050 *
Income of spouse or partner (\$000s)	0.0013
Speaks English well	0.1133
Less than high school education	-0.0085
Some college	0.0896
Four-year degree	-0.1370
Advanced degree	-0.1627
Black American	-0.2354
Asian-Pacific American	0.0411
Hispanic American	-0.3753 **
Native American	0.0280
Other minority†	-0.4919
Female	-0.6904 **
Black American-female interaction term	excluded
Hispanic American-female interaction term	0.4602 *
Asian-Pacific American-female interaction term	-0.0466
Native American-female interaction term	-0.0302
Other minority-female interaction term†	-0.1550

Simulations of business ownership rates. Using the same approach as for the 2000 data, the study team used the 2009 through 2011 results to simulate business ownership rates if minorities and women had the same probability of self-employment as similarly situated non-Hispanic whites and non-Hispanic white males, respectively. Again, BBC performed these calculations for only those groups where race/ethnicity or gender was a statistically significant negative factor in business ownership (as shown in Figure F-6). Figure F-7 shows actual and simulated (“benchmark”) business ownership rates for Hispanic American construction workers and non-Hispanic white female construction workers in the study area.

In 2009 through 2011 Hispanic American construction workers owned businesses at 70 percent of the rate that would be expected for similarly situated non-Hispanic white workers. That disparity is similar to simulation results from 2000 (disparity index of 71).

Simulation results for women in 2009 through 2011 indicated a more severe disparity than in 2000. About 32 percent of non-Hispanic white women would own businesses in the construction industry if gender did not have an impact on self-employment. However, the actual 2009 through 2011 self-employment rate for women was 15 percent (disparity index of 45).

Figure F-7.
Comparison of actual business ownership rates to simulated rates
for relevant geographic market area construction workers, 2009 through 2011

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	13.4%	19.1%	70
Non-Hispanic white female	14.8%	32.5%	45

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: BBC Research & Consulting from statistical models of 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Results specific to the engineering industry in the relevant geographic market area in 2000. Figure F-8 presents the coefficients from the probit model predicting business ownership in the engineering industry in the relevant geographic market area in 2000.

According to the model, older individuals were more likely to own businesses in the engineering industry as were individuals with higher incomes from a spouse or partner.

After controlling for race- and gender-neutral factors, statistically significant disparities in rates of business ownership remained for Asian-Pacific Americans and women working in the engineering industry in the relevant geographic market area.

The Asian-Pacific American-female interaction term was statistically significant and positive. That result indicates that Asian-Pacific women are more likely than Asian-Pacific men and more likely than other women to be engineering business owners. However, they are still significantly less likely than non-Hispanic white men to be engineering business owners in the relevant geographic market area. In contrast, “other minority” women are more likely than non-Hispanic white men to be business owners in the local engineering industry.

Figure F-8.
Relevant geographic market area
engineering industry business
ownership model, 2000

Note:

The minority-female interaction terms measure the combined effect of belonging to a particular minority group and being female.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

The Black American-female interaction term was excluded because there were no engineering business owners who were both Black American and female in the dataset.

Source:

BBC Research & Consulting from 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.4048 **
Age	0.0838 **
Age-squared	-0.0004
Disabled	-0.2639
Married	0.0074
Number of children in household	-0.0233
Number of people over 65 in household	-0.0177
Owns home	-0.1375
Home value (\$000s)	0.0004
Monthly mortgage payment (\$000s)	-0.0643
Interest and dividend income (\$000s)	0.0028
Income of spouse or partner (\$000s)	0.0027 **
Speaks English well	-0.2727
Less than high school education	-0.4420
Some college	-0.2216
Four-year degree	-0.0562
Advanced degree	-0.0204
Black American	-0.2491
Asian-Pacific American	-0.4257 **
Hispanic American	0.2012
Native American	0.7635
Other minority†	-0.3054
Female	-0.6310 **
Black American-female interaction term	excluded
Hispanic American-female interaction term	0.2341
Asian-Pacific American-female interaction term	0.9777 **
Native American-female interaction term	0.2703
Other minority-female interaction term†	1.4501 **

Simulations of business ownership rates. The study team simulated business ownership rates in the engineering industry in the relevant geographic market area using the same approach as it used for the construction industry. Figure F-9 presents actual and simulated (“benchmark”) business ownership rates for Asian-Pacific Americans and non-Hispanic white women in the local engineering industry.

Figure F-9.
Comparison of actual business ownership rates to simulated rates
for relevant geographic market area engineering workers, 2000

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian-Pacific American	9.4%	12.1%	78
Non-Hispanic white female	5.9%	15.7%	38

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Source: BBC Research & Consulting from statistical models of 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Nine percent of Asian-Pacific Americans in the engineering industry in the relevant geographic market area were business owners in 2000 compared with a benchmark of 12 percent (disparity index of 78). In other words, Asian-Pacific American engineering workers owned businesses at 78 percent of the rate that would be expected for similarly situated non-Hispanic white workers.

The disparity index for non-Hispanic white women in the local engineering industry was 38, indicating that non-Hispanic white women working in the industry own engineering firms at just 38 percent of the rate observed for similarly-situated non-Hispanic white men (i.e., non-Hispanic white males who share the same personal, financial, and educational characteristics of non-Hispanic white females).

Results specific to the engineering industry in the relevant geographic market area in 2009 through 2011. Figure F-10 presents the coefficients from the probit model predicting business ownership in the engineering industry in the relevant geographic market area in 2009 through 2011. Unlike the 2000 model, none of the race-and gender-neutral factors was a statistically significant predictor of business ownership for the local engineering industry in 2009 through 2011.

After statistically controlling for race- and gender-neutral factors, the regression model indicated that Asian-Pacific Americans were less likely than non-Hispanic whites to own engineering businesses in the relevant geographic market area in 2009 through 2011. Differences in the probability of business ownership between men and women were not significant.

Figure F-10.
Consortium engineering industry
business ownership model, 2009
through 2011

Note:

The minority-female interaction terms measure the combined effect of belonging to a particular minority group and being female.

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

The Black American-female, Asian-Pacific American-female and Native-American-female interaction terms were excluded because the dataset did not contain any engineering business owners in those minority groups who were female.

Source:

BBC Research & Consulting from 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-1.9172 *
Age	0.0020
Age-squared	0.0003
Disabled	-0.1829
Married	0.2256
Number of children in household	-0.0584
Number of people over 65 in household	-0.0389
Owns home	-0.0397
Home value (\$000s)	0.0002
Monthly mortgage payment (\$000s)	-0.0314
Interest and dividend income (\$000s)	-0.0081
Income of spouse or partner (\$000s)	-0.0008
Speaks English well	0.0524
Less than high school education	-0.6860
Some college	-0.2839
Four-year degree	-0.0476
Advanced degree	-0.0169
Black American	-0.2038
Asian-Pacific American	-0.5890 **
Hispanic American	-0.0068
Native American	1.1461
Other minority†	-0.1763
Female	-0.2920
Black American-female interaction term	excluded
Hispanic American-female interaction term	0.3295
Asian-Pacific American-female interaction term	excluded
Native American-female interaction term	excluded
Other minority-female interaction term†	1.0297

Simulations of business ownership rates. The study team simulated business ownership rates in the Consortium engineering industry using the same approach as it used for the construction industry and the 2000 engineering industry. Figure F-11 presents actual and simulated (“benchmark”) business ownership rates for Asian-Pacific American workers in the local engineering industry. BBC performed those simulations only for Asian-Pacific American workers because they were the only group for which race/ethnicity or gender was a statistically significant negative factor in business ownership in 2009 through 2011.

Figure F-11.
Comparison of actual business ownership rates to simulated rates
for relevant geographic market area engineering workers, 2009 through 2011

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian-Pacific American	4.9%	13.3%	36

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Source: BBC Research & Consulting from statistical models of 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Approximately 5 percent of Asian-Pacific Americans in the study area engineering industry were business owners in 2009 through 2011 compared with a benchmark business ownership rate of about 13 percent (a disparity index of 36). The simulated business ownership rates indicated that Asian-Pacific Americans working in the industry own engineering firms at about one-third of the rate observed for similarly-situated non-Hispanic white men (i.e., non-Hispanic white males who share the same personal, financial, and educational characteristics of non-Hispanic white females).

Results specific to the goods and services industry in the relevant geographic market area in 2000. Figure F-12 presents the coefficients from the probit model predicting business ownership in the engineering industry in the relevant geographic market area in 2000. According to the model, older individuals were more likely to own businesses in the engineering industry (but age had less of an effect for the oldest individuals) as were individuals with higher interest and dividend income. Individuals with more education than a high school diploma had a higher probability of business ownership but so did individuals with less than a high school degree.

After controlling for race- and gender-neutral factors, statistically significant disparities in rates of business ownership remained for Asian-Pacific Americans working in the goods and services industry in the relevant geographic market area. Differences in the probability of business ownership between men and women were not significant.

Figure F-12.
Relevant geographic market area
goods and services industry
business ownership model, 2000

Note:

The minority-female interaction terms measure the combined effect of belonging to a particular minority group and being female.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

BBC Research & Consulting from 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-4.9944 **
Age	0.0978 **
Age-squared	-0.0008 **
Married	0.0636
Disabled	0.0481
Number of children in household	-0.0217
Number of people over 65 in household	0.0688
Owns home	-0.0878
Home value (\$000s)	0.0004
Monthly mortgage payment (\$000s)	0.1240
Interest and dividend income (\$000s)	0.0211 **
Income of spouse or partner (\$000s)	-0.0029
Speaks English well	0.2425
Less than high school education	0.8927 **
Some college	0.7512 **
Four-year degree	0.7040 **
Advanced degree	0.8754 **
African American	-0.1075
Asian-Pacific American	-0.6499 **
Hispanic American	-0.0961
Other minority†	0.2405
Female	-0.3990
Minority-female interaction term	0.2750

Simulations of business ownership rates. The study team simulated business ownership rates in the goods and services industry in the relevant geographic market area using the same approach as it used for the construction and engineering industries. Figure F-13 presents actual and simulated (“benchmark”) business ownership rates for Asian-Pacific Americans in the local goods and services industry.

Figure F-13.
Comparison of actual business ownership rates to simulated rates
for relevant geographic market area goods and services workers, 2000

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian-Pacific American	2.6%	9.4%	28

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-3.

Source: BBC Research & Consulting from statistical models of 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Only 3 percent of Asian-Pacific Americans in the engineering industry in the relevant geographic market area were business owners in 2000 compared with a benchmark of 9 percent (disparity

index of 28). In other words, Asian-Pacific American engineering workers owned businesses at 28 percent of the rate that would be expected for similarly situated non-Hispanic white workers.

Results specific to the goods and services industry in the relevant geographic market area in 2009 through 2011. Figure F-14 presents the coefficients from the probit model predicting business ownership in the goods and services industry in the relevant geographic market area in 2009 through 2011. Unlike the 2000 model, none of the race-and gender-neutral factors was a statistically significant predictor of business ownership for the local goods and services industry in 2009 through 2011.

After statistically controlling for race- and gender-neutral factors, the regression model indicated that Hispanic Americans were less likely than non-Hispanic whites to own goods and services businesses in the relevant geographic market area in 2009 through 2011. Differences in the probability of business ownership between men and women were not significant.

Figure F-14.
Consortium goods and services
industry business ownership model,
2009 through 2011

Note:

The minority-female interaction terms measure the combined effect of belonging to a particular minority group and being female.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

The less than high school and Black American were excluded because there were no goods and services business owners in the dataset with those characteristics.

Source:

BBC Research & Consulting from 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.2318 *
Age	-0.0015
Age-squared	0.0003
Married	-0.0506
Disabled	-0.3580
Number of children in household	0.0565
Number of people over 65 in household	-0.2669
Owens home	-0.3549
Home value (\$000s)	0.0002
Monthly mortgage payment (\$000s)	0.1243
Interest and dividend income (\$000s)	0.0162
Income of spouse or partner (\$000s)	-0.0016
Speaks English well	0.3526
Less than high school education	excluded
Some college	0.0561
Four-year degree	0.3588
Advanced degree	-0.0800
African American	excluded
Asian-Pacific American	-0.5541
Hispanic American	-0.4956 *
Native American, Subcontinent Asian American and other	-0.5866
Female	-0.2391
Minority-female interaction term	-0.1993

Simulations of business ownership rates. The study team simulated business ownership rates in the Consortium goods and services industry using the same approach as it used for the construction and engineering industries as well as the 2000 goods and services industry. Figure F-15 presents actual and simulated (“benchmark”) business ownership rates for Hispanic American workers in the local goods and services industry. BBC performed those simulations only for Hispanic American workers because they were the only group for which race/ethnicity or gender was a statistically significant negative factor in business ownership in 2009 through 2011.

Figure F-15.
Comparison of actual business ownership rates to simulated rates
for relevant geographic market area goods and services workers, 2009 through 2011

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	2.6%	10.1%	26

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-3.

Source: BBC Research & Consulting from statistical models of 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Approximately 3 percent of Hispanic Americans in the study area goods and services industry were business owners in 2009 through 2011 compared with a benchmark business ownership rate of about 10 percent (a disparity index of 26). The simulated business ownership rates indicated that Hispanic Americans working in the industry own goods and services firms at about one-third of the rate observed for similarly-situated non-Hispanic white men (i.e., non-Hispanic white males who share the same personal, financial, and educational characteristics of non-Hispanic white females).

Summary of Business Ownership in Construction, Engineering and Goods and Services

Disparities in business ownership were present in the construction industry in the relevant geographic market area:

- Business ownership rates for Black Americans and Hispanic Americans were substantially lower than that of non-Hispanic whites in both 2000 and 2009 through 2011. Business ownership rates were also lower for “other minority” groups in 2009 through 2011.
- Business ownership rates for women were substantially lower than that of men in both 2000 and 2009 through 2011.
- After statistically controlling for a number of race- and gender-neutral factors, substantially fewer Black Americans, Hispanic Americans, and women owned businesses than similarly-situated non-Hispanic whites (or non-Hispanic white men) in 2000. That disparity persisted for Hispanic Americans and women in 2009 through 2011.

BBC also identified disparities in business ownership in the engineering industry in the relevant geographic market area:

- Business ownership rates for Asian-Pacific Americans and Hispanic Americans were substantially lower than that of non-Hispanic whites in 2009 through 2011 (but not in 2000).
- Business ownership rates for women were substantially lower than that of men in both 2000 and 2009 through 2011.
- BBC used regression models to investigate the presence of race/ethnicity- and gender-based disparities in business ownership rates after accounting for race- and gender-neutral

factors. The results indicated substantial disparities for both women and Asian-Pacific Americans in 2000. That disparity persisted for Asian-Pacific Americans in 2009 through 2011.

BBC also identified disparities in business ownership in the local goods and services industry:

- Business ownership rates for Asian-Pacific Americans, Hispanic Americans and Black Americans were substantially lower than that of non-Hispanic whites in 1990 and 2009 through 2011 (but not in 2000).
- Business ownership rates for women were substantially lower than that of men in 2000.
- After statistically controlling for a number of race- and gender-neutral factors, substantially fewer Asian-Pacific Americans owned goods and services businesses than similarly-situated non-Hispanic whites in 2000 and substantially fewer Hispanic Americans owned goods and services businesses than similarly-situated non-Hispanic whites in 2009 through 2011.

APPENDIX G.

Access to Capital for Business Formation and Success

APPENDIX G.

Access to Capital for Business Formation and Success

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.^{1, 2} Researchers have also found that the amount of 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 Black 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 Appendix G presents information about homeownership and mortgage lending, because home equity can be an important source of capital to start and expand businesses. The appendix then presents information about business loans, assessing whether minorities and females experience any difficulties acquiring business capital.

Homeownership and Mortgage Lending

BBC analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

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. 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

Any barriers to homeownership and home equity growth for minorities and women can affect business opportunities by constraining their available funding. Similarly, any barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. 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 BBC used 2000 Census and 2009-2011 American Community Survey (ACS) data to examine homeownership rates in the relevant geographic market area (San Diego, Orange and Imperial counties) and in the United States. Figure G-1 presents homeownership rates for minority groups and non-Hispanic whites.

As shown in Figure G-1, about two-thirds of non-Hispanic white households (66%) owned homes in the Relevant geographic market area in 2000, but homeownership rates were much lower for both Black Americans (34%) and Hispanic Americans (41%). Homeownership rates in 2000 were also lower for Native Americans (49%), Subcontinent Asian Americans (51%) and Asian-Pacific Americans (56%).

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, BBC 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.

**Figure G-1.
Homeownership
rates, 2000 and
2009-2011**

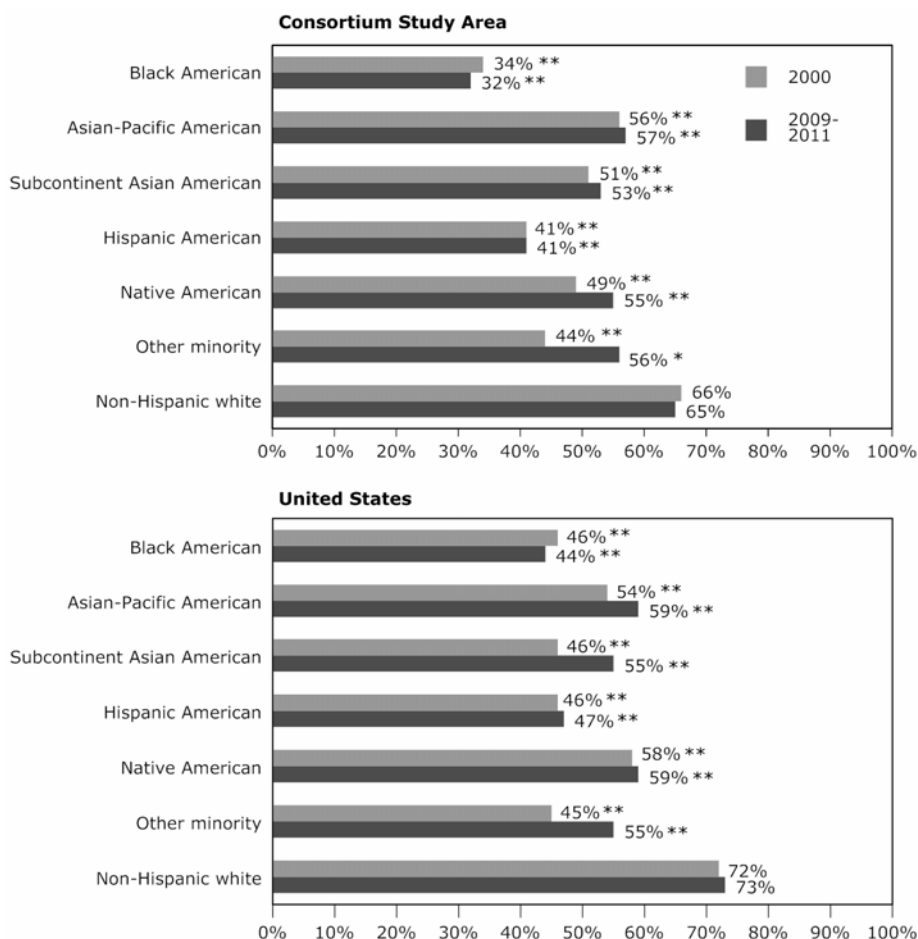
Note:

The sample universe is all households.

** Denotes that the difference in proportions from non-Hispanic white for the given year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2000 U.S. Census and 2009-2011 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>



Disparities in homeownership rates between racial/ethnic minorities and non-minorities were also apparent in 2009 through 2011.¹³

- Approximately 32 percent of Black American households were homeowners, compared to 65 percent of non-Hispanic white households;
- About 41 percent of Hispanic American households were homeowners;
- Homeownership rates for Subcontinent Asian Americans and Asian-Pacific Americans were 53 percent and 57 percent, respectively; and
- Native American households owned homes at a rate of 55 percent.

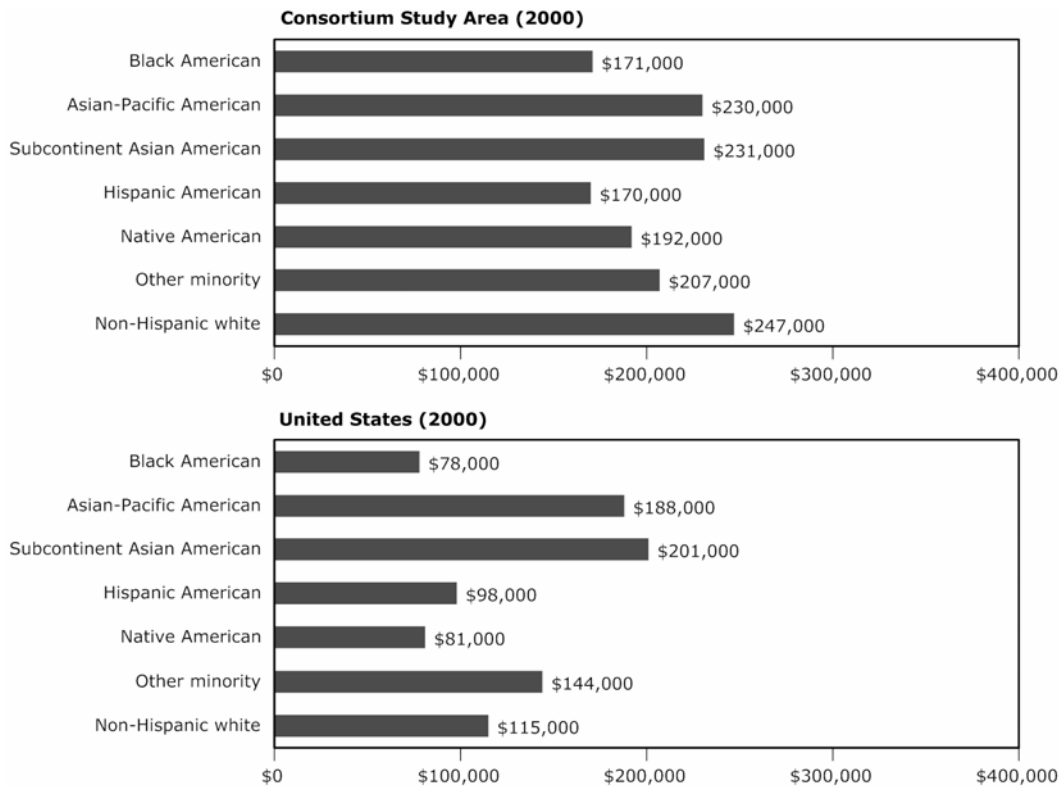
Lower rates of homeownership may reflect lower incomes for minorities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. An older study found that the probability

¹³ Although not presented in this report, the study team also examined homeownership rates for heads of households working in the construction, engineering, and goods and services industries. Each minority group in the construction industry and each minority group except “other minority” in the engineering industry had a lower rate of home ownership than non-Hispanic whites in the Relevant geographic market area. Due to small sample sizes in the goods and services industry, Subcontinent Asian Americans, Native Americans and “other minority” were excluded from the analysis but all other groups had lower rates of homeownership than non-Hispanic whites.

of homeownership is considerably lower for Black 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 2000 Census and 2009-2011 ACS data, BBC compared median home values by racial/ethnic group. Figure G-2 presents results for the relevant geographic market area and the United States as a whole in 2000.

Figure G-2.
Median home values, 2000



Note: The sample universe is all owner-occupied housing units.

Source: BBC Research & Consulting from 2000 U.S. Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

In 2000, the median home value of homes owned by non-Hispanic whites in the Relevant geographic market area was approximately \$247,000, substantially greater than the median value of homes owned by Hispanic Americans (\$170,000), Black Americans (\$171,000) and Native Americans (\$192,000). The median home value for Asian-Pacific Americans (\$230,000) and Subcontinent Asian Americans (\$231,000) was also below that of non-Hispanic whites.

Figure G-3 presents median home values by racial/ethnic groups in the Relevant geographic market area and in the U.S. based on 2009-2011 ACS data. Similar to 2000 data, Black Americans

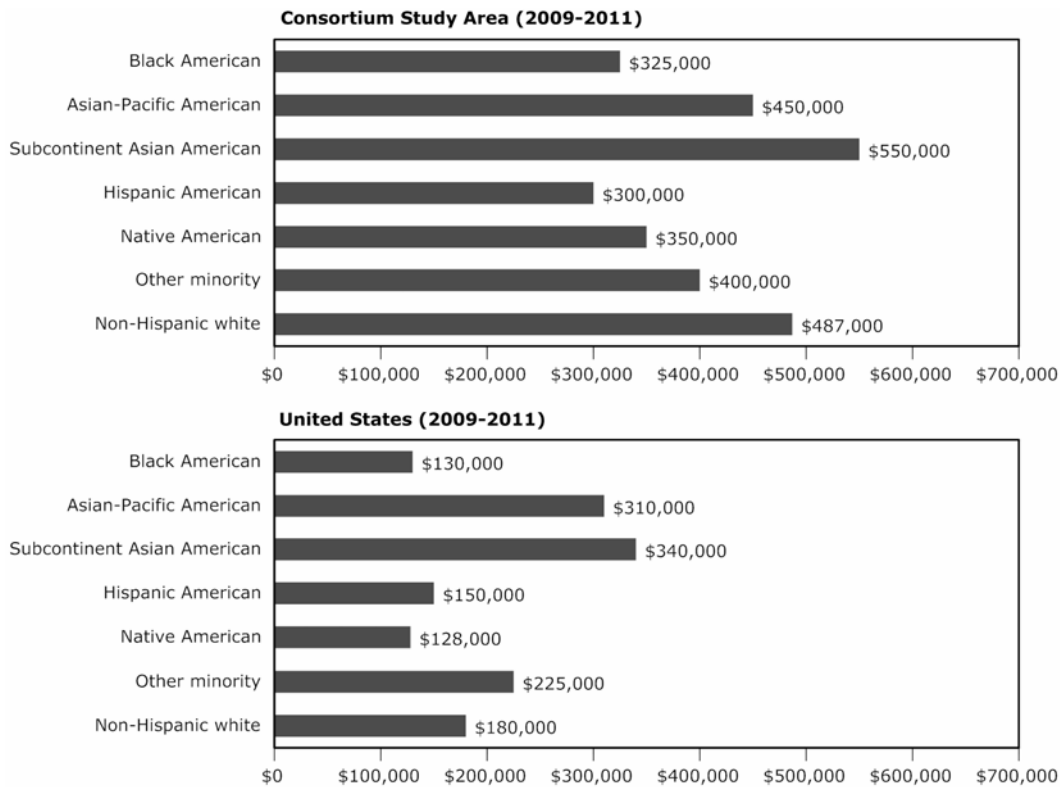
¹⁴ Jackman. 1980. "Racial Inequalities in Home Ownership."

¹⁵ Fairlie, Robert W. and Harry A. Krashinsky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." IZA Discussion Paper. No. 2201.

(\$325,000), Hispanic Americans (\$300,000) and Native Americans (\$350,000) had substantially lower median home values than non-Hispanic whites (\$487,000) in the Relevant geographic market area. Median home values for Asian-Pacific Americans (\$450,000) were slightly below non-Hispanic whites and Subcontinent Asian Americans (\$550,000) had higher home values than non-Hispanic whites in the Relevant geographic market area.

Home values in the Relevant geographic market area were much higher for all groups than in the United States as a whole. However, similar trends in the disparities among racial/ethnic groups were evident in the nation as a whole.

Figure G-3.
Median home values, 2009 through 2011



Note: The sample universe is all owner-occupied housing units.

Source: BBC Research & Consulting from 2009-2011 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when applying for home mortgages. In a recent lawsuit, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against Black 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

BBC explored market conditions for mortgage lending in the Relevant geographic market area and in the nation as a whole. 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.

BBC examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2006, 2009, and 2012. Although 2012 provides the most current representation of the home mortgage market, the 2006 data represent market conditions from before the recent mortgage crisis. Many of the institutions that originated loans in 2006 were no longer in business by the 2012 reporting date for HMDA data.¹⁸ For example, the 2006 HMDA data include information about 735,000 loan applications in the Relevant geographic market area that approximately 910 lenders processed. The 2012 HMDA data for the Relevant geographic market area include information about 499,000 loan applications that about 850 lenders processed. In addition, the percentage of government-insured loans, which the study team did not include in its analysis, increased dramatically between 2006 and 2012, decreasing the proportion of total loans that the study team analyzed in the 2012 data.¹⁹

Mortgage denials. BBC 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.²⁰ Loan

¹⁶ Savage, Charlie. December 22, 2011. “\$335 Million Settlement on Countywide Lending Bias.” *NYTimes.com*. Available online at: <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>

¹⁷ Financial institutions were required to report 2012 HMDA data if they had assets of more than \$41 million (\$39 million for 2009 and \$35 million for 2006), have a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies are required to report HMDA data if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, are located in a Metropolitan Statistical Area (MSA; or originated five or more home purchase loans in an MSA) and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

¹⁸ According to an article by the Federal Reserve, the volume of reported loan applications and originations fell sharply from 2007 to 2008 after previously falling between 2006 and 2007. See Avery, Brevoort, and Canner, “The 2008 HMDA Data: The Mortgage Market during a Turbulent Year.” Available online: <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/hmda08draft.pdf>.

¹⁹ Loans insured by government programs have surged since 2006. In 2006, about 10 percent of first lien home loans were insured by a government program. More than half of home loans were insured by the government in 2009. Source: “The 2009 HMDA Data: The Mortgage Market in a Time of Low Interest Rates and Economic Distress,” *Federal Reserve Bulletin*. December 2010, pp A39-A77.

²⁰ The median family income in 2012 was about \$65,000 for the United States as a whole, \$45,000 for Imperial County, \$85,300 for Orange County and \$75,900 for San Diego County. Source: U.S. Department of Housing and Urban Development (HUD) at www.huduser.org.

denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.²¹

Figure G-4 presents loan denial results for the Relevant geographic market area and the U.S. in 2006, 2009, and 2012. Data for 2006 show higher denial rates for all groups in the Relevant geographic market area compared with 2012. In 2006, Black American, Asian American, Hispanic American, Native American and Native Hawaiian and other Pacific Islander high-income applicants all exhibited higher loan denial rates compared with non-Hispanic white applicants. Results in 2009 were similar.

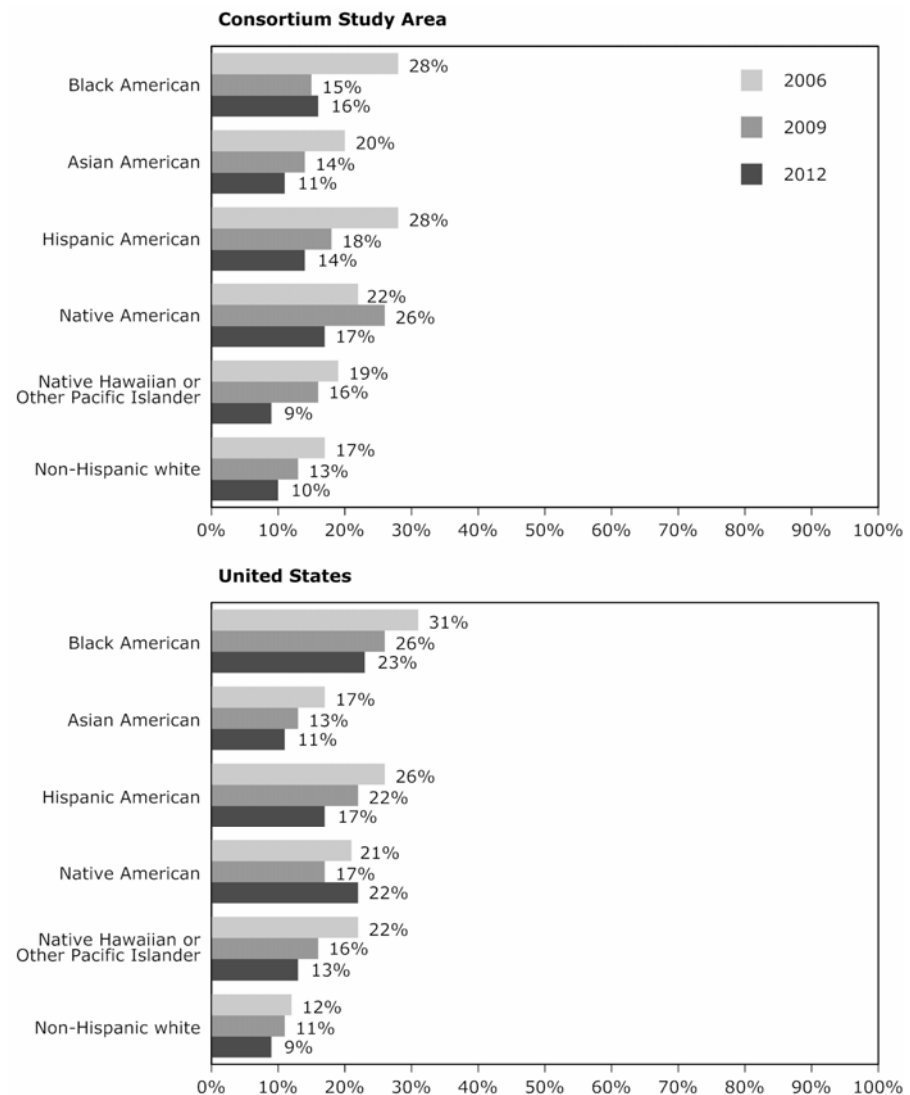
Figure G-4.
Denial rates of
conventional
purchase loans to
high-income
households,
2006, 2009 and
2012

Note:

High-income borrowers are those households with 120% or more than the HUD area median family income (MFI).

Source:

FFIEC HMDA data 2006, 2009 and 2012.



²¹ For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

In 2012, loan denial rates remained high for all minority loan applicants except Native Hawaiian and other Pacific Islanders in the Relevant geographic market area:

- The denial rate was highest among Native American applicants, 17 percent of whom had their applications denied, compared to 10 percent of non-Hispanic white applicants.
- Among high-income Black American applicants, 16 percent were denied.
- Fourteen percent of high-income Hispanic American applicants were denied.
- The denial rate for high-income Asian Americans was 11 percent.

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.²² It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination.²³ The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.²⁴
- 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.²⁵
- 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 Black American borrowers across 13 census tracts received significantly fewer loans and of smaller sizes compared to their white counterparts.²⁶

However, other studies have found that differences in preferences for Federal Housing Administration (FHA) loans—mortgage loans that the government insures—versus conventional loans among racial and ethnic groups may partially explain disparities found in conventional loan approvals between minorities and non-minorities.²⁷ Several studies have found that, historically, minority borrowers are far more likely to seek FHA loans than comparable non-Hispanic white borrowers across different income and wealth levels. The

²² 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.

²³ Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." *The Journal of Economic Perspectives*. 12:41-62.

²⁴ Yinger, John. 1995. *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation, 71.

²⁵ 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.

²⁶ 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.

²⁷ Canner. 1991. "Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets."

insurance on FHA loans protects the lender, but the borrower can be disadvantaged by higher borrowing costs.^{28, 29}

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.³⁰ 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.³¹ Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure.

Although there is no standard definition of a subprime loan, there are several commonly-used approaches to examining rates of subprime lending. BBC used a "rate-spread method"—in which subprime loans are identified as those loans with substantially above-average interest rates—to measure rates of subprime lending in 2006, 2009, and 2012.³² 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.

Subprime home purchase loans. Figure G-5 shows the percent of conventional home purchase loans that were subprime in the Relevant geographic market area and the United States, based on 2006, 2009 and 2012 HMDA data. The rates of subprime lending in 2009 and 2012 were dramatically lower overall than in 2006 due to the collapse of the mortgage lending market in the late 2000s.

²⁸ Yinger. 1995. *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. 80.

²⁹ See definition of subprime loans discussed on the following page.

³⁰ Avery, Brevoort, and Canner, "The 2006 HMDA Data." *Federal Reserve Bulletin*, December 2007, pp. A73-A109.

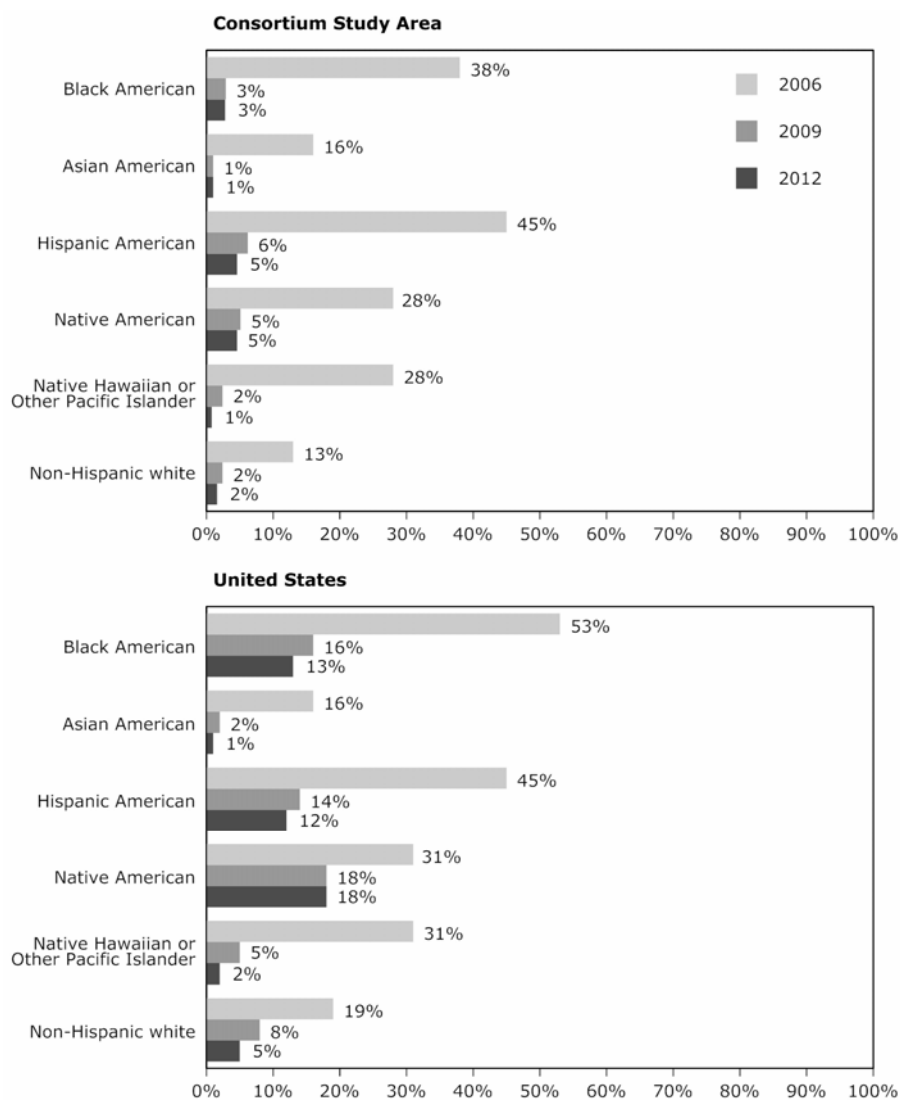
³¹ Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure." *Federal Reserve Bank of Boston*.

³² 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. BBC identified subprime loans according to those measures in the corresponding time periods.

In the Relevant geographic market area in 2006, 2009 and 2012, Black American, Hispanic American and Native American borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites.

Figure G-5.
Percent of
conventional home
purchase loans that
were subprime,
2006, 2009 and
2012

Source:
FFIEC HMDA data 2006, 2009
and 2012.



Data for 2006 indicate substantial disparities for all minority groups:

- About 13 percent of home purchase loans issued to non-Hispanic whites were subprime.
- By contrast, 45 percent of home purchase loans issued to Hispanic Americans were subprime.
- Thirty-eight percent of home purchase loans issued to Black Americans were subprime.
- Twenty-eight percent of home purchase loans issued to Native Americans and Native Hawaiians or other Pacific Islanders were subprime.
- About 16 percent of home purchase loans issued to Asian Americans were subprime.

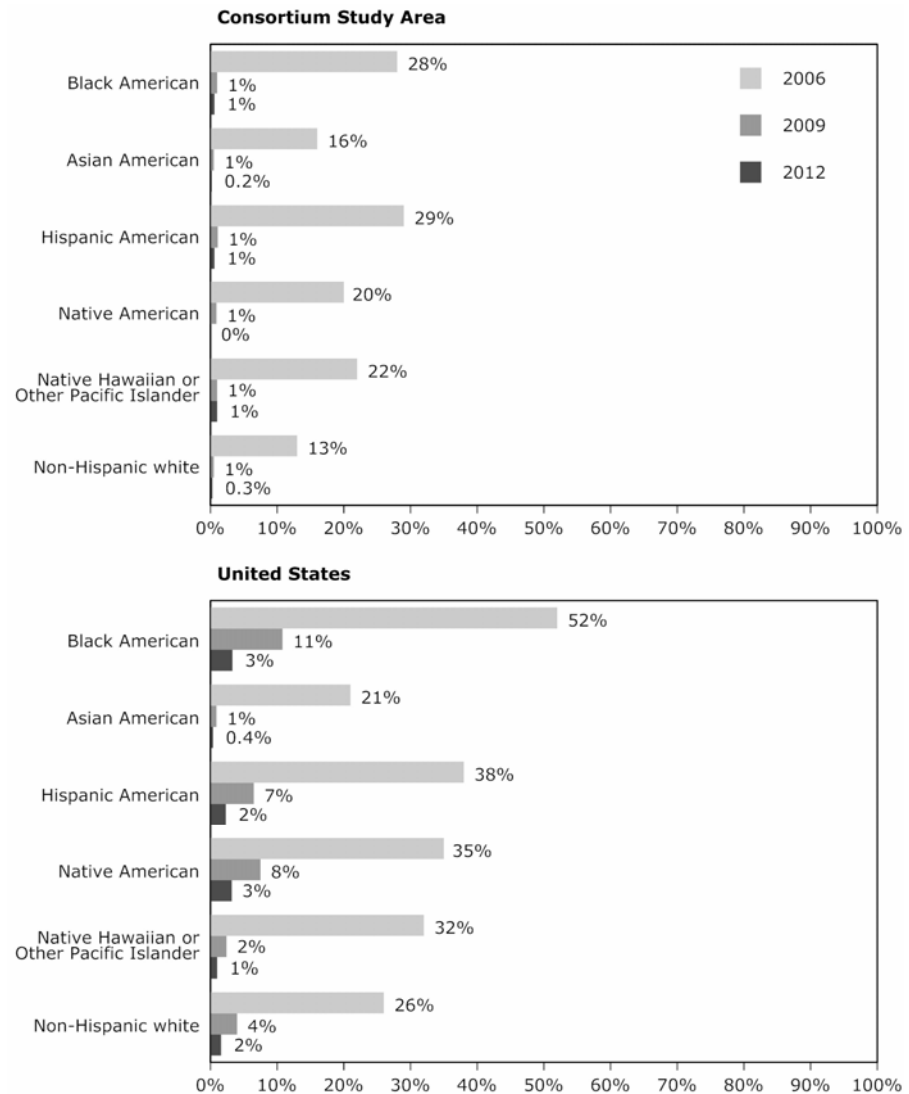
Although the overall volume of subprime loans dropped substantially between 2006 and 2012, racial/ethnic disparities in subprime lending persisted for Black Americans, Hispanic Americans and Native Americans:

- In 2012, fewer than 2 percent of conventional home purchase loans issued to non-Hispanic white borrowers were subprime.
- About 5 percent of home purchase loans issued to both Hispanic Americans and Native Americans were subprime.
- About 3 percent of home purchase loans issued to Black Americans were subprime.

Subprime refinance loans. Figure G-6 presents the percentage of home refinance loans that were subprime in the Relevant geographic market area and the United States. As with home purchase loans, the rates of subprime lending for refinance loans in 2009 and 2012 were dramatically lower than in 2006 due to the collapse of the mortgage lending market in the late 2000s.

Figure G-6.
Percent of
conventional
refinance loans that
were subprime,
2006, 2009 and
2012

Source:
FFIEC HMDA data 2006, 2009
and 2012.



Compared to non-Hispanic white borrowers in the Relevant geographic market area, Black Americans, Hispanic Americans and Native Hawaiian or Other Pacific Islanders were more likely to receive subprime refinance loans in all three years (2006, 2009 and 2012). Native American borrowers were more likely to receive subprime refinance loans in both 2006 and 2009 and Asian Americans were more likely to receive subprime refinance loans in 2006 but not in 2009 or 2012.

In the Relevant geographic market area in 2012, 0.6 percent of refinance loans issued to both Black Americans and Hispanic Americans were subprime and 1.0 percent of refinance loans used to Native Hawaiian or Other Pacific Islanders were subprime. In contrast, only 0.3 percent of refinance loans issued to non-Hispanic whites in the study area were subprime.

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.”³³ Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.³⁴ 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 Black American neighborhoods compared with white neighborhoods, even after controlling for income.³⁵ For example, borrowers in higher-income Black 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 since late 2006 has been far-reaching, resulting in the loss of home equity, decreased demand for housing, and increased rates of foreclosure.³⁶ 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 2006.³⁷ 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.”³⁸

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

³³ 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.”

³⁴ Freddie Mac. 1996, September. “Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America’s Families.” *Freddie Mac*. (accessed February 5, 2007); and Lanzerotti. 2006. “Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California.” *Federal Reserve Bank of San Francisco*.

³⁵ Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.

³⁶ Joint Center for Housing Studies of Harvard University. 2008. “The State of the Nation’s Housing.”

³⁷ *Ibid.*

³⁸ Gerardi, Shapiro, and P. Willen. 2008. “Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure.” *Federal Reserve Bank of Boston*.

assets clearly have the potential to substantially affect the ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press.”³⁹

- 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.”⁴⁰

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, 2010.⁴¹ 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.^{42, 43} 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.

Opportunities to obtain business capital through home mortgages appear to be limited especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

Redlining. Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. Those areas are often racially determined, such as Black

³⁹ 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.”

⁴⁰ 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.*

⁴¹ 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.*

⁴² 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.

⁴³ National Federation of Independent Business (NFIB). 2010. Small Business Credit in a Deep Recession.

American or mixed-race neighborhoods.⁴⁴ That practice can perpetuate problems in already poor neighborhoods.⁴⁵ 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.⁴⁶ Some studies found that the race of an applicant—but not the racial makeup of the neighborhood—to be a factor in loan denials.

Studies of redlining have primarily focused on the geographic aspect of lender decisions. However, redlining can also include the practice of restricting credit flows to minority neighborhoods through procedures that are not observable in actual loan decisions. Examples include branch placement, advertising, and other pre-application procedures.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ Such steering can affect the perception of minority borrowers about the availability of mortgage loans.

Gender discrimination in mortgage lending. Relatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. Perceived risks associated with granting loans to women of childbearing age and unmarried women resulted in “income discounting,” limiting the availability of loans to women.⁵¹

The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending

⁴⁴ 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.

⁴⁵ Ladd, Helen F. 1998. “Evidence on Discrimination in Mortgage Lending.” *The Journal of Economic Perspectives*. 12:41-62.

⁴⁶ 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.

⁴⁷ Yinger, John. 1995. “Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination.” Russell Sage Foundation. New York. 78-79.

⁴⁸ Holloway. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”

⁴⁹ Kantor, Amy C. and John D. Nystuen. 1982. “De Facto Redlining a Geographic View.” *Economic Geography*. 4:309-328.

⁵⁰ Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 78-79.

⁵¹ Card. 1980. “Women, Housing Access, and Mortgage Credit.”

markets. For example, there is some past evidence that lenders under-appraised properties for female borrowers.⁵²

Access to Business Capital

Barriers to capital markets can have substantial impacts on small business formation and expansion. For example, during interviews and public meetings that BBC conducted in 2013, “discrimination in obtaining loans due to race and gender” was identified as a barrier to business success. In addition, several studies have found evidence that start-up capital is important for business profits, longevity, and other outcomes.

- The amount of start-up capital is associated with small business sales and other outcomes;⁵³
- Limited access to capital has affected the size of Black American-owned businesses;^{54, 55} and
- Weak financial capital was identified as a reason that more Black American-owned businesses than non-Hispanic white-owned businesses closed over a four-year period.⁵⁶

Bank loans are one of the largest sources of debt capital for small businesses.⁵⁷ 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 race/ethnicity and gender discrimination in capital markets by evaluating:

- Loan denial rates;
- Loan values;
- Interest rates;
- Business owners’ fears that loan applications will be rejected;
- Sources of capital; and
- Relationships between start-up capital and business survival.

To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data from the Federal Reserve Board’s 1998 and 2003 SSBF—the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The

⁵² Ladd, Helen F. 1982. “Equal Credit Opportunity: Women and Mortgage Credit.” *The American Economic Review*. 72:166-170.

⁵³ 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.”

⁵⁴ 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.

⁵⁵ Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

⁵⁶ 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.

⁵⁷ 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 Black Americans, whose rate of lending from commercial banks is even greater than other minorities. See Blanchard, Lloyd, Bo Zhao and John Yinger. 2005. “Do Credit Market Barriers Exist for Minority and Woman Entrepreneurs.” *Center for Policy Research, Syracuse University*.

survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The samples from 1998 and 2003 contain records for 3,521 and 4,240 businesses, respectively. The study team applied sample weights to provide representative estimates of loan denial and interest rates.

The SSBF records the geographic location of businesses by Census Division, not by city, county, or state. The Pacific Census Division (referred to throughout this report as the Pacific region) contains data from California, along with Alaska, Oregon, Hawaii and Washington. The Pacific region is the level of geographic detail of SSBF data most specific to the Relevant geographic market area, and 2003 is the most recent information available from the SSBF because the survey was discontinued after that year.

Loan denial rates. Figure G-7 presents loan denial rates from the 1998 and 2003 SSBFs for the Pacific region and for the United States.⁵⁸ National SSBF data for 1998 reveal that Black American-, Asian American-, and Hispanic American-owned businesses exhibited loan denial rates that were considerably higher than that of non-Hispanic white male-owned businesses. In 2003, the loan denial rate for Black American-owned businesses (51%) in the United States remained substantially higher than for non-Hispanic white male-owned businesses.

As shown in Figure G-7, about 34 percent of minority- and women-owned businesses in the Pacific region reported being denied loans in 1998, a larger percentage than the 21 percent of non-Hispanic white male-owned businesses that reported being denied loans. According to 2003 SSBF data, a smaller percentage of minority- and female-owned businesses in the Pacific region were denied loans compared to non-Hispanic white male-owned businesses, which was inconsistent with national results for that year. (Loan denial statistics on individual minority groups in the Pacific region are not reported in Figure G-7 due to relatively small sample sizes.)

⁵⁸ 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.

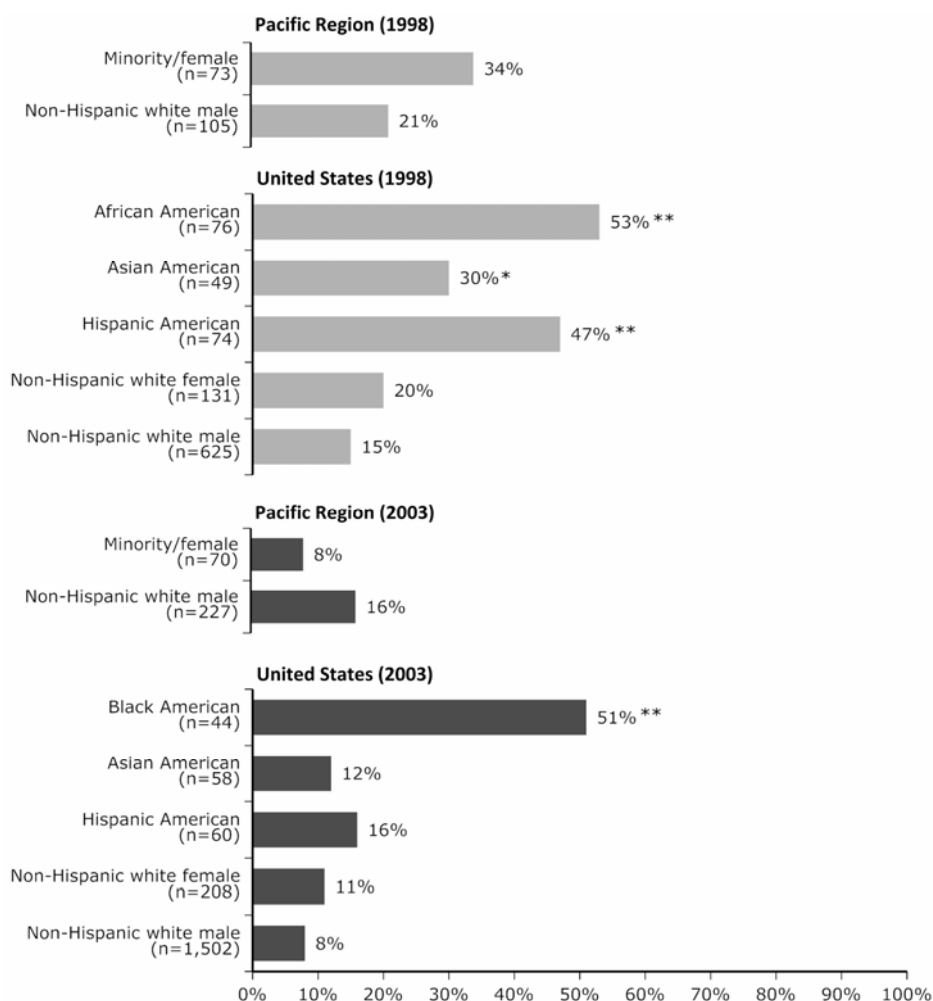
**Figure G-7.
Business loan
denial rates,
1998 and 2003**

Note:

** Denotes that the difference in proportion from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 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. Findings from those studies include the following:

- Commercial banks are less likely to loan to Black American-owned businesses than to non-Hispanic white-owned businesses after statistically controlling for other factors.⁵⁹
- Black American, Hispanic American, and Asian American men are more likely to be denied loans than non-Hispanic white men. However, Black American borrowers are more likely to apply for loans.⁶⁰
- Disparities in loan denial rates between Black American-owned and non-Hispanic white-owned businesses tend to decrease with increasing competitiveness of lender markets. A

⁵⁹ 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.

⁶⁰ 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.

similar phenomenon is observed when considering differences in loan denial rates between male- and female-owned businesses.⁶¹

- 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 Black 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 Black American-owned businesses and non-Hispanic white-owned businesses.⁶²
- Loan denial rates are higher for Black 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.⁶³
- Women-owned businesses are no less likely to apply or to be approved for loans in comparison to male-owned businesses.⁶⁴
- Charles River Associates (CRA) incorporated the 2003 SSBF in a study prepared for the Santa Clara Valley Transportation Authority (also located in the Pacific region). Combining data from the 1998 and 2003 SSBFs “to increase precision of estimates,” the CRA study revealed possible disparities in loan denial rates based on race/ethnicity and gender using a probit econometric model and controlling for other factors. CRA’s results indicate that Black American-owned businesses had the highest probabilities of loan denial. They also reported that Hispanic American- and Asian American-owned businesses were more likely to be denied loans.⁶⁵

BBC regression model for denial rates in the SSBF. The BBC study team conducted its own analysis of the SSBF by developing a model 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

⁶¹ Cavalluzzo, 2002. “Competition, Small Business Financing and Discrimination: Evidence from a New Survey.”

⁶² Cavalluzzo, Ken and John Wolken. 2002. “Small Business Turndowns, Personal Wealth and Discrimination.” *FEDS Working Paper No. 2002-35*.

⁶³ 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.

⁶⁴ Coleman. 2002. “Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances.”

⁶⁵ CRA International. 2007. “Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization.” *Prepared for Santa Clara Valley Transportation Authority*.

loan denial. The standard model includes three general categories of variables that the study team used:

- Owners' demographic characteristics (including race and gender), credit, and resources (14 variables);
- Business characteristics and credit and financial health (29 variables); and
- The environment in which businesses and lenders operate and characteristics of the loans (19 variables).⁶⁶

BBC developed two models, one for the 1998 SSBF and one for the 2003 SSBF using those standard variables. After excluding a small number of observations where the loan outcome was imputed, the 1998 national sample included 931 businesses that had applied for a loan during the three years preceding the 1998 SSBF and the Pacific region included 172 such businesses. The 2003 national sample included 1,897 businesses that had applied for a loan during the three years preceding the 2003 SSBF and the Pacific region included 298 such businesses.

Given the relatively small sample size for the Pacific region and the large number of variables in the model, the study team included all U.S. businesses in the model and estimated any Pacific region effects by including regional control variables—an approach commonly used in other studies that analyze SSBF data.⁶⁷ The regional variables include an indicator variable for businesses located in the Pacific region and interaction variables that represent businesses owned by minorities or women that are located in the Pacific region.⁶⁸

1998 SSBF regression results. Figure G-8 presents the marginal effects from the 1998 probit model predicting loan denials. The dependent variable represented whether a business' 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. Those effects include the following:

- Having a four-year college degree is associated with a lower probability of loan denial;
- More equity in the business owner's home—if he or she is a homeowner—is associated with a lower probability of loan denial;
- Being a business that filed for bankruptcy in the past seven years or that has been delinquent in business transactions is associated with a higher probability of loan denial;

⁶⁶ 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*.

⁶⁷ 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*.

⁶⁸ BBC also considered an interaction variable to represent firms that are both minority and female but the term was not significant in 1998 or 2003.

- Being a business *owner* who filed for bankruptcy in the past seven years or has had a judgment against him or her is associated with a higher probability of loan denial;
- Being a family-owned business is associated with a greater likelihood of loan denial;
- Having an existing line of credit, an existing mortgage, or existing vehicle or equipment loans is associated with a lower likelihood of loan denial; however, having outstanding loans from stockholders is associated with a higher likelihood of loan denial;
- Being in the construction industry is associated with a higher probability of loan denial;
- Being in highly concentrated industry segments (as measured by the Herfindahl index) is associated with a higher probability of loan denial; and
- Applying for business mortgages and vehicle and equipment loans is associated with a lower probability of loan denial.

After statistically controlling for race- and gender-neutral influences, the study team observed that businesses owned by Black Americans and Hispanic Americans were more likely to have their loans denied than other businesses. The indicator variable for the Pacific region and the interaction terms for Pacific 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 are not significantly different from the U.S. as a whole after accounting for other factors.

The study team simulated loan approval rates for those minority groups with statistically significant disparities (i.e., Black American- and Hispanic 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 46.4% would indicate an approval rate of 53.6%).

The probit modeling approach allowed for simulations of loan approval rates for those groups as if they had the same probability of loan approval as similarly situated non-Hispanic white male-owned businesses. To conduct those simulations, BBC took the following steps:

1. BBC performed a probit regression analysis predicting loan approval using only non-Hispanic white male-owned businesses in the dataset.⁶⁹
2. The study team then used the coefficients from that model and the mean characteristics of Black American- and Hispanic American-owned businesses (including the effects of a business being in the Pacific region) to estimate the probability of loan approval of such groups.

⁶⁹ That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

Figure G-8.

Likelihood of business loan denial (probit regression) in the U.S. in the 1998 SSBF, Dependent variable: loan denial

Variable	Marginal Effect	Variable	Marginal Effect	Variable	Marginal Effect
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Black American	0.352 **	D&B credit score = moderate risk	0.088	Partnership	0.016
Asian American	0.015	D&B credit score = average risk	0.105	S corporation	-0.023
Hispanic American	0.221 **	D&B credit score = significant risk	0.053	C corporation	-0.028
Native American	0.058	D&B credit score = high risk	0.066	Construction industry	0.103 **
Female	-0.027	Total employees	0.000	Manufacturing industry	0.006
Pacific region	0.010	Percent of business owned by principal	0.000	Transportation, communications and utilities industry	0.075
Black American in Pacific region	-0.066	Family-owned business	0.075 **	Finance, insurance and real estate industries	-0.021
Asian American in Pacific region	0.040	Firm purchased	-0.034	Engineering industry	0.122
Hispanic American in Pacific region	-0.008	Firm inherited	0.027	Other industry	0.035906
Female in Pacific region	0.106	Firm age	-0.001	Herfindahl index = .10 to .18	0.379935 **
		Firm has checking account	0.031	Herfindahl index = .18 or above	0.361935 **
		Firm has savings account	-0.027	Located in MSA	0.007519
		Firm has line of credit	-0.125 **	Sales market local only	0.015881
Owner's characteristics, credit and resources		Existing capital leases	-0.007	Loan amount	0.000000
Age	0.002	Existing mortgage for business	-0.046 *	Capital lease application	-0.024101
Owner experience	0.001	Existing vehicle loans	-0.065 **	Business mortgage application	-0.065146 **
Less than high school education	0.079	Existing equipment loans	-0.055 **	Vehicle loan application	-0.096823 **
Some college	-0.015	Existing loans from stockholders	0.108 **	Equipment loan application	-0.073413 **
Four-year degree	-0.061 **	Other existing loans	-0.009	Loan for other purposes	-0.039329
Advanced degree	-0.044	Firm used trade credit in past year	-0.034		
Log of Home Equity	-0.010 **	Log of total sales in prior year	0.000		
Bankruptcy in past 7 years	0.311 **	Negative sales in prior year	0.072		
Judgement against in past 3 years	0.246 **	Log of cost of doing business in prior year	0.002		
Log of net worth excluding home	0.001	Log of total assets	0.004		
Owner has negative net worth	-0.027	Negative total assets	-0.048		
		Log of total equity	0.014		
		Negative total equity	0.217		
		Firm bankruptcy in past 7 years	0.216 *		
		Firm delinquency in business transactions	0.246 **		

Note: * Statistically significant at 90% confidence level.

** Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects. The omitted industry, to which the marginal effect of industries shown is relative, is the trade industry. "Mining industry" perfectly predicted loan outcome and dropped out of the regression.

Source: BBC Research & Consulting analysis of 1998 SSBF data.

The results of those simulations yielded estimates of loan approval rates for non-Hispanic white-owned businesses who shared the same characteristics of Black American- and Hispanic American-owned businesses. Higher simulated rates indicate that, in reality, Black American- and Hispanic American-owned businesses are less likely to be approved for loans than similarly-situated non-Hispanic white male-owned businesses. Figure G-9 shows those simulated loan approval rates (“benchmark”) in comparison to the actual approval rates observed in the 1998 SSBF. The disparity index was calculated by taking the actual loan approval rate for each group and dividing it by each group’s benchmark, and then multiplying the result by 100. Values less than 100 indicate that, in reality, the group is less likely to be approved for a loan than what would be expected for similarly-situated non-Hispanic white male-owned businesses—in other words that race/ethnicity affects the likelihood of those groups being approved for loans.

Figure G-9.
Comparison of actual loan approval rates to simulated loan approval rates, 1998

Group	Loan approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
Black American	46.4%	77.0%	60
Hispanic American	53.7%	76.0%	71

Note: Actual approval rates presented here and denial rates in Figure G-7 do not sum to 100% because some observations were excluded from the probit regression.

“Loan approval” means that a business owner always or at least sometimes had his or her business loan applications approved over the previous three years.

Source: BBC Research & Consulting analysis of 1998 SSBF data.

Based on 1998 SSBF data, the actual loan approval rate for Black American-owned businesses was 46 percent. Model results showed that Black American-owned businesses would have an approval rate of about 77 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses (disparity index of 60). Similarly, Hispanic American-owned businesses would have an approval rate of about 76 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses, compared with their actual loan approval rate of 54 percent (disparity index of 71).

2003 SSBF regression results. BBC also conducted a regression analysis with 2003 SSBF data.⁷⁰ As in the 1998 regression analysis, the dependent variable represented whether a business’ loan applications over the past three years were always denied. Figure G-10 presents the marginal effects from the probit model predicting loan denial. In the 2003 model, the following race- and gender-neutral factors significantly affected the probability of loan denial:

- Location in the Pacific region is associated with a higher likelihood of loan denial;

⁷⁰ The 2003 SSBF contains multiple implicates (five copies of each record) to better address the issue of missing values. The values of all reported variables remain constant across the five implicates, but the values of imputed variables may differ. Only 1.8 percent of all values was missing and was imputed. BBC’s regression analysis is performed on the first implicate.

- Being a business owner who filed for bankruptcy in the past seven years is associated with a higher likelihood of loan denial;
- Being a business with an average or high-risk credit score is associated with a higher probability of loan denial;
- Being an inherited businesses or older businesses is associated with a lower likelihood of loan denial;
- Having an existing line of credit or savings account is associated with a lower likelihood of loan denial;
- Being an S or C corporation is associated with a higher probability of being denied loans;
- Being in the transportation, communications and utilities industry is associated with a higher likelihood of being denied loans; and
- Applying for business mortgages, vehicle loans, and loans for “other” purposes is associated with a greater likelihood of loan denial.

After statistically controlling for race- and gender-neutral influences, the study team observed that businesses owned by Black Americans were more likely to have their loans denied than other businesses. Figure G-10 also indicates that although there is little or no overall influence of business owner gender on rates of loan denial, female business owners in the Pacific region appear to have a lower likelihood of loan denial than female business owners nationally.

The study team also simulated approval rates from the 2003 SSBF results using the same approach as it used for the 1998 results. Figure G-11 presents actual and simulated (“benchmark”) approval rates for Black American-owned businesses, the sole minority group with statistically significant disparities in loan approval in the 2003 data. Simulated approval rates indicated that Black American-owned businesses are approved at 71 percent of the rate observed for similarly-situated non-Hispanic white male-owned businesses (i.e., non-Hispanic white male-owned businesses with the same demographic, credit and financial health, lender environment, and loan characteristics of Black American-owned businesses).

Figure G-11.
Comparison of actual loan approval rates to simulated loan approval rates, 2003

Group	Loan approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
Black American	49.1%	68.8%	71

Note: Actual approval rates presented here and denial rates in Figure G-7 do not sum to 100% because some observations were excluded from the probit regression.

“Loan approval” means that a business owner always or at least sometimes had his or her business loan applications approved over the previous three years.

Source: BBC Research & Consulting analysis of 2003 NSSBF data.

Figure G-10.

Likelihood of business loan denial (probit regression) in the U.S. in the 2003 SSBF, Dependent variable: loan denial

Variable	Marginal Effect	Variable	Marginal Effect	Variable	Marginal Effect
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Black American	0.217 **	D&B credit score = moderate risk	-0.017	Partnership	0.009
Asian American	-0.014	D&B credit score = average risk	0.035 *	S corporation	0.030 *
Hispanic American	-0.005	D&B credit score = significant risk	0.019	C corporation	0.034 *
Native American or other minority	0.032	D&B credit score = high risk	0.059 **	Construction industry	0.029
Female	0.017	Total employees	0.000	Manufacturing industry	0.021
Pacific region	0.057 **	Percent of business owned by principal	0.000	Transportation, communications and utilities industry	0.184 **
Black American in Pacific region	-0.033	Family-owned business	-0.018	Finance, insurance and real estate industries	-0.002
Asian American in Pacific region	0.017	Firm purchased	0.001	Engineering industry	0.010
Hispanic American in Pacific region	0.016	Firm inherited	-0.037 **	Other industry	0.011
Native American or other minority in Pacific region	-0.014	Firm age	-0.001 **	Herfindahl index = .10 to .18	0.003
Female in Pacific region	-0.031 *	Firm has checking account	-0.047 **	Herfindahl index = .18 or above	0.030
Owner's characteristics, credit and resources		Firm has savings account	-0.027 **	Located in MSA	0.021
Age	0.000	Firm has line of credit	-0.088 **	Sales market local only	0.014
Owner experience	0.001	Existing capital leases	-0.005	Loan amount	0.000
Some college	0.001	Existing mortgage for business	0.017	Capital lease application	-0.016
Four-year degree	0.002	Existing vehicle loans	0.012	Business mortgage application	-0.032 **
Advanced degree	-0.022	Existing equipment loans	-0.012	Vehicle loan application	-0.052 **
Log of Home Equity	0.001	Existing loans from stockholders	0.017	Equipment loan application	-0.018
Bankruptcy in past 7 years	0.096 *	Other existing loans	0.026	Loan for other purposes	-0.018
Judgement against in past 3 years	0.019	Firm used trade credit in past year	-0.007		
Log of net worth excluding home	-0.001	Log of total sales in prior year	0.001		
		Log of cost of doing business in prior year	-0.005		
		Log of total assets	-0.002		
		Log of total equity	0.001		
		Negative total equity	0.025		
		Firm bankruptcy in past 7 years	-0.024		
		Firm delinquency in business transactions	0.016		

Note: * Statistically significant at 90% confidence level.

** Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects. The omitted industry, to which the marginal effect of industries shown is relative, is the trade industry.

"Less than high school education," "Negative sales in prior year" and "Mining industry" perfectly predicted loan outcome and were excluded from the final regression; "Owner has negative net worth" and "Negative total assets" dropped because of collinearity.

Source: BBC Research & Consulting analysis of 2003 SSBF data.

Fear of denial. 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 1998 and 2003 SSBF, Figure G-12 presents the percentage of businesses that reported needing credit but did not apply for loans because of fears of denial.

In 1998 and 2003, Black American- and Hispanic American-owned businesses were more likely than non-Hispanic white male-owned businesses in the nation to forgo applying for loans due to a fear of denial. Non-Hispanic white women-owned businesses were also more likely to forgo applying for loans due to a fear of denial. In the Pacific region in both 1998 and 2003, fear of denial was greater for minority- and women-owned businesses than for non-Hispanic white male-owned businesses but those differences were not statistically significant.

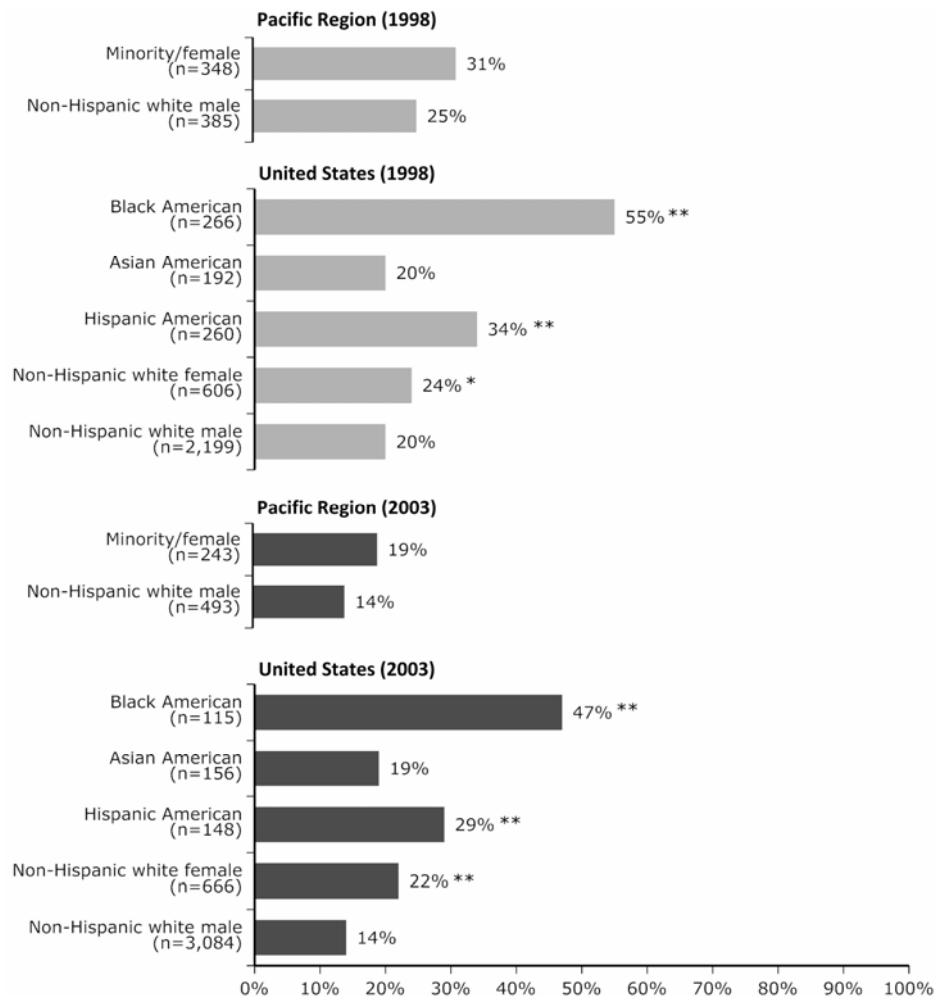
Figure G-12.
Businesses that
needed loans but
did not apply due
to fear of denial,
1998 and 2003

Note:

** Denotes that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 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:

- Black 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, Black American, Hispanic American, and Asian American male business owners.⁷²
- Black 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
- In its study for the Santa Clara Valley Transportation Authority (located in the Pacific Region), CRA used an econometric model to investigate businesses that did not apply for loans for fear of denial. The model explored whether differences between race/ethnicity and gender groups exist after statistically controlling for other factors. CRA based its analysis on combined data from the 1998 and 2003 SSBFs. Results from CRA's model indicate that Black American- and Hispanic American-owned businesses are more likely to not apply for loans out of fear of being denied. In addition, results for businesses located in the Pacific region did not differ significantly from national results.⁷⁴

BBC regression model for fear of denial in the SSBF. The BBC study team conducted its own econometric analysis of fear of denial by developing a model to explore the relationships between fear of denial and the race/ethnicity and gender of 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 a small number of observations where fear of denial was imputed, the 1998 national sample included 3,457 businesses and the Pacific region included 715 such businesses. The 2003 national sample included 4,231 businesses and the Pacific region included 736 such businesses. In both 1998 and 2003, Pacific region effects are modeled using regional control variables in the national model.⁷⁵

1998 SSBF regression results. Figure G-13 presents the marginal effects from the probit regression model predicting the likelihood that a business needs credit but will not apply for loans due to fear of loan denial. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of forgoing application for a loan due to fear of denial. Factors that are associated with a *greater* likelihood of not applying for a loan due to fear of loan denial include:

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 CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. *Prepared for Santa Clara Valley Transportation Authority*.

⁷⁵ Again, the study team considered an interaction variable to represent firms that are both minority and female but the term was not significant in 1998 or 2003.

- The business owner or business filing for bankruptcy in the past seven years or having had a judgment against the business;
- The business having an average, significant, or high-risk credit score;
- The business having an existing mortgage, existing vehicle loans, existing loans from stockholders, or other existing loans;
- Higher total assets for the business; and
- The business being delinquent in business transactions or filing for bankruptcy in the past seven years.

Factors that are associated with a *lower* likelihood of not applying for a loan due to fear of loan denial include:

- More equity in the business owner's home—if he or she is a homeowner—and more business owner net worth but also negative net worth;
- If the business was acquired through a purchase;
- Having an older business;
- Having a savings account or a line of credit; and
- More sales in the prior year (but also negative sales in the prior year).

After statistically controlling for race- and gender-neutral influences, the study team observed that Black American-owned businesses were more likely to forgo applying for loans due to fear of denial. Overall, fear of denial tends to be higher in the Pacific region. However, both Black American- and Asian American-owned businesses in the Pacific region were less likely to fear loan denial than Black American- and Asian American-owned businesses nationwide.

Figure G-13.

Likelihood of forgoing a loan application due to fear of denial (probit regression) in the U.S. in the 1998 SSBF,
Dependent variable: needed a loan but did not apply due to fear of denial

Variable	Marginal Effect	Variable	Marginal Effect	Variable	Marginal Effect
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Black American	0.294 **	D&B credit score = moderate risk	0.079	Partnership	-0.008
Asian American	0.049	D&B credit score = average risk	0.103 **	S corporation	0.001
Hispanic American	0.025	D&B credit score = significant risk	0.163 **	C corporation	0.036
Native American	0.069	D&B credit score = high risk	0.209 **	Mining industry	-0.078
Female	0.006	Total employees	-0.001	Construction industry	-0.034
Pacific region	0.074 **	Percent of business owned by principal	0.000	Manufacturing industry	-0.006
Black American in Pacific region	-0.110 *	Family-owned business	0.022	Transportation, communications and utilities industry	0.048
Asian American in Pacific region	-0.099 *	Firm purchased	-0.070 **	Finance, insurance and real estate industries	-0.031
Hispanic American in Pacific region	0.034	Firm inherited	0.003	Engineering industry	-0.001
Native American in Pacific region	-0.025	Firm age	-0.003 **	Other industry	-0.034
Female in Pacific region	0.066	Firm has checking account	0.050	Herfindahl index = .10 to .18	0.000
Owner's characteristics, credit and resources		Firm has savings account	-0.056 **	Herfindahl index = .18 or above	0.011
Age	-0.001	Firm has line of credit	-0.062 **	Located in MSA	0.031
Owner experience	0.001	Existing capital leases	0.037	Sales market local only	-0.017
Less than high school education	0.088	Existing mortgage for business	0.105 **		
Some college	-0.003	Existing vehicle loans	0.049 **		
Four-year degree	-0.014	Existing equipment loans	0.034		
Advanced degree	-0.029	Existing loans from stockholders	0.097 **		
Log of home equity	-0.007 **	Other existing loans	0.067 **		
Bankruptcy in past 7 years	0.324 **	Firm used trade credit in past year	0.016		
Judgement against in past 3 years	0.093 **	Log of total sales in prior year	-0.022 **		
Log of net worth excluding home	-0.034 **	Negative sales in prior year	-0.167 **		
Owner has negative net worth	-0.168 **	Log of cost of doing business in prior year	-0.002		
		Log of total assets	0.020 **		
		Negative total assets	0.115		
		Log of total equity	-0.009		
		Negative total equity	0.010		
		Firm bankruptcy in past 7 years	0.567 **		
		Firm delinquency in business transactions	0.237 **		

Note: * Statistically significant at 90% confidence level.
 ** Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects. The omitted industry, to which the marginal effect of industries shown is relative, is the trade industry.

Source: BBC Research & Consulting analysis of 1998 SSBF data.

2003 SSBF regression results. Figure G-14 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 *greater* likelihood of not applying for a loan due to fear of loan denial include:

- The business having a significant or high risk credit score;
- A larger percentage of business owned by the principal owner;
- The business having an existing mortgage, existing vehicle or equipment loans, existing loans from stockholders or other existing loans;
- Higher cost of doing business in the prior year;
- Having been delinquent in business transactions or filing for bankruptcy (business owner or business) in the past seven years; and
- Location in a metropolitan area.

Factors that are associated with a *lower* likelihood of not applying for a loan due to fear of loan denial include:

- The business owner being older and having a four-year college degree;
- More equity in the business owner's home—if he or she is a homeowner—and more business owner net worth;
- Being an older business;
- More sales in the prior year (but also negative sales in the prior year); and
- Having a local (as opposed to regional, national or international) sales market.

After statistically controlling for race- and gender-neutral influences, the study team observed that Black American- and Hispanic American-owned businesses were more likely to forgo applying for a loan due to fear of denial (similar to CRA's analysis). In addition, BBC's model indicates that women-owned businesses were also more likely to need a loan but choose not to apply due to fear of denial. Although not found nationally, in the Pacific region, Native American or other minority-owned businesses were more likely to fear denial than other businesses.

Figure G-14.
Likelihood of forgoing a loan application due to fear of denial (probit regression) in the U.S. in the 2003 SSBF,
Dependent variable: needed a loan but did not apply due to fear of denial

Variable	Marginal Effect	Variable	Marginal Effect	Variable	Marginal Effect
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Black American	0.215 **	D&B credit score = moderate risk	-0.010	Partnership	0.004
Asian American	0.050	D&B credit score = average risk	0.040	S corporation	0.014
Hispanic American	0.071 *	D&B credit score = significant risk	0.047 *	C corporation	0.016
Native American or other minority	-0.025	D&B credit score = high risk	0.104 **	Construction industry	0.036
Female	0.044 **	Total employees	0.000	Manufacturing industry	-0.009
Pacific region	0.036	Percent of business owned by principal	0.001 **	Transportation, communications and utilities industry	-0.047
Black American in Pacific region	-0.081	Family-owned business	-0.007	Finance, insurance and real estate industries	0.042
Asian American in Pacific region	-0.002	Firm purchased	-0.010	Engineering industry	-0.025
Hispanic American in Pacific region	-0.047	Firm inherited	-0.031	Other industry	0.012
Native American or other minority in Pacific region	0.425 **	Firm age	-0.003 **	Herfindahl index = .10 to .18	-0.005
Female in Pacific region	-0.049	Firm has checking account	0.010	Herfindahl index = .18 or above	0.024
Owner's characteristics, credit and resources		Firm has savings account	0.011	Located in MSA	0.049 **
Age	-0.002 **	Firm has line of credit	-0.006	Sales market local only	-0.061 **
Owner experience	0.001	Existing capital leases	0.030		
Less than high school education	0.043	Existing mortgage for business	0.051 **		
Some college	0.004	Existing vehicle loans	0.029 *		
Four-year degree	-0.036 *	Existing equipment loans	0.040 *		
Advanced degree	-0.020	Existing loans from stockholders	0.073 **		
Log of home equity	-0.004 **	Other existing loans	0.106 **		
Bankruptcy in past 7 years	0.226 **	Firm used trade credit in past year	0.018		
Judgement against in past 3 years	0.256 **	Log of total sales in prior year	-0.022 **		
Log of net worth excluding home	-0.025 **	Negative sales in prior year	-0.091 *		
		Log of cost of doing business in prior year	0.012 *		
		Log of total assets	0.005		
		Log of total equity	-0.007		
		Negative total equity	-0.032		
		Firm bankruptcy in past 7 years	0.210 **		
		Firm delinquency in business transactions	0.144 **		

Note: * Statistically significant at 90% confidence level.
 ** Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects. The omitted industry, to which the marginal effect of industries shown is relative, is the trade industry.

"Mining industry" perfectly predicted loan outcome and was excluded from the regression; "Owner has negative net worth" and "Negative total assets" dropped because of collinearity.

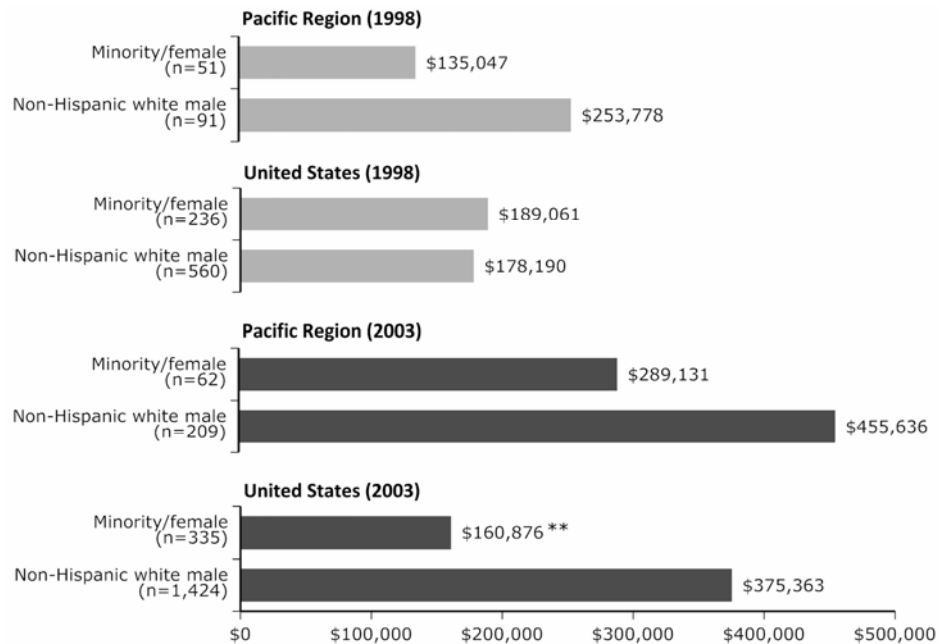
Source: BBC Research & Consulting analysis of 2003 SSBF data.

Loan values. The study team also considered average loan values for businesses that received loans. Results from the 1998 and 2003 SSBFs for mean loan values issued to different racial/ethnic and gender groups are presented in Figure G-15.

Figure G-15.
Mean value of
approved
business loans,
1998
and 2003

Note:
** Denotes that the difference in means from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source:
BBC Research & Consulting from 1998 and 2003 Survey of Small Business Finances.



Comparisons of loan amounts between non-Hispanic white male-owned businesses and minority- and women-owned businesses indicated the following:

- In both 1998 and 2003, minority- and women-owned businesses in the Pacific region were issued loans that were worth less, on average, than loans issued to non-Hispanic white male-owned businesses.
- In 2003, national results showed that minority- and women-owned businesses were issued loans that were worth, on average, less than half of the loan amount issued to non-Hispanic white male-owned businesses. However, national 1998 data suggest that minority- and women-owned businesses were issued loans that were worth slightly more, on average, than loans issued to non-Hispanic white male-owned businesses.

Previous national studies have found that Black American-owned businesses are issued loans that are worth less than loans issued to non-Hispanic white-owned businesses with similar characteristics. Examinations of construction companies in the United States have also revealed that Black American-owned businesses are issued loans that are worth less than loans issued to businesses with otherwise identical characteristics.⁷⁶

The BBC study team conducted its own 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 inconclusive.

⁷⁶ Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

Interest rates. Based on 1998 and 2003 SSBF data, Figure G-16 presents the average interest rates on commercial loans by the race/ethnicity of business owners. In 1998, on average, minority- and women-owned businesses in the Pacific region were issued loans with similar interest rates to loans issued to non-Hispanic white male-owned businesses. However, in 2003, the average interest rate on loans issued to minority- and women-owned businesses appeared to be higher (by 1.6 percentage points) than the mean interest rate of loans for non-Hispanic white male-owned businesses.

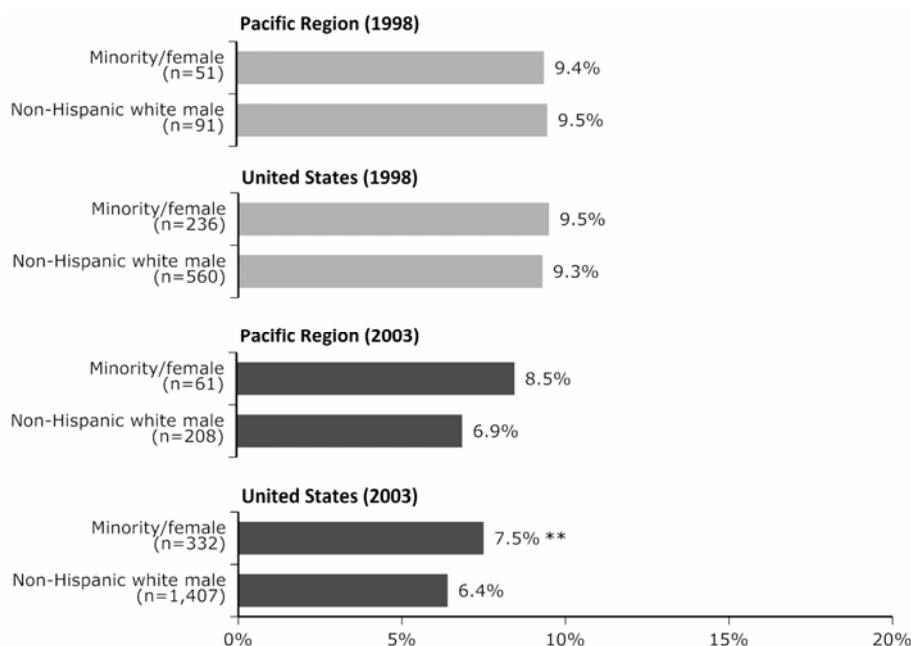
Figure G-16.
Mean interest
rate for
business loans,
1998 and 2003

Note:

** Denotes that the difference in means from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 1998 and 2003 Survey of Small Business Finances.



The overall pattern in the Pacific region for loan interest rates was similar to that found in the United States in 1998 and 2003.

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 Black American- or female-owned businesses received higher rates.⁷⁷
- Among a sample of businesses with no past credit problems, Black American-owned businesses had significantly higher interest rates on approved loans than other groups.⁷⁸
- In its study for the Santa Clara Valley Transportation Authority, CRA also investigated differences in interest rates by race/ethnicity and gender using a linear econometric model

⁷⁷ Cavalluzzo. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

⁷⁸ Blanchflower. 2003. "Discrimination in the Small Business Credit Market."

that accounted for other factors that may impact interest rates. The CRA study indicated that, on a national level, Black American- and Hispanic American-owned businesses pay a higher interest rate for loans than non-Hispanic white-owned businesses after statistically controlling for other factors. CRA did not find any additional differences between minority- and non-minority-owned businesses located in the Pacific region.⁷⁹

BBC regression model for interest rates in the SSBF. The 2003 SSBF data for the Pacific region indicate higher interest rates, on average, for minority- and women-owned businesses compared with white male-owned businesses. The BBC study team conducted a regression analysis of interest rates using data from both the 1998 and the 2003 SSBFs in order to explore the relationships between interest rates and the race/ethnicity and gender of business owners while statistically controlling for other factors. BBC 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.

After excluding a small number of observations where the interest rate was imputed, the 1998 national sample included 719 businesses that received a loan in the past three years and the Pacific region included 125 such businesses. The 2003 national sample included 1,606 businesses that received a loan in the past three years and the Pacific region included 247 such businesses. Again, Pacific region effects were modeled using regional control variables.⁸⁰

1998 SSBF regression results. Figure G-17 presents the coefficients from the 1998 linear model. The results from the regression model indicate that a number of race- and gender-neutral factors significantly affect interest rates, including the following factors:

- Being a business owner with less than a high school education is associated with higher interest rates;
- Being a business acquired through purchase is associated with lower interest rates;
- Having existing loans (other than vehicle or equipment loans or loans from stockholders) is associated with higher interest rates;
- More sales in the prior year (but also negative sales in the prior year) are associated with lower interest rates;
- An increase in a business' total equity is associated with lower interest rates as is having negative equity;
- Capital leases are associated with higher interest rates; and
- Collateral requirements are associated with lower interest rates.

⁷⁹ CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. *Prepared for Santa Clara Valley Transportation Authority.*

⁸⁰ BBC considered an interaction variable to represent businesses that are both minority- and female-owned but the term was not significant in 1998 or 2003.

After statistically controlling for race- and gender-neutral influences, the study team did not observe any differences between minority- and female-owned businesses and non-Hispanic white-owned businesses in loan interest rates.

2003 SSBF regression results. Figure G-18 presents the coefficients from the 2003 linear model. The results from the regression model indicate that a number of race- and gender-neutral factors significantly affect interest rates, including the following factors:

- Location in the Pacific region is associated with higher interest rates;
- The business owner having an advanced degree is associated with lower interest rates;
- The business owner's net worth is associated with a lower interest rate;
- High risk credit scores are associated with higher interest rates;
- An increase in a business' total equity is associated with higher interest rates as is having negative equity;
- Being in the construction industry is associated with lower interest rates but being in the transportation, communications, and utilities industry is associated with higher interest rates;
- Capital leases are associated with higher interest rates and vehicle loans 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 Hispanic American-owned businesses received loans with interest rates higher than non-Hispanic white-owned businesses (about 1 percentage point higher). Black American-owned businesses in the Pacific region received loans with higher interest rates than other businesses.

Figure G-17.

Interest rate (linear regression) in the U.S. in the 1998 SSBF, Dependent variable: interest rate on most recent approved loan

Variable	Coefficient	Variable	Coefficient	Variable	Coefficient
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Constant	14.625 **	D&B credit score = moderate risk	-0.270	Partnership	0.060
Black American	1.464	D&B credit score = average risk	-0.161	S corporation	0.246
Asian American	1.258	D&B credit score = significant risk	-0.145	C corporation	0.225
Hispanic American	-0.303	D&B credit score = high risk	0.502	Mining industry	-0.079
Native American	-0.609	Total employees	0.002	Construction industry	-0.064
Female	-0.304	Percent of business owned by principal	0.005	Manufacturing industry	-0.020
Pacific region	-0.093	Family-owned business	0.305	Transportation, communications and utilities industry	0.131
Black American in Pacific region	-2.668	Firm purchased	-0.404 *	Finance, insurance and real estate industries	-0.528
Asian American in Pacific region	-2.001	Firm inherited	-0.052	Engineering industry	-0.134
Hispanic American in Pacific region	0.141	Firm age	-0.001	Other industry	-0.423
Female in Pacific region	0.515	Firm has checking account	0.080	Herfindahl index = .10 to .18	-0.099
Owner's characteristics, credit and resources		Firm has savings account	0.359	Herfindahl index = .18 or above	0.229
		Firm has line of credit	-0.315	Located in MSA	-0.060
		Existing capital leases	0.112	Sales market local only	-0.165
		Existing mortgage for business	0.044	Approved Loan amount	0.000
		Existing vehicle loans	-0.138	Capital lease application	1.267 **
		Existing equipment loans	-0.080	Business mortgage application	-0.272
		Existing loans from stockholders	0.234	Vehicle loan application	-0.478
		Other existing loans	0.601 **	Equipment loan application	-0.068
		Firm used trade credit in past year	-0.200	Loan for other purposes	-0.452
		Log of total sales in prior year	-0.206 *	Loan guaranteed	0.071
		Negative sales in prior year	-3.222 **	Collateral required	-0.388 *
		Log of cost of doing business in prior year	0.019	Length of loan (months)	-0.002
		Log of total assets	0.027	Fixed rate	0.037
		Negative total assets	1.990		
		Log of total equity	-0.173 **		
		Negative total equity	-2.236 **		
		Firm bankruptcy in past 7 years	-0.597		
		Firm delinquency in business transactions	0.430		

Note: * Statistically significant at 90% confidence level.

** Statistically significant at 95% confidence level.

Coefficients are presented in percentage form. Native American in the Pacific region perfectly predicted interest rate (due to small sample size) and was excluded from the final regression. The omitted industry, to which the marginal effect of industries shown is relative, is the trade industry.

Source: BBC Research & Consulting analysis of 1998 SSBF data.

Figure G-18.
Interest rate (linear regression) in the U.S. in the 2003 SSBF,
Dependent variable: interest rate on most recent approved loan

Variable	Coefficient	Variable	Coefficient	Variable	Coefficient
Race/ethnicity and gender		Firm's characteristics, credit and financial health		Firm and lender environment and loan characteristics	
Constant	11.993 **	D&B credit score = moderate risk	0.241	Partnership	-0.510
Black American	1.787	D&B credit score = average risk	0.192	S corporation	-0.142
Asian American	0.119	D&B credit score = significant risk	0.279	C corporation	-0.113
Hispanic American	1.096 *	D&B credit score = high risk	1.013 **	Mining industry	0.228
Native American or other minority	-0.437	Total employees	-0.002	Construction industry	-0.555 *
Female	-0.212	Percent of business owned by principal	-0.001	Manufacturing industry	-0.235
Pacific region	1.224 **	Family-owned business	-0.516	Transportation, communications and utilities industry	1.367 **
Black American in Pacific region	2.906 *	Firm purchased	-0.001	Finance, insurance and real estate industries	-0.036
Asian American in Pacific region	0.235	Firm inherited	0.065	Engineering industry	0.515
Hispanic American in Pacific region	-0.139	Firm age	-0.012	Other industry	0.372
Native American or other minority in Pacific region	-0.972	Firm has checking account	-0.354	Herfindahl index = .10 to .18	0.550
Female in Pacific region	0.403	Firm has savings account	-0.017	Herfindahl index = .18 or above	0.876
		Firm has line of credit	-0.028	Located in MSA	0.111
		Existing capital leases	0.132	Sales market local only	-0.148
		Existing mortgage for business	0.028	Approved Loan amount	0.000
Owner's characteristics, credit and resources		Existing vehicle loans	0.344	Capital lease application	1.221 *
Age	-0.013	Existing equipment loans	0.563	Business mortgage application	0.547
Owner experience	0.011	Existing loans from stockholders	0.191	Vehicle loan application	-1.062 **
Less than high school education	0.284	Other existing loans	0.380	Equipment loan application	-0.261
Some college	0.239	Firm used trade credit in past year	0.252	Loan for other purposes	-0.369
Four-year degree	-0.324	Log of total sales in prior year	-0.157	Loan guaranteed	-0.312
Advanced degree	-0.572 *	Negative sales in prior year	-2.286	Collateral required	-0.842 **
Log of home equity	0.006	Log of cost of doing business in prior year	-0.144	Length of loan (months)	-0.004 **
Bankruptcy in past 7 years	0.241	Log of total assets	-0.142	Fixed rate	1.185 **
Judgement against in past 3 years	-0.205	Log of total equity	0.182 *		
Log of net worth excluding home	-0.149 **	Negative total equity	2.132 *		
		Firm bankruptcy in past 7 years	-0.206		
		Firm delinquency in business transactions	-0.179		

Note: * Statistically significant at 90% confidence level.

** Statistically significant at 95% confidence level.

The omitted industry, to which the marginal effect of industries shown is relative, is the trade industry. "Owner has negative net worth" and "Negative total assets" dropped out of the regression because of collinearity.

Source: BBC Research & Consulting analysis of 2003 SSBF data.

Results from BBC availability interviews. As part of the availability interviews that the study team conducted for the Consortium disparity study, BBC asked several questions related to potential barriers or difficulties that businesses have faced in the local marketplace. The interviewer introduced those questions with the following description: “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 in California within the past five years as we ask you these questions.” Only those businesses located within the relevant geographic market area were included in the analysis.

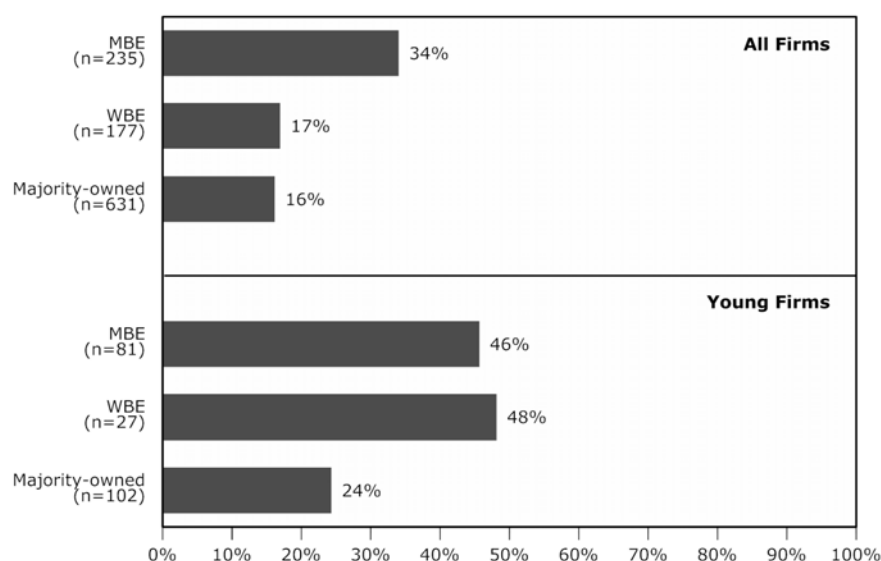
For each potential barrier, the study team examined whether the percentage of businesses that indicated that they had experienced that specific barrier or difficulty differed among minority-owned business enterprises (MBEs), non-Hispanic white women-owned business enterprises (WBEs), and majority-owned businesses (i.e., non-Hispanic white male-owned businesses). The study team also examined if affirmative responses differed for young businesses (i.e., businesses that were 12 years old or younger, which corresponded to the youngest quarter of businesses across all completed availability interviews).

Access to lines of credit and loans. The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” As shown in Figure G-19, of all businesses, 34 percent of MBEs reported difficulties obtaining lines of credit or loans. A smaller percentage of WBEs (17%) and majority-owned businesses (16%) reported that they had experienced difficulties with obtaining lines of credit or loans.

Overall, a larger percentage of young businesses reported that they had experienced difficulties with obtaining lines of credit or loans compared to all businesses. Young MBEs and WBEs were much more likely to report such difficulties than young majority-owned businesses.

Figure G-19.
Has your company experienced any difficulties in obtaining lines of credit or loans?

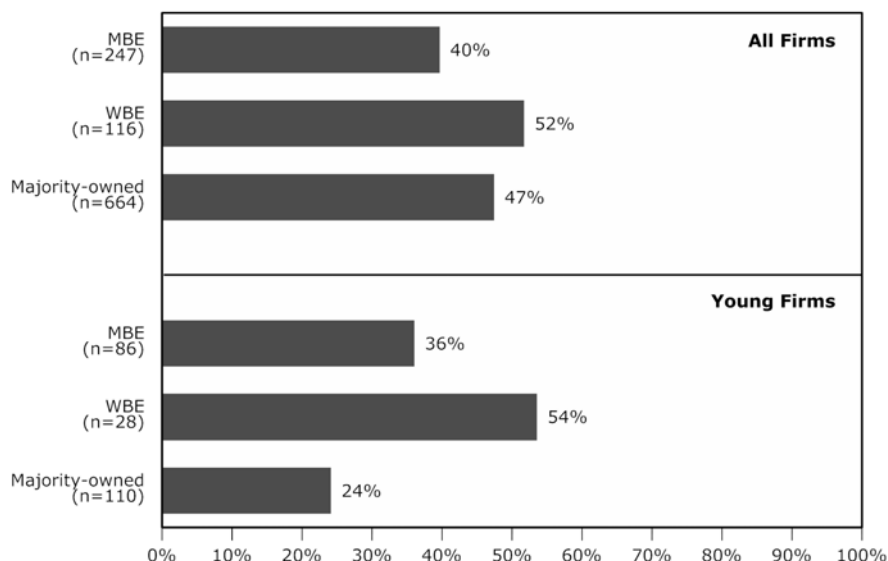
Source:
BBC Research & Consulting
from Availability Interviews.



Receiving timely payment. Need for business credit is, in part, linked to whether businesses are paid for their work in a timely manner. In the availability interviews, BBC asked, “Has your company had any difficulties receiving payment in a timely manner?” Figure G-20 shows that many MBEs, WBEs, and majority-owned businesses reported difficulties with receiving timely payment. Overall, WBEs and majority-owned firms were more likely to report difficulties receiving payment in a timely manner than MBEs. Young MBEs and majority-owned businesses were less likely to report such difficulties compared with all respondents, while young WBEs were more likely to report such difficulties.

Figure G-20.
Has your company experienced any difficulties receiving payment in a timely manner?

Source:
BBC Research & Consulting from
Availability Interviews.



Bonding and Insurance

Access to 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.⁸¹ High insurance requirements on public sector projects may also represent a barrier for certain construction and engineering firms attempting to do business with government agencies.

Bonding. To research whether bonding represented a barrier for businesses in the relevant geographic market area, BBC asked firms completing availability interviews:

- Has your company obtained or tried to obtain a bond for a project?
- [and if so] Has your company had any difficulties obtaining bonds needed for a project?

Figure G-21 presents results from those questions. Among businesses that reported that they had obtained or tried to obtain a bond, 36 percent of MBEs reported difficulties with obtaining

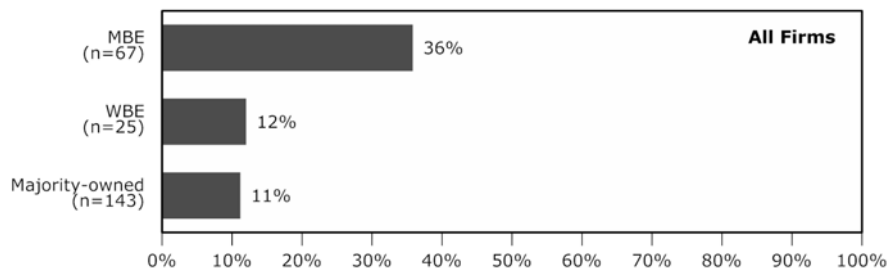
⁸¹ For example, Enchautegui, Maria E. et al. 1997. “Do Minority-Owned Businesses Get a Fair Share of Government Contracts?” *The Urban Institute*: 1-117, p. 56.

bonds needed for a project. A smaller percentage of WBEs (12%) and majority-owned businesses (11%) reported difficulties with obtaining bonds needed for a project.⁸²

Figure G-21.
Has your company
had any difficulties
obtaining bonds
needed for a
project?

Source:

BBC Research & Consulting from
Availability Interviews.



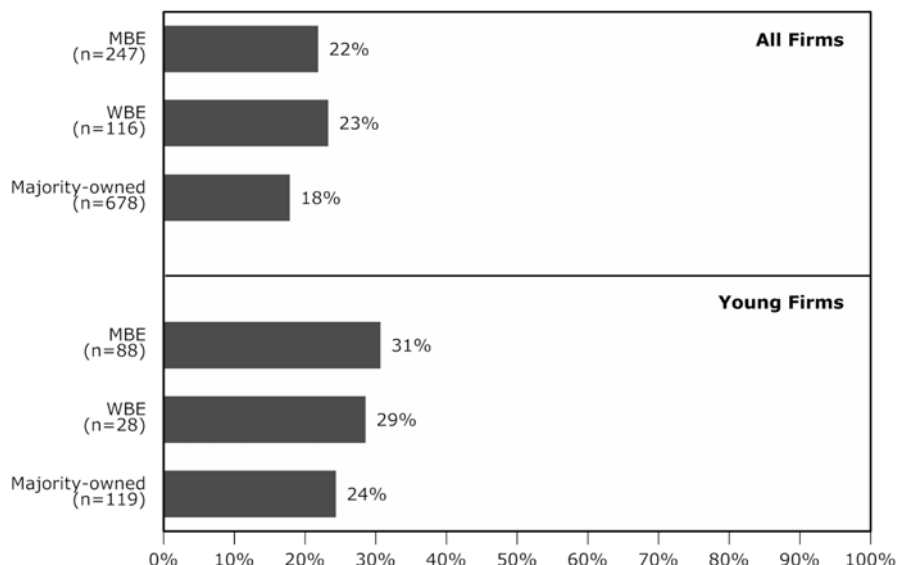
Insurance. BBC also examined whether MBEs and WBEs were more likely than majority-owned businesses to report that insurance requirements represented a barrier to bidding. Figure G-22 presents those results. About 22 percent of MBEs and 23 percent of WBEs reported such difficulties. Compared to MBE/WBEs, a smaller percentage of majority-owned businesses (18%) reported that insurance requirements present a barrier to bidding on projects.

Overall, a larger percentage of young businesses reported that insurance requirements on a project present a barrier to bidding compared to all businesses. Among young businesses, a larger percentage of MBEs (31%) and WBEs (29%) than majority-owned businesses (24%) reported that insurance requirements on a project present a barrier to bidding

Figure G-22.
Have any insurance
requirements on
projects presented
a barrier to bidding?

Source:

BBC Research & Consulting
from Availability Interviews.



⁸² There were not enough businesses that had answered whether they had experienced difficulties obtaining bonds needed for a project to draw conclusions for the young business analysis for that question.

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 Black Americans, Hispanic Americans and Native Americans in the relevant geographic market area own homes compared with non-Hispanic whites. Black Americans, Hispanic Americans and Native Americans who do own homes tend to have lower home values.
- Asian-Pacific Americans and Subcontinent Asian Americans are also less likely to own homes in the relevant geographic market area compared with non-Hispanic whites. However, those who do own homes tend to have similar or higher home values.
- Black Americans, Asian Americans, Hispanic Americans and Native Americans applying for home mortgages in the Relevant geographic market area were more likely than non-Hispanic whites to have their applications denied in 2006, 2009 and 2012. Native Hawaiian or other Pacific Islanders were also more likely to have their loans denied in both 2006 and 2009.
- Black American and Hispanic American mortgage borrowers in the relevant geographic market area were more likely than non-Hispanic whites to be issued subprime home purchase and refinance loans in 2006, 2009 and 2012. Native Americans and Native Hawaiians or other Pacific Islanders were also more likely to receive subprime loans during the study period.
- There is evidence that Black American and Hispanic American business owners were more likely to have been denied business loan applications than similarly situated non-Hispanic whites. Results for the Pacific region appear consistent with national results.
- Among business owners who reported needing business loans, there is evidence that Black Americans, Hispanic Americans, and women were more likely to forgo applying for loans due to fear of denial than similarly-situated non-minorities and men. Results for the Pacific region appear to be consistent with national results. In the Pacific region in 2003, Native American business owners were also more likely to forgo applying for loans due to fear of denial than other business owners.
- There is evidence for 2003 that Hispanic American business owners receiving business loans paid higher interests rates than similarly-situated non-minorities (with results for the Pacific region consistent with national results). In the Pacific region, it appeared that Black American-owned businesses also paid higher interest rates than other businesses.

APPENDIX H.

**Success of Businesses in the Construction,
Engineering, and Goods and Services Industries**

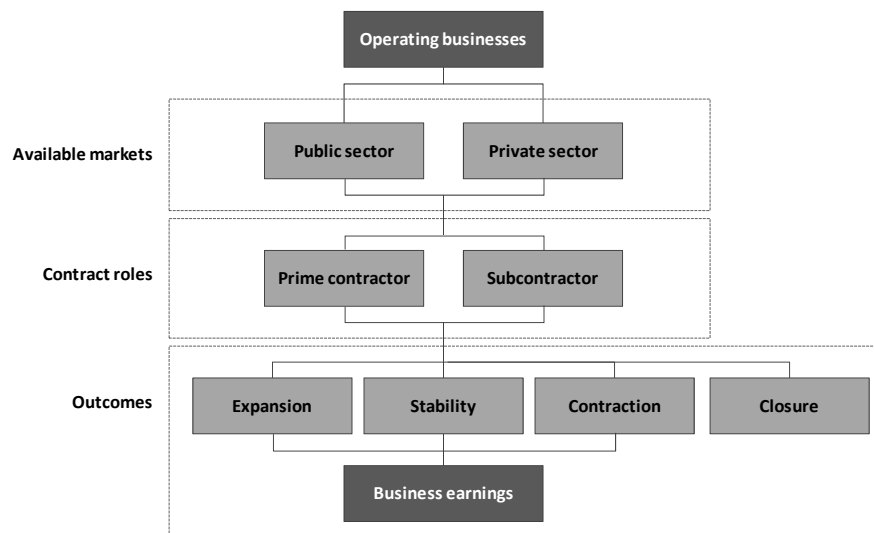
APPENDIX H.

Success of Businesses in the Construction, Engineering, and Goods and Services Industries

BBC examined the success of minority- and women-owned business enterprises (MBE/WBEs) that were located in the relevant geographic market area in the construction, engineering, and goods and services industries.¹ 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).² Figure H-1 provides a framework for the study team's analyses.

Figure H-1.
Business
outcomes

Source:
BBC Research &
Consulting.



BBC examined outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Participation in public and private sector markets, including contractor roles and size of contracts bid on and performed;
- Business closures;
- Business expansions and contractions;
- Business receipts and earnings; and
- Size distribution of gross revenue.

¹ In Appendix H and other marketplace appendices, the engineering industry focuses on architectural, engineering and related services. "Goods and services" refers to petroleum wholesalers, bus service and urban transit, and investigation and security services, as these are the industries that most closely identify the petroleum, transit and security goods and services related to transportation contracting.

² The study team uses the terms "MBEs" and "WBEs" to refer to businesses that are owned and controlled by minorities or women, regardless of whether they are certified or meet the revenue and net worth requirements for DBE certification and regardless of whether they are certified as MBEs or WBEs.

Participation in Public and Private Sector Markets

BBC drew on information that the study team collected as part of the availability analysis to examine business outcomes for MBE/WBEs and majority-owned businesses in the relevant geographic market area, including information about:

- Whether businesses have been successful in the private sector, public sectors, or both;
- Whether businesses have bid on and won contracts in study industries and the sizes of those contracts; and
- Whether businesses have worked as prime contractors, subcontractors, or both.

Public sector versus private sector work. BBC examined whether minority- and women-owned transportation contracting businesses were any more or less likely to work in the private sector than the public sector. The study team separately examined responses for businesses working in the construction and engineering industries.^{3,4,5}

Construction. Figure H-2 presents the distribution of majority-, minority-, and women-owned businesses that reported bidding on government and private sector prime contracts and subcontracts, based on availability interview responses.

- Of the 166 construction businesses that reported bidding on public sector prime contracts in the past five years, 66 percent were majority-owned, 25 percent were MBEs, and 9 percent were WBEs.
- Of the 197 construction businesses that reported bidding on private sector prime contracts in the past five years, 65 percent were majority-owned, 23 percent were MBEs, and 12 percent were WBEs.
- The percentage of MBEs that reported bidding as subcontractors was slightly lower than the percentage of MBEs that reported bidding as prime contractors. The study team observed that result for both public and private sector work.
- The percentage of WBEs that reported bidding as subcontractors was slightly higher than the percentage of WBEs that reported bidding as prime contractors. The study team observed that result for both public and private sector work.
- The percentage of MBE/WBEs bidding as prime contractors was about the same for private sector work (35%) and public sector work (34%).

³ The study team deemed a business to have performed or bid on public sector work if it answered “yes” to either of the following questions in availability interviews: (a) “During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in California?”; or (b) “During the past five years, has your company worked on any part of a contract for a state or local government agency in California?”

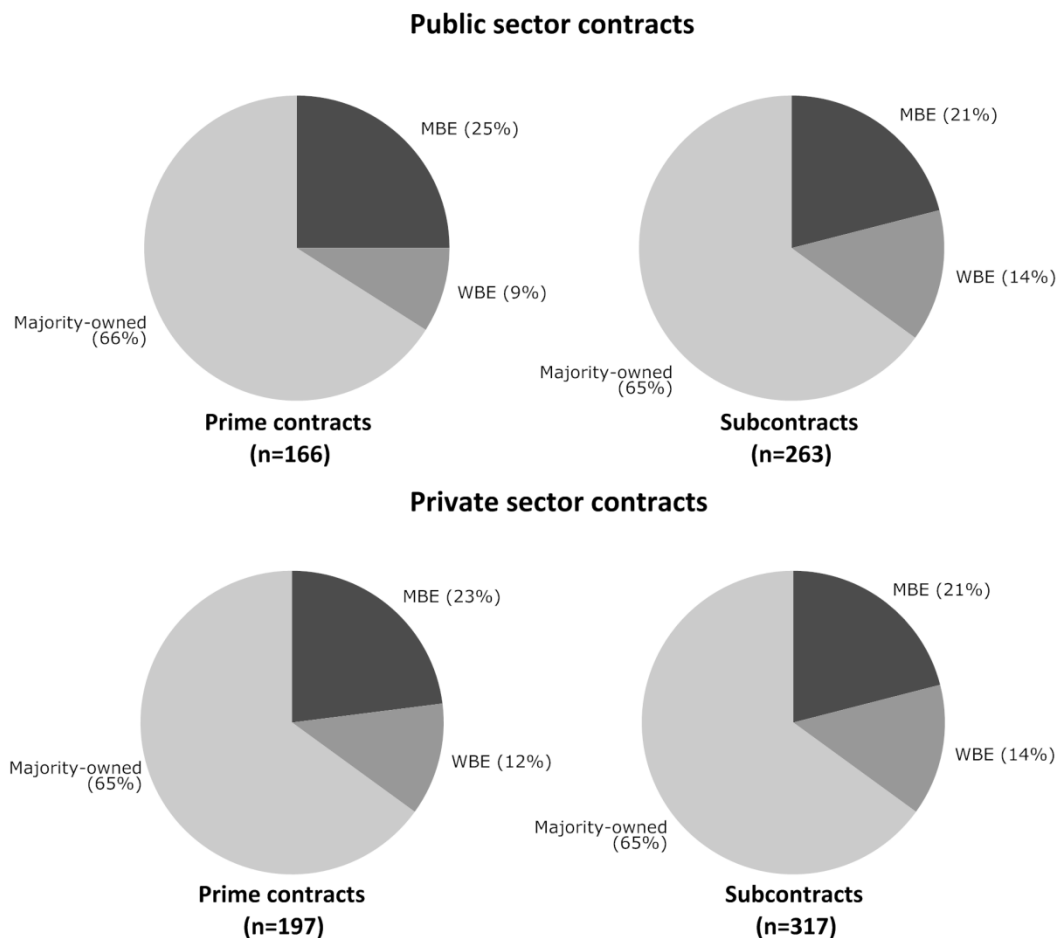
⁴ The study team deemed a business to have performed or bid on private sector work if it answered “yes” to either of the following questions in availability interviews: (a) “During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in California?”; or (b) “During the past five years, has your company worked on any part of a contract for a private sector organization in California?”

⁵ The sample size of goods and services firms in the relevant geographic market area was too small to draw conclusions about that industry’s public sector versus private sector work.

The study team also asked construction businesses if they had worked on any public sector contracts (including both prime contracts and subcontracts). When asked to consider the past five years, about 76 percent of MBE construction businesses reported that they had been successful in obtaining public sector work. A larger percentage of WBEs (88%) and majority owned businesses (81%) said that they had obtained public sector work.

Overall, all businesses were more successful obtaining construction work in the private sector than in the public sector. About 96 percent of WBEs and 86 percent of majority-owned businesses reported that they had been successful in obtaining private sector work in the past five years. A smaller percentage (78%) of MBEs reported that they had been successful in obtaining work in the private sector.

Figure H-2.
MBEs, WBEs and majority-owned construction businesses bidding on public and private sector work in California in the past five years



Note: "WBE" represents white women-owned firms.
 Total may not add to 100 percent due to rounding.

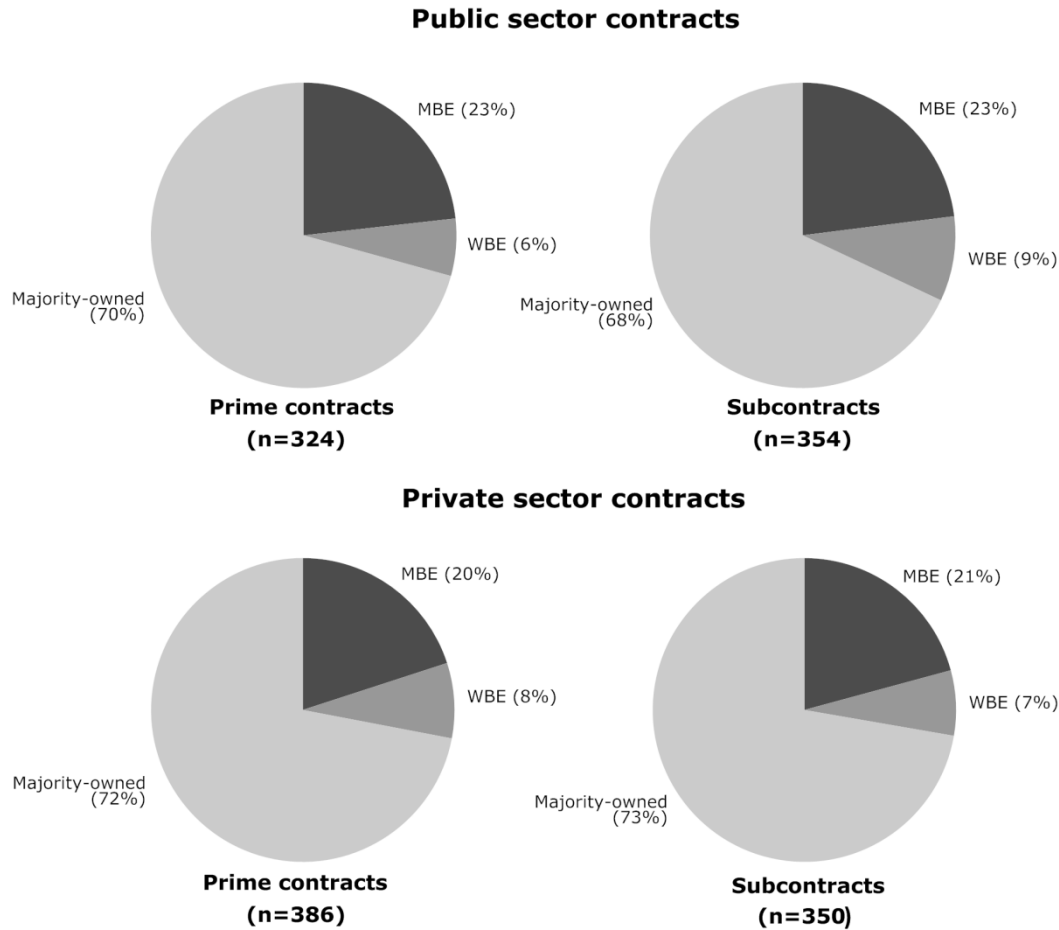
Source: BBC Research & Consulting from Availability Interviews.

Engineering. The study team also analyzed the representation of MBE/WBEs among all businesses bidding on public and private sector engineering prime contracts and subcontracts.

Figure H-3 presents the distribution of majority-, minority-, and women-owned engineering businesses that reported bidding on public and private sector prime contracts and subcontracts.

Figure H-3.

MBEs, WBEs and majority-owned engineering businesses bidding on public and private sector work in California in the past five years



Note: "WBE" represents white women-owned firms.
Total may not add to 100 percent due to rounding.

Source: BBC Research & Consulting from Availability Interviews.

The results for engineering businesses were similar to those for construction businesses for public sector prime contracts. Engineering MBE/WBEs represented about 30 percent of businesses that reported bidding on public sector prime contracts. A smaller percentage (28%) of engineering MBE/WBEs reported bidding on private sector prime contracts than construction MBE/WBEs. A slightly larger percentage of MBE/WBEs reported bidding on subcontracts in the than on prime contracts in the public sector.

The study team also asked engineering businesses if they had received any engineering work in the past five years. WBEs, MBEs, and majority- owned businesses were similarly successful in obtaining public sector work (82%, 81%, and 84%, respectively). About 80 percent of MBE/WBEs reported that they had worked on a private sector engineering contract in the past

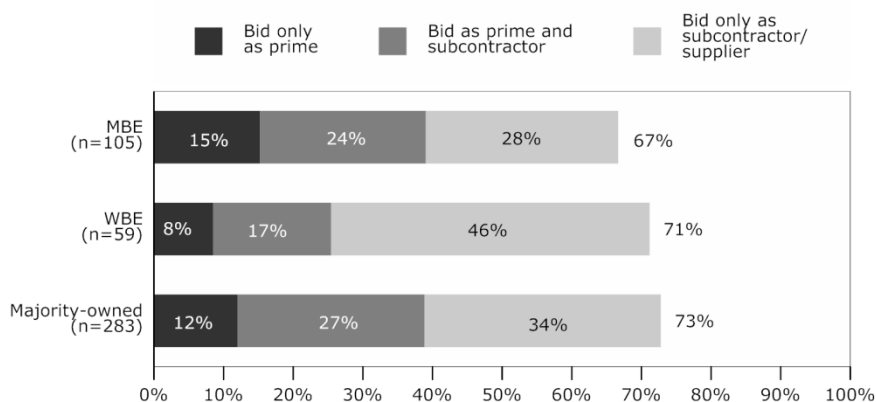
five years. A slightly higher percentage (86%) of majority-owned engineering businesses said that they had received private sector engineering work in the past five years.

Overall, majority-owned businesses were slightly more successful in obtaining private sector engineering work than public sector engineering work, and WBE/MBEs were slightly more successful in obtaining public sector work. MBE/WBEs were slightly less successful in obtaining work than majority-owned businesses in both the private and public sectors.

Bidding as prime contractors and subcontractors/suppliers. BBC further examined the percentage of MBEs, WBEs, and majority-owned businesses that bid on public and private sector work in different roles (i.e., as prime contractors, subcontractors, or both). Those results pertain to bidding within the California contracting industry within the past five years.⁶

Construction. Figure H-4 presents the percentage of majority-, minority, and women-owned construction businesses that reported bidding on public sector work as a prime contractor, a subcontractor, or as both.

Figure H-4.
Percent of construction businesses that reported submitting a bid for any part of a public sector project in California in the past five years



Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from Availability Interviews.

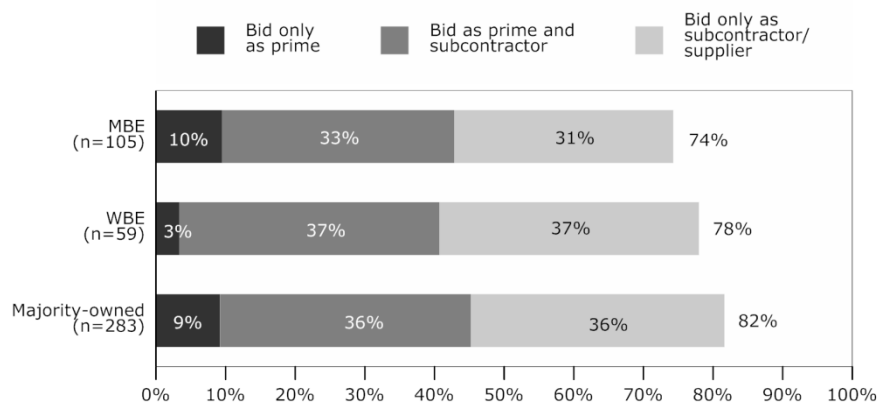
- Of MBE construction businesses that reported being qualified and interested in future transportation work, 67 percent said that they had bid on public sector work as a prime contractor or as a subcontractor in the past five years (including submitting price quotes). About 15 percent bid only as a prime contractor and about 28 percent bid only as a subcontractor.
- A larger percentage of WBEs that reported being qualified and interested in future transportation work (71%) reported bidding on public sector work in the past five years. About 8 percent had bid only as a prime contractor and, compared to MBE and majority-owned businesses, a larger percentage (46%) bid only as a subcontractor.

⁶ The sample size of goods and services firms in the relevant geographic market area was too small to draw conclusions about that industry's bidding behavior.

- A slightly larger percentage of majority-owned construction businesses that reported being qualified and interested in future transportation work (73%) reported that they had bid on public sector work in the past five years. About 9 percent had bid only as a prime contractor and 36 percent bid only as a subcontractor.

The study team also asked business owners and managers if their businesses had bid on a private sector construction project in the past five years. Figure H-5 presents the percentage of minority-, women-, and majority-owned construction businesses that reported bidding on private sector work as a prime contractor, a subcontractor, or as both.

Figure H-5.
Percent of construction businesses that reported submitting a bid for any part of a private sector project in California in the past five years



Note: "WBE" represents white women-owned firms.

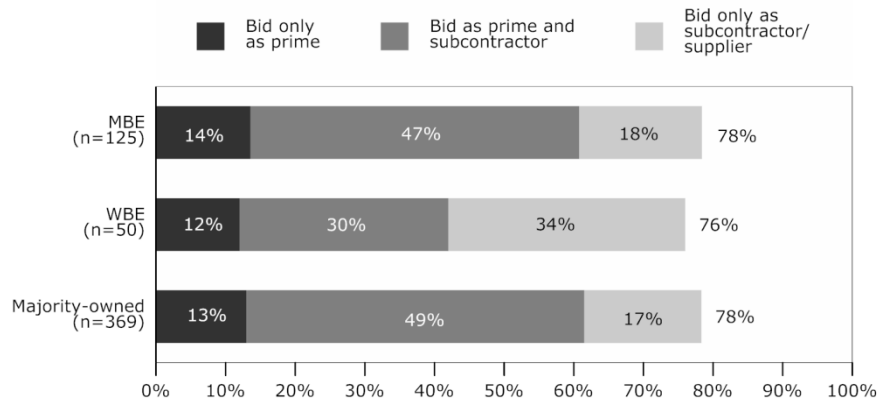
Source: BBC Research & Consulting from Availability Interviews.

- Of MBE construction businesses that reported being qualified and interested in future transportation work, 74 percent said that they had bid on private sector work as a prime contractor or as a subcontractor in the past five years. About 10 percent reported that they had bid only as a prime contractor and about 31 percent reported that they had bid only as a subcontractor.
- Compared to MBEs, a slightly larger percentage of WBEs that reported being qualified and interested in future transportation work (78%) reported bidding on private sector construction work, but a smaller percentage of WBEs (3%) than MBEs reported bidding only as a prime contractor. About 37 percent of WBEs said that they had bid only as a subcontractor on private sector work in the past five years.
- Overall, a larger percentage (82%) of majority-owned construction businesses that reported being qualified and interested in future transportation work said that they had bid on private sector work in the past five years. Compared to MBEs, about the same percentage of majority-owned businesses (9%) reported that they had bid only as prime contractor. 36 percent of majority-owned businesses reported that they had bid only as a subcontractor.

Engineering. Figures H-6 and H-7 examine prime contract versus subcontract bidding for engineering businesses, based on data from the availability interviews.

Figure H-6 presents the percentage of majority-, minority-, and women-owned engineering businesses in the relevant geographic market area that reported bidding on public sector work as a prime contractor, a subcontractor, or as both.

Figure H-6.
Percent of engineering businesses that reported submitting a bid for any part of a public sector project in California in the past five years



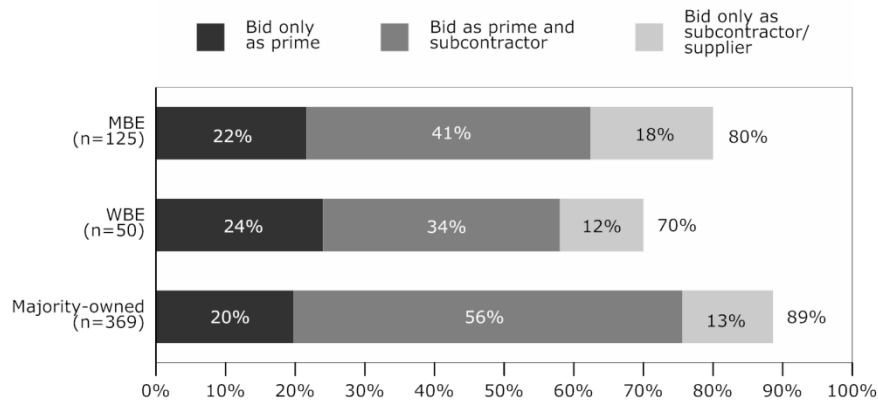
Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from Availability Interviews.

- Of MBE engineering businesses that reported being qualified and interested in future transportation work, 78 percent said that they had bid on public sector work as a prime contractor or as a subcontractor in the past five years (including submitting price quotes). About 14 percent of MBEs reported that they had bid only as a prime contractor and 18 percent reported that they had bid only as a subcontractor.
- A slightly smaller percentage of WBEs that reported being qualified and interested in future transportation work (76%) reported bidding on public sector work in the past five years, and a slightly smaller percentage (12%) that they had bid only as a prime contractor. About 34 percent reported that they bid only as a subcontractor.
- Compared to MBEs, about the same percentage of majority-owned engineering businesses that reported being qualified and interested in future transportation work (78%) said that they had bid on public sector work in the past five years. Compared to WBEs, a smaller percentage (17%) of majority-owned firms reported that they had bid only as a subcontractor. About 13 percent reported bidding only as a prime contractor.

Figure H-7 presents the percentage of majority-, minority, and women-owned engineering businesses in the relevant geographic market area that reported bidding on private sector work as a prime contractor, a subcontractor, or as both.

Figure H-7.
Percent of engineering businesses that reported submitting a bid for any part of a private sector project in California in the past five years



Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from Availability Interviews.

- Of MBE engineering businesses that reported being qualified and interested in future transportation work, about 80 percent said that they had bid on private sector work as a prime contractor or as a subcontractor in the past five years. About 22 percent said that they had bid only as a prime contractor and 18 percent said that they had bid only as a subcontractor.
- Compared to MBEs, a smaller percentage (70%) of WBEs that reported being qualified and interested in future transportation work said that they had bid on private sector engineering work in the past five years. About 24 percent said that they had bid only as a prime contractor and 12 percent said that they had bid only as a subcontractor.
- Overall, a larger percentage (89%) of majority-owned engineering businesses that reported being qualified and interested in future transportation work said that they had bid on private sector work in the past five years. Compared to MBE/WBEs, a slightly smaller percentage of majority-owned businesses (20%) had bid only as a prime contractor. About 13 percent of majority-owned businesses had bid only as a subcontractor.

Largest contract in California in the past five years. As part of the availability interviews, the study team asked businesses to identify the largest contract they were awarded in California in the past five years.⁷

Construction. Among construction businesses, 69 percent of WBEs and 74 percent of MBEs reported that the largest contract they received was worth less than \$1 million. A smaller percentage of majority-owned businesses (60%) reported that the largest contract they received was worth less than \$1 million.

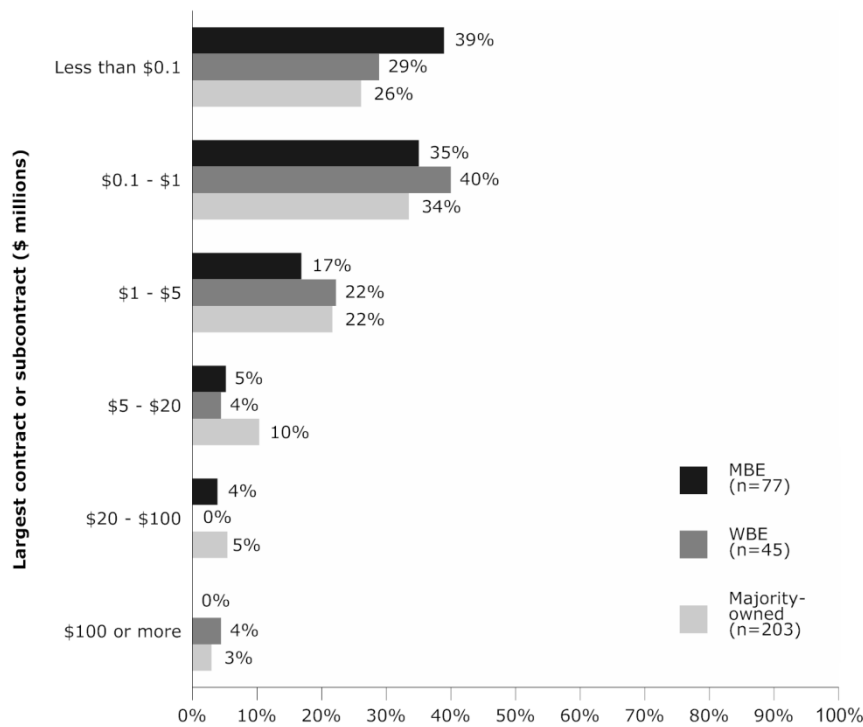
About 9 percent of MBE/WBEs working in construction said that the largest contract they had received in the past five years was worth more than \$5 million. In contrast, 19 percent of

⁷ The sample size of goods and services firms in the relevant geographic market area was too small to draw conclusions about the largest contract size for businesses in that industry.

majority-owned construction businesses said that the largest contract they had received in the past five years was worth more than \$5 million.

Only 4 percent of MBE/WBEs said that the largest contract they had received in the past five years was worth more than \$20 million. A larger percentage (8%) of majority-owned construction businesses said the largest contract they received in the past five years was worth more than \$20 million.

Figure H-8.
Largest contract or subcontract that the company received in California in the past five years, construction



Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from Availability Interviews.

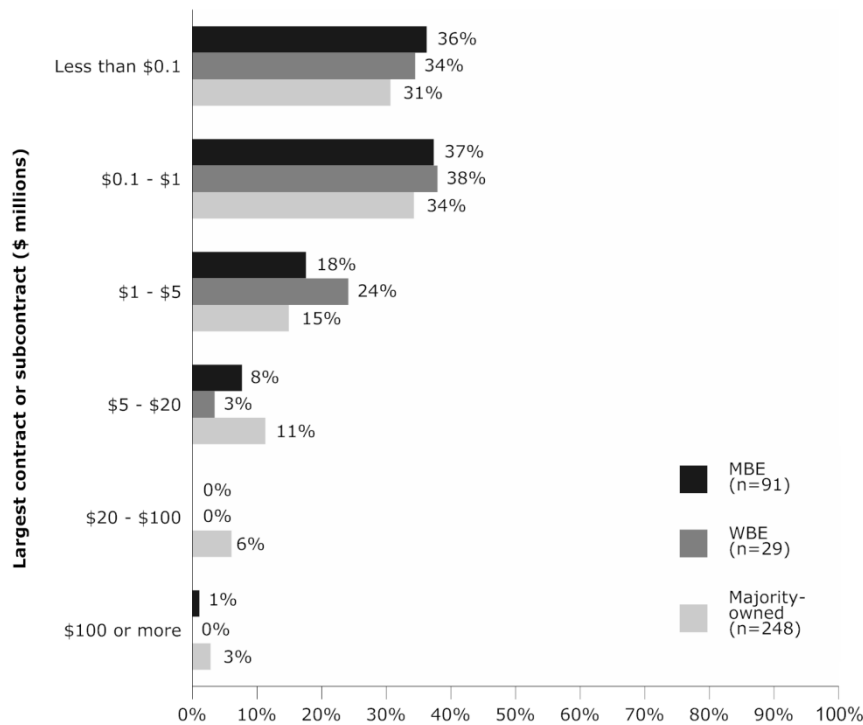
Engineering. Among engineering businesses, 74 percent of MBEs and 72 percent of WBEs reported that the largest contract they had been awarded in the past five years was worth \$1 million or less. Compared to MBE/WBEs, a smaller percentage of majority-owned businesses (65%) said that the largest contract that they had been awarded in the past five years was worth \$1 million or less.

Only about 3 percent of WBEs and 9 percent of MBEs said that the largest contract they had been awarded in the past five years was worth \$5 million or more. Compared to MBE/WBEs, a larger percent of majority-owned businesses (20%) said that the largest contract they had been awarded in the past five years was worth \$5 million or more.

No WBEs and only about 1 percent of MBEs said that the largest contract they had been awarded in the past five years was worth \$20 million or more. Compared to MBE/WBEs, a larger

percent (9%) of majority-owned businesses said that the largest contract they have received in the past five years was worth \$20 million or more.

Figure H-9.
Largest contract or subcontract that the company received in California in the past five years, engineering



Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from Availability Interviews.

Relative capacity. Some recent legal cases regarding race- and gender-conscious contracting programs have considered the importance of the "relative capacity" of businesses included in an availability analysis.⁸ One approach to accounting for differing capacities among different types of businesses is to examine relatively small contracts, a technique noted in *Rothe Development Corp. v. U.S. Department of Defense*. In addition to examining small contracts, BBC directly measured capacity in its availability analysis.⁹

Measurement of capacity. The availability analysis produced a database of 964 businesses potentially available for work with the SANDAG, NCTD, or ICTC.¹⁰ "Relative capacity" for a business is measured as the largest contract or subcontract that the business bid on or performed in California within the five years preceding when BBC interviewed it. BBC uses

⁸ 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).

⁹ See Appendix D for details about the availability interview process.

¹⁰ 246 of those businesses were not included in the availability marketplace analysis reported in this section, because they did not provide responses to questions D2 or D4 on the availability interview.

relative capacity as one factor in determining whether a business would be available to bid on specific SANDAG, NCTD, or ICTC prime contracts and subcontracts.

Assessment of possible disparities in capacity of MBE/WBEs and majority-owned businesses.

One factor that affects capacity is the specializations, or subindustries, of businesses within the transportation contracting industry. Subindustries, such as bridge and elevated highway construction, tend to involve relatively large projects. Other subindustries, such as surveying, typically involve smaller projects. One way of accounting for variation in capacities among businesses in different subindustries is to assess whether a business has a capacity above or below the median level of businesses in the same subindustry.

BBC tested whether MBE/WBEs bid on larger or smaller prime contracts or subcontracts compared with other businesses in the same subindustry. Figure H-10 indicates the median bid capacity among businesses in the relevant geographic market area in each of the 32 subindustries that the study team examined in the availability analysis. Note that the interview questions regarding the largest project that businesses had bid on or been awarded captured data in dollar ranges rather than in specific dollar amounts.

Figure H-10.
Median relative capacity by subindustry

Subindustry	Median Bid Capacity
Construction	
Asphalt and concrete supply	\$500,000
Building construction	\$1 million to \$2 million
Electrical work	\$500,000 to \$1 million
Excavation and drilling	\$100,000 to \$500,000
Fencing, guardrails and signs	\$100,000 to \$500,000
Flagging services	\$100,000 to \$500,000
Heavy Construction	\$500,000 to \$1 million
Heavy construction equipment rental	\$100,000 to \$500,000
Landscape services	\$100,000 to \$500,000
Masonry and other stonework	\$500,000 to \$1 million
Other construction	\$100,000 to \$500,000
Other construction supplies	\$500,000 to \$1 million
Plumbing and HVAC	\$2 million to \$5 million
Steel building materials	\$100,000 to \$500,000
Structural steel erection	\$2 million to \$5 million
Trucking	\$500,000 to \$1 million
Water, sewer and utility lines	\$1 million to \$2 million
Wrecking and demolition	\$100,000 to \$500,000
Engineering	
Archeological expeditions	\$1 million
Construction management	\$500,000 to \$1 million
Engineering	\$500,000 to \$1 million
Environmental research and consulting	\$100,000 to \$500,000
Landscape architecture	\$100,000 to \$500,000
Surveying and mapmaking	\$100,000 to \$500,000
Testing services	\$100,000 to \$500,000
Transportation consulting	\$1 million
Goods and services	
Petroleum products	\$100,000 to \$500,000
Security services	\$100,000 to \$500,000
Towing services	\$1 million to \$2 million
Transit services	\$2 million to \$5 million

Source: BBC Research & Consulting from Availability Interviews.

Construction. An initial question is whether MBE/WBEs are as likely as majority-owned businesses to have above-median capacities within their subindustries. Figure H-11 presents those results for construction businesses. MBE/WBEs were less likely than majority-owned businesses to have above-median capacities.

- About 32 percent of MBE and 33 percent of WBE construction businesses had above-median relative capacities.

- Compared to MBE/WBEs, a larger percentage of majority-owned construction businesses (45%) reported relative capacities that were higher than the median for their subindustries.

Figure H-11.
Proportion of firms with above-
median bid capacity by ownership

Source:
BBC Research & Consulting from
Availability Interviews.

Firm ownership	Construction	Engineering	Overall
Minority	32 %	32 %	31 %
Female	33	31	34
Majority-owned	45	44	44

Engineering. Figure H-11 also shows the percentage of engineering businesses that reported relative capacities that exceeded the median for their subindustries.

- About 31 percent of MBE and 32 percent of WBE construction businesses had above-median relative capacities.
- Compared to MBE/WBEs, a larger percentage of majority-owned engineering businesses (44%) reported having above-median bid capacities.

Figure H-11 also shows the overall percentage of businesses from the construction, engineering, and goods and services industries that reported relative capacities that exceed the median for their subindustries. The overall results were similar to the industry-specific results showing that MBE/WBEs were less likely than majority-owned businesses to have above-median capacities.

Further analysis. BBC considered whether race- and gender-neutral factors could account for the disparities in relative capacity identified for MBEs and WBEs in construction, engineering, and goods and services. There were several variables from the availability interviews that may be related to relative capacity — for example, annual revenue, number of employees, and whether a business has multiple establishment locations.

After considering business characteristics from the availability interviews, the study team determined that age of business was the race- and gender-neutral factor that might best explain differences in relative capacity within a subindustry, while also being external to capacity measures. Theoretically, the longer that companies are in business, the larger the contracts or subcontracts that they might pursue.

To test that hypothesis, the study team conducted a logistic regression analyses for the construction, engineering, and goods and services industries to determine whether relative capacity could be at least partly explained by the age of businesses and whether MBE/WBEs differ from majority-owned businesses of similar ages in terms of capacity.

The results for the businesses in the relevant geographic market area are shown in Figure H-12. The results of the analysis indicated the following:

- Business age was a significant predictor of having above-median capacity. The older a business, the more likely it was to show above-median capacity.

- Minority ownership was negatively related to showing above-median capacity, but that effect was not statistically significant.
- WBE ownership was negatively related to having above-median capacity, but that effect was not statistically significant.

Figure H-12.
Bid capacity model:
Construction, engineering, and goods and services industries in the relevant geographic market area

Note:

** Denotes statistical significance at the 95% confidence level.

Source:

BBC Research & Consulting from 2012-2013 Availability Interviews.

Variable	Coefficient	Z-Statistic
Constant	-1.28	-6.99 **
Age of firm	0.03	6.62 **
Minority	-0.21	-1.06
Female	-0.36	-1.25

Summary of markets, contracting roles, and bid capacity. Availability interview results show that many MBE/WBEs attempt to work as prime contractors and as subcontractors on both public and private sector contracts:

- Availability interview results for businesses in the construction and engineering industries indicated that MBEs were slightly more likely to have pursued work in the public sector than the private sector within the past five years. WBEs were slightly more likely to have pursued work in the private sector than the public sector.
- WBEs in the construction and engineering industries were less likely than MBEs and majority-owned businesses to have said that they pursued public or private sector work in the past five years.
- Overall, MBEs in the construction industry were more likely than WBEs and majority-owned businesses to report that they have bid as prime contractors.

Data from the availability interviews also indicated differences in the success that businesses experience in obtaining work:

- MBEs were less successful in obtaining construction and engineering work in the private sector than WBEs and majority-owned businesses.
- Majority-owned businesses were more successful in obtaining engineering work in the private sector than MBE/WBEs.
- MBE/WBEs and majority-owned businesses had similar rates of success in obtaining engineering work in the public sector.

There were also differences in the largest transportation prime contracts and subcontracts that businesses reported receiving in California in the past five years. Among construction and engineering businesses, MBE/WBEs were less likely than majority-owned businesses to report that their largest contracts were worth \$5 million or more.

BBC also examined the largest contracts businesses reported bidding on or receiving in the transportation contracting industry in California in the past five years ("relative capacity").

WBE/MBEs in construction and engineering were less likely than majority-owned businesses to have capacities exceeding the median for their subindustries.

Business Closures, Expansions, and Contractions

BBC used Small Business Administration (SBA) data to examine business outcomes—including closures, expansions, and contractions—for minority-owned businesses in California and in the nation as a whole. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for white-owned businesses.

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

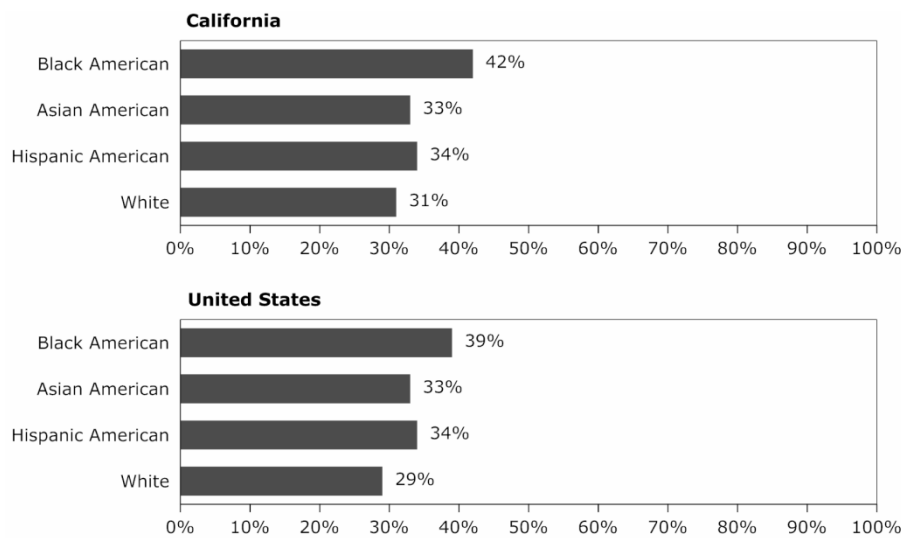
Overall rates of business closures in California. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) 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.^{11, 12} The SBA report examined patterns in each state but not in individual metropolitan areas or counties. Figure H-13 presents those data for Black American-, Asian American-, and Hispanic American-owned businesses as well as for white-owned businesses.

As shown in Figure H-13, 42 percent of Black American-owned firms that were operating in California in 2002 had closed by the end of 2006, a higher rate than those of other groups, including white-owned firms (31%). Hispanic American- (34%) and Asian American-owned firms (33%) also had closure rates that were higher than that of white-owned firms. Differences in closure rates between minority-owned firms and white-owned firms were similar in California and in the United States during that time period.

¹¹ Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

¹² 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 Black Americans, Asian Americans, and whites.

Figure H-13.
Rates of business closure, 2002-2006, California and the U.S.



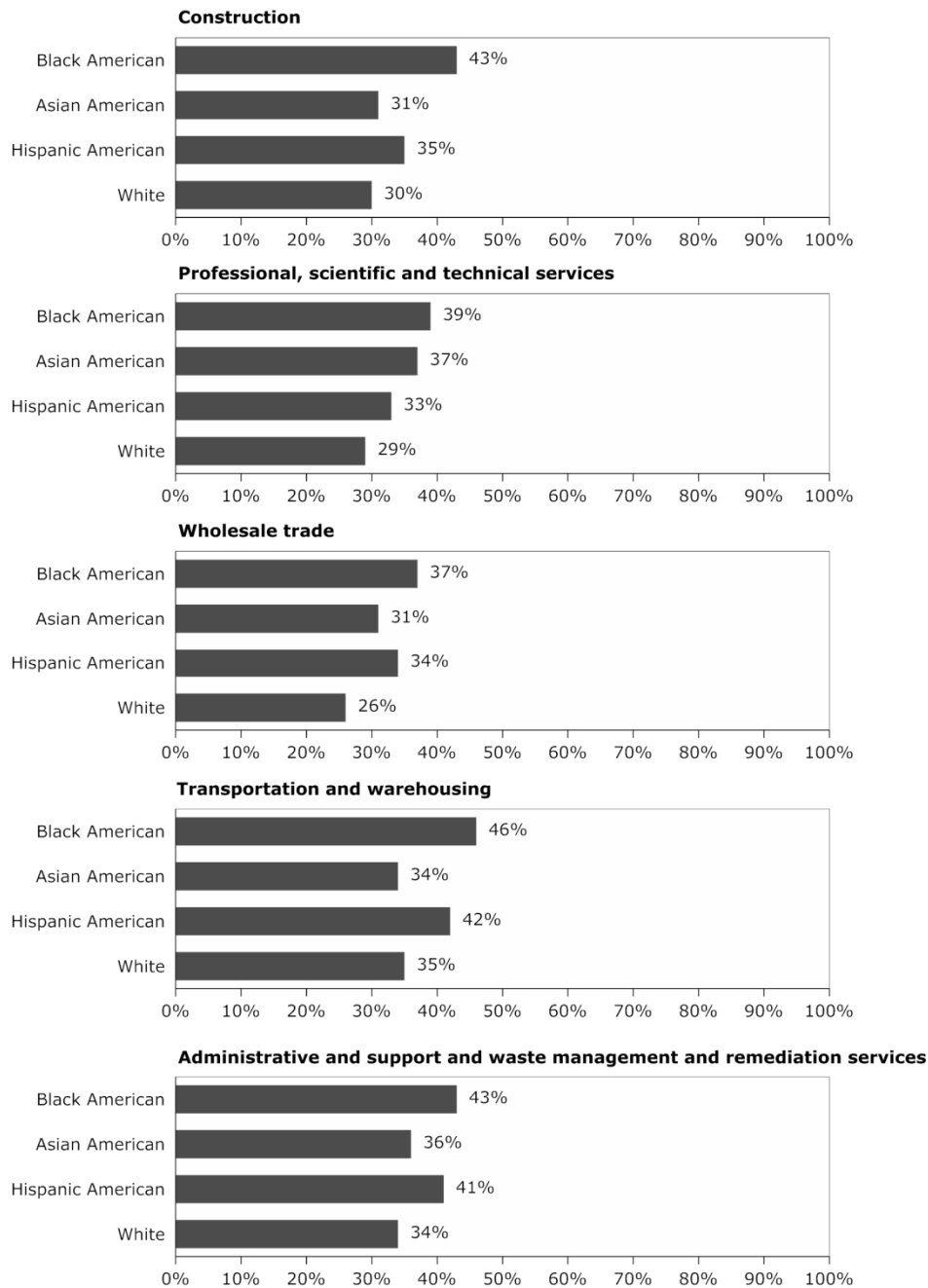
Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Rates of business closures by industry. The SBA report also examined business closure rates by race/ethnicity for 21 different industry classifications. Figure H-14 compares national rates of firm closure by race/ethnicity for the following industry classifications most related to the transportation contracting industry—construction; professional, scientific, and technical services (which includes engineering); wholesale trade (which includes petroleum wholesalers); transportation and warehousing (which includes transit agencies); and administrative and support and waste management and remediation services (which includes security services).

Black 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 construction (43%); professional, scientific, and technical services (39%); and the three goods and services industries (37%, 46% and 43%). Hispanic American-owned businesses and Asian American-owned businesses that were operating in 2002 were also more likely to have closed by 2006 than white-owned businesses in construction; professional, scientific, and technical services; and the three goods and services industries. The study team could not examine whether those differences also existed in the relevant geographic market area or in California as a whole, because the SBA analysis by industry was not available for individual states, counties or metropolitan areas.

Figure H-14.
Rates of business closure, 2002-2006, various industries in the U.S.



Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Unsuccessful closures. Not all business closures can be interpreted as “unsuccessful closures.” Businesses may close when an owner retires or a more profitable business alternative emerges, both of which represent “successful closures.” The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.¹³ 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-15 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction; professional, scientific, and technical services; wholesale trade; transportation, communications and utilities; and all industries.^{14, 15} In the CBO data, administrative and support and waste management and remediation services was included in professional, scientific, and technical services.

According to CBO data, Black American-owned businesses were the most likely to report being “unsuccessful” at the time at which their businesses closed. About 77 percent of Black American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by “other minority groups” (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

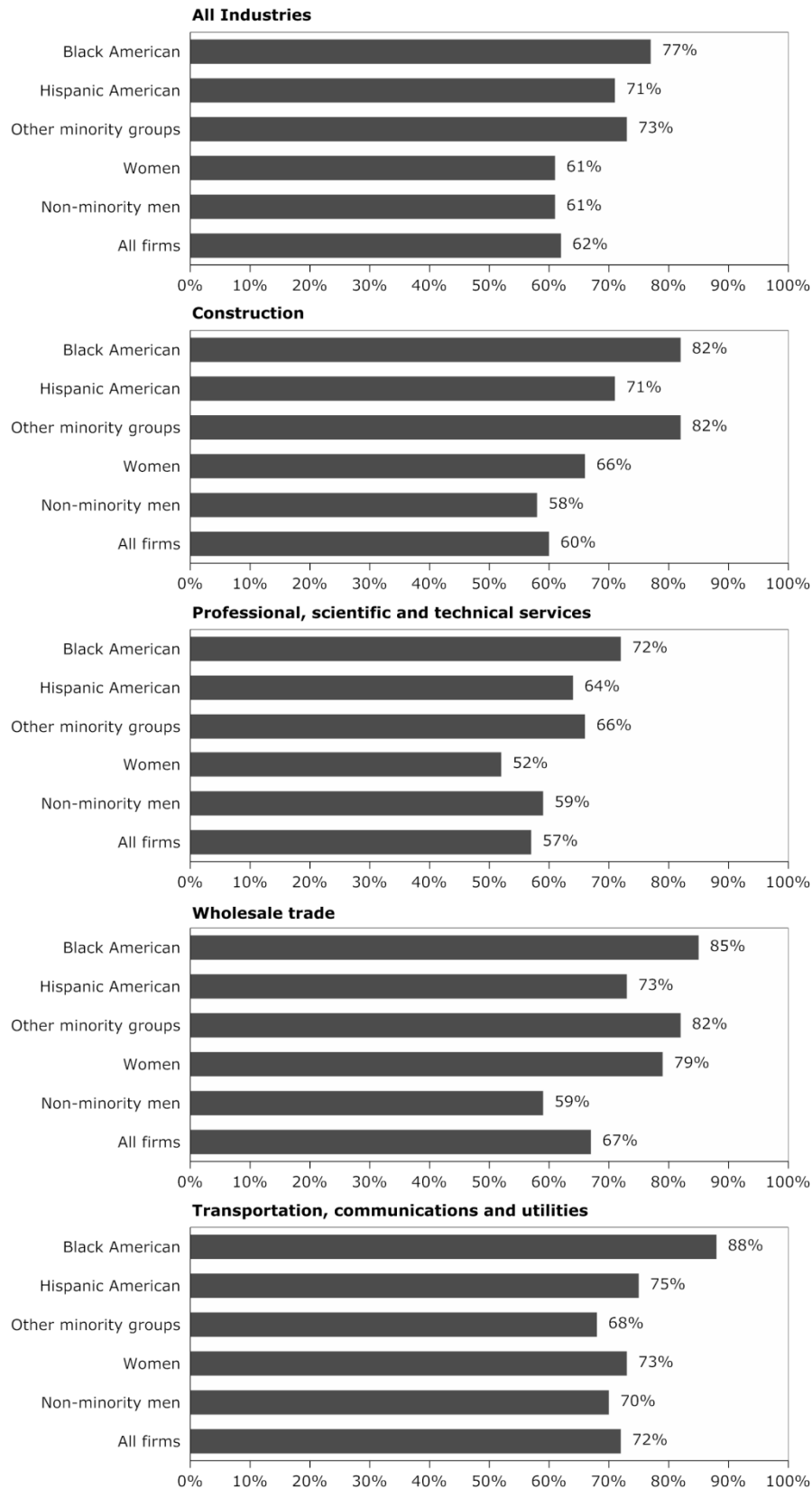
In the construction industry and in wholesale trade, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses. Those trends were similar in the professional services industry with one exception—women-owned businesses (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%). In the transportation, communications and utilities industry all minority groups except “other minority groups” were more likely to report unsuccessful business closures than non-Hispanic white men. Women were also more likely to report unsuccessful business closures than non-Hispanic white men.

¹³ 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.

¹⁴ All CBO data should be interpreted with caution as firms that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, Thomas J. and James Schmitz. 1996. “Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey.” *Journal of Business & Economic Statistics*. 14(2): 231-241. This report does not include CBO data on overall firm closure rates because firms not responding to the survey were found to be much more likely to have closed than ones that did.

¹⁵ This study includes CBO data on firm success because there is no compelling reason to believe that closed firms responding to the survey would have reported different rates of success/failure than those closed firms that did not respond to the survey. Headd, Brian. U.S. Small Business Administration, Office of Advocacy. 2000. *Business Success: Factors leading to surviving and closing successfully*. Washington D.C.: 12.

Figure H-15.
Unsuccessful closure rates for firms that closed between 1992 and 1995 in the U.S.



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

Note: Administrative and support and waste management and remediation services is included in "Professional, scientific and technical services."

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.¹⁶
- 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.¹⁷ Similar research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.¹⁸
- 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 Black American-owned and non-minority-owned businesses.¹⁹
- 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.²⁰
- 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.²¹

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 individual counties or metro areas.

¹⁶ 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.

¹⁷ 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.

¹⁸ Fairlie, R. and A. Robb. 2009. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." University of California, Santa Cruz.

¹⁹ *Ibid.* 24.

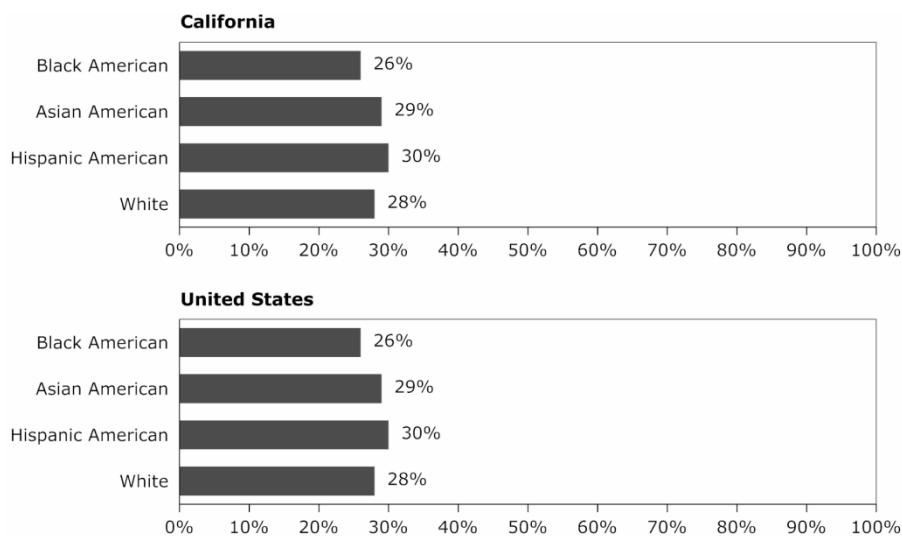
²⁰ Bates, Timothy. 2002. "Analysis of Young Small Businesses That Have Closed: Delineating Successful from Unsuccessful Closures." Center for Economic Studies, U.S. Census Bureau.

²¹ 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 California businesses that expanded and contracted between 2002 and 2006. Figure H-16 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 California and for the nation as a whole.

Approximately 28 percent of white-owned California businesses expanded between 2002 and 2006, compared to 26 percent of Black American-owned businesses, 29 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-16.
Percentage of firms that expanded, 2002-2006



Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

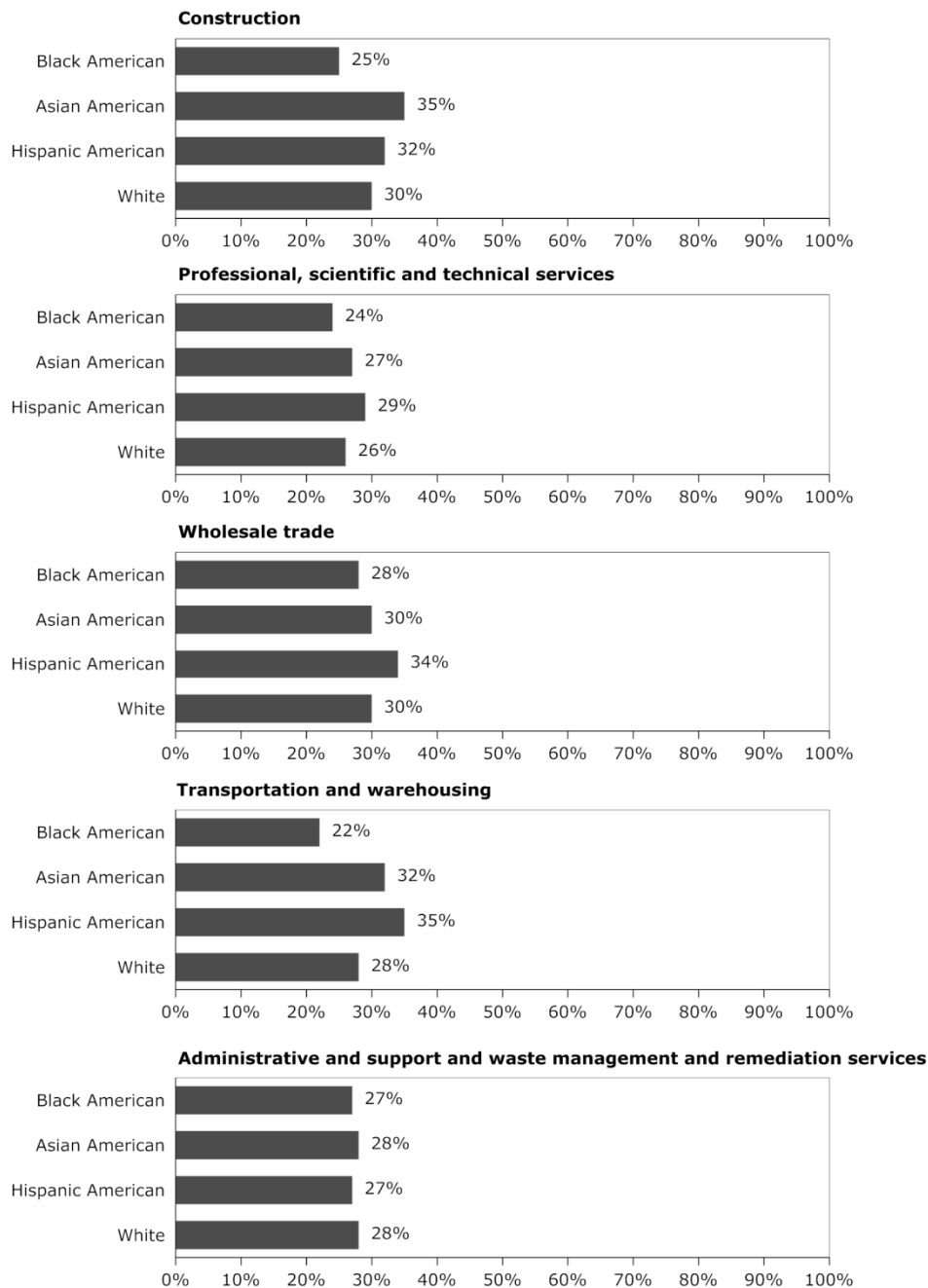
Figure H-17 presents the percentage of businesses that expanded in construction; professional, scientific, and technical services; wholesale trade; transportation and warehousing; and administrative and support and waste management and remediation services in the United States. The 2010 SBA study did not report results for businesses in individual industries at the state level.

At the national level, the patterns evident for construction; professional, scientific, and technical services; wholesale trade; and transportation and warehousing were similar to those observed for all industries:

- Black American-owned businesses in those industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Hispanic American- and Asian American-owned companies in industries just as likely (if not slightly more likely) than white-owned businesses to have expanded between 2002 and 2006.

In the administrative and support and waste management and remediation services industry there did not appear to be substantial differences in the percentage of minority-owned firms expanding compared to white-owned firms.

Figure H-17.
Percentage of firms expanding, 2002-2006, various industries in the U.S.

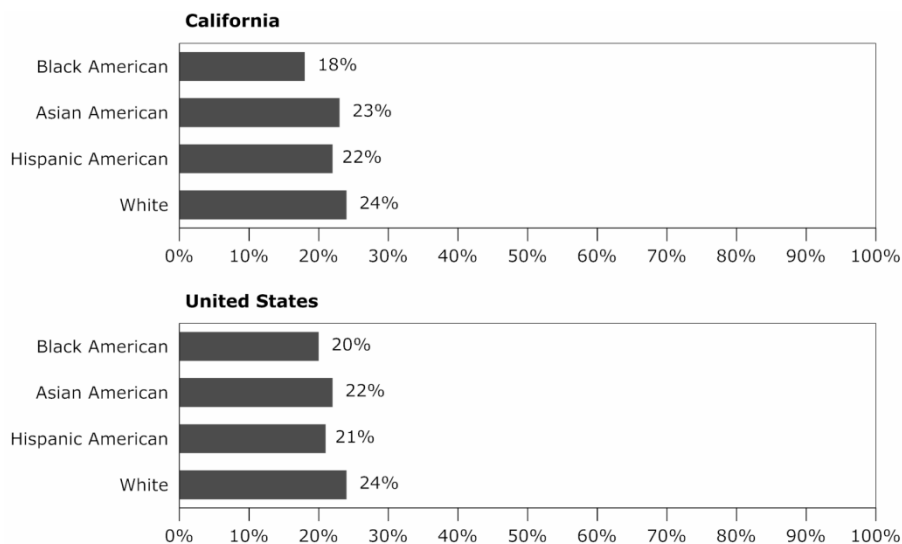


Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Contractions. Figure H-18 shows the percentage of non-publicly held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in California and in the nation as a whole. At both the state level and the national level, Black American- (18%), Asian American- (23%), and Hispanic American-owned businesses (22%) were slightly less likely to have contracted between 2002 and 2006 than white-owned businesses.

Figure H-18.
Percentage of firms contracting, 2002-2006

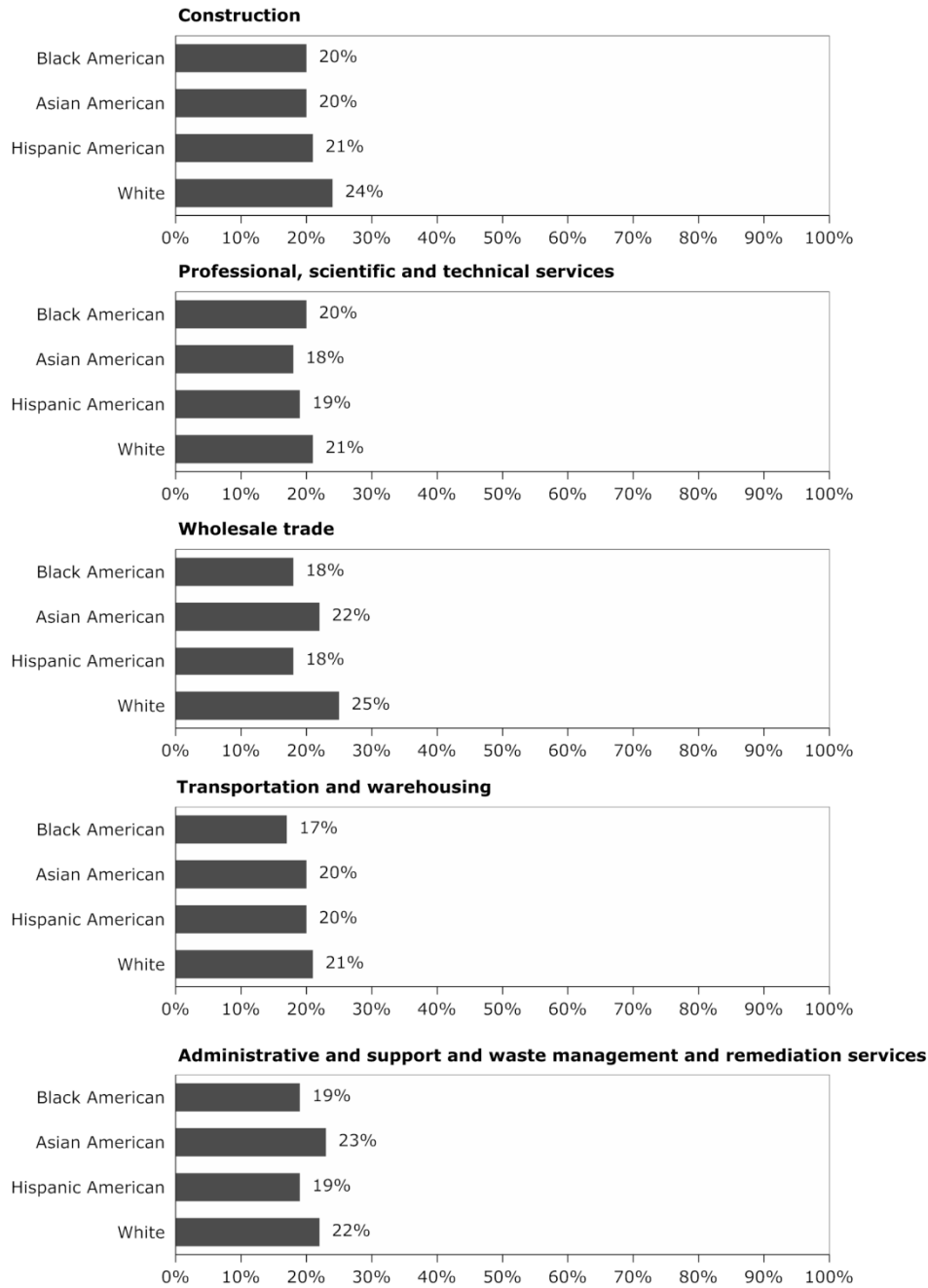


Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-19 shows the percentage of businesses that contracted in construction; professional, scientific, and technical services; wholesale trade; transportation and warehousing; and administrative and support and waste management and remediation services at the national level. Compared to white-owned construction businesses in the United States, a slightly smaller percentage of Black American-, Hispanic American-, and Asian American-owned businesses in each of those industries contracted between 2002 and 2006, with one exception—in the administrative and support and waste management and remediation services industry, Asian American-owned firms were slightly more likely to contract than white-owned firms.

Figure H-19.
Rates of business contraction, 2002-2006, various industries in the U.S.



Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

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 2007 Survey of Business Owners;
- Business earnings data for business owners from the 2000 Census and 2009-2011 American Community Survey (ACS); and
- Annual revenue data for SANDAG transportation construction and engineering businesses that the study team collected as part of availability interviews.

Business receipts. The study team examined receipts for businesses in the relevant geographic market area, California and the United States using data from the 2007 SBO, conducted by the U.S. Census Bureau. 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.²²

Receipts for all businesses. Figure H-20 presents 2007 mean annual receipts for employer and non-employer businesses, by race/ethnicity and gender. Data for the relevant geographic market area are not available for individual racial/ethnic groups and are presented for a combined “all minorities” category. The SBO data for businesses across all industries in the relevant geographic market area, California and in the nation as a whole indicate that average receipts for minority- and women-owned businesses were much lower than the average for all businesses, with some groups faring worse than others.

In the relevant geographic market area, average receipts for minority-owned businesses (\$238,000) were approximately half that of all businesses (\$445,000). Average receipts for women-owned businesses were even lower at \$181,000.

In California as a whole, average receipts for Black American-owned businesses (\$139,000), Hispanic American-owned businesses (\$142,000) and Native Hawaiian-owned businesses (\$151,000) were about one-third that of all businesses (\$420,000). Average receipts for American Indian and Alaska Native-owned businesses (\$123,000) were 29 percent of the average for all businesses. Asian American-owned businesses had higher average receipts (\$363,000) than other minority groups in 2007, although they were still below the average for all businesses. Average receipts for women-owned businesses (\$176,000) were about 42 percent of the average for all businesses.

Disparities in business receipts for minority- and women-owned businesses compared to all businesses in California are broadly consistent with those seen in the United States as a whole. However, differences in average receipts between Black American-owned businesses (\$70,000) and all businesses (\$416,000) were larger in the U.S. than California. That pattern was also true for women-owned businesses (\$154,000) in the U.S.

²² 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.

A 2007 SBA study identified differences similar to those presented in Figure H-25 when examining businesses in all industries across the U.S.²³

Figure H-20.
Mean annual receipts
(thousands) for all
businesses, by
race/ethnicity and
gender of owners, 2007

Note:

Includes employer and non-employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender.

Source:

2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

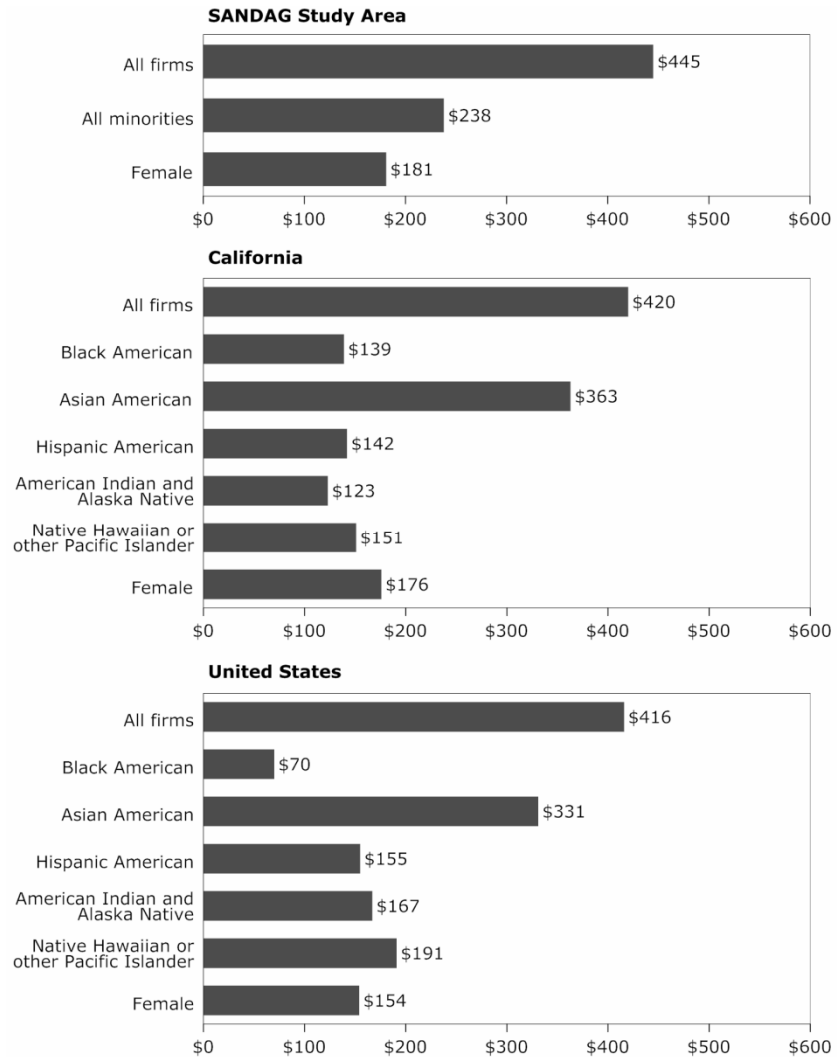


Figure H-21 presents average annual receipts in 2007 for only employer businesses. Again, data for the relevant geographic market area are not available for individual racial/ethnic groups and are presented for a combined “all minorities” category. Minority- and women-owned employer businesses had substantially lower average business receipts than all employer businesses in the relevant geographic market area, California and in the nation as a whole.

In the relevant geographic market area, average annual receipts for minority-owned businesses and for women-owned businesses were approximately \$1.2 million—about two-thirds the average for all businesses (\$1.9 million).

²³ 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.

In California, average annual receipts for Black American- (\$1.6 million) and Asian American-owned employer businesses (\$1.4 million) were greater than businesses owned by other minority groups but still below the average for all businesses (\$2.0 million). Average receipts for American Indian and Alaska Native-owned businesses (\$837,000) were less than half of the average for all businesses. Average receipts for women-owned employer businesses (\$1.3 million) were about two-thirds that of all businesses in California.

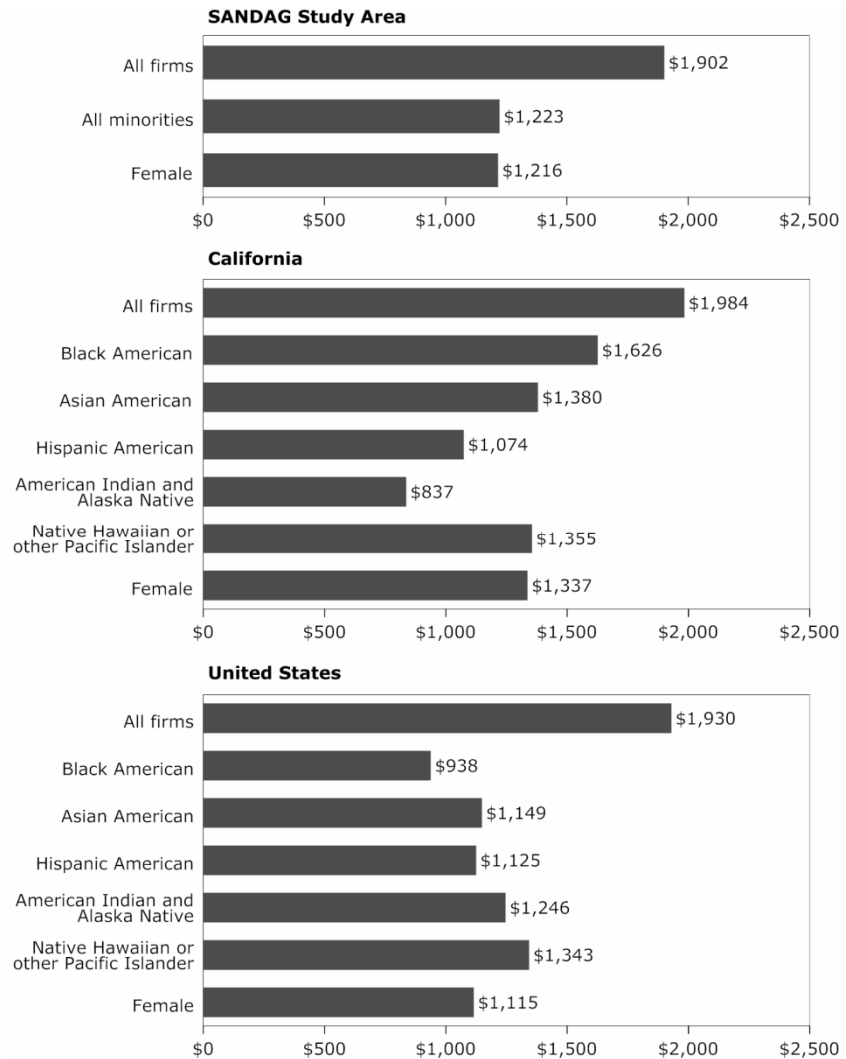
Figure H-21.
Mean annual receipts
(thousands) for
employer businesses,
by race/ethnicity and
gender of owners, 2007

Note:

Includes only employer businesses.
Does not include publicly-traded
companies or other businesses not
classifiable by race/ethnicity and
gender.

Source:

2007 Survey of Business Owners,
part of the U.S. Census Bureau's
2007 Economic Census.



Receipts by industry. The study team also analyzed SBO receipts data separately for businesses in construction and professional, scientific, and technical services. Figure H-22 presents mean annual receipts in 2007 for all businesses (i.e., employer and non-employer businesses combined) and for just employer businesses in the industries that most closely represent study industries by racial/ethnic and gender group. Results are presented for California and for the nation as a whole. Data by industry were not available for the relevant geographic market area.

Figure H-22.

Mean annual receipts (thousands) for businesses in the construction and professional, scientific and technical services industries, by race/ethnicity and gender of owners, 2007

	All firms					Employer firms				
	Construction	Professional, scientific, and technical services	Administrative and support and waste management and remediation services	Transportation and warehousing	Wholesale trade	Construction	Professional, scientific, and technical services	Administrative and support and waste management and remediation services	Transportation and warehousing	Wholesale trade
California										
Black American	N/A	\$92	\$89	\$87	\$4,296	NA	\$725	\$860	\$1,096	\$23,911
Asian American	\$323	\$149	\$161	\$192	\$2,243	\$1,655	\$796	\$1,023	\$1,298	\$4,229
Hispanic American	\$202	\$108	\$62	\$130	\$1,110	\$1,146	\$691	\$621	\$1,028	\$3,602
American Indian and Alaska Native	\$254	\$81	\$44	\$97	\$279	\$1,232	\$324	\$285	\$269	\$1,069
Native Hawaiian or other Pacific Islander	\$483	\$246	\$42	\$116	N/A	\$2,378	N/A	\$347	N/A	N/A
Female	\$485	\$106	\$100	\$246	\$2,035	\$2,179	\$643	\$1,068	\$1,534	\$5,888
All firms	\$600	\$205	\$190	\$231	\$2,956	\$2,174	\$977	\$1,227	\$1,568	\$6,544
United States										
Black American	\$107	\$78	\$47	\$66	\$803	\$1,069	\$717	\$784	\$672	\$6,986
Asian American	\$273	\$201	\$155	\$137	\$2,168	\$1,533	\$950	\$1,009	\$1,248	\$4,173
Hispanic American	\$167	\$121	\$63	\$106	\$1,455	\$1,083	\$693	\$686	\$815	\$4,697
American Indian and Alaska Native	\$262	\$116	\$100	\$121	\$1,001	\$1,390	\$630	\$1,044	\$866	\$5,006
Native Hawaiian or other Pacific Islander	\$363	\$187	\$149	\$130	\$943	\$1,628	####	\$1,278	\$1,377	\$2,930
Female	\$361	\$98	\$83	\$230	\$1,839	\$1,625	\$543	\$845	\$1,431	\$6,202
All firms	\$447	\$201	\$182	\$258	\$3,363	\$1,789	\$863	\$1,104	\$1,597	\$7,687

Notes: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender.
 "NA" denotes that data were not available at the time of publication and are subject to revision.

Source: 2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

Construction. In the California construction industry, average 2007 receipts for minority- and women-owned businesses were lower than the average for all businesses (\$600,000). Results for all businesses (i.e., employer and non-employer businesses combined) indicate that:

- Average receipts for Hispanic American-owned construction businesses (\$202,000) were approximately one-third that of all California construction businesses.
- Average receipts for American Indian and Alaska Native-owned construction businesses (\$254,000) were less than half that of all California construction businesses.
- Average receipts for Asian American- and Native Hawaiian-owned construction businesses were higher than those of all other minority-owned construction businesses, but were still substantially below that of all California construction businesses.
- Average receipts for women-owned construction businesses in California (\$485,000) were less than the average for all businesses.
- Data were not available for Black American-owned construction businesses in California.

Although SBO data indicated that average receipts were higher for construction employer businesses than for all construction businesses (i.e., employer and non-employer businesses combined), average receipts for minority- and women-owned construction employer businesses were still substantially less than that of all construction employer businesses. That pattern was evident in California and in the nation as a whole.

Professional, scientific, and technical services. In the California professional, scientific, and technical services industry, minority-owned businesses had lower average receipts than all businesses. Results for all businesses (i.e., employer and non-employer businesses combined) in the professional, scientific, and technical services industry indicate that:

- Average receipts for Black American-owned businesses (\$92,000) were about 45 percent of that of all businesses (\$205,000).
- Average receipts for American Indian and Alaska Native-owned businesses (\$81,000) were approximately 39 percent of that of all businesses.
- Average receipts for Asian American-owned businesses (\$149,000) were substantially less than that of all businesses.
- Average receipts for Hispanic American-owned (\$108,000) were about half that of all businesses.
- Average receipts for women-owned businesses (\$106,000) were also about half that of all businesses.
- Average receipts for Native Hawaiian-owned businesses were higher than that of all businesses.

An examination of only employer businesses in professional, scientific, and technical services yielded similar results—minority- and women-owned businesses had between 33 percent and 82 percent of the average annual receipts of all California employer businesses in professional, scientific, and technical services in 2007.

Goods and services. The industries available in the SBO data that most closely represent the transportation contracting industry include wholesale trade, transportation and warehousing, and administrative and support and waste management and remediation services. On average, wholesale trade had higher earnings than other industries.

In each of those industries, average 2007 receipts for minority- and women-owned California businesses were lower than the average for all businesses with one notable exception—average receipts for Black American-owned wholesale trade companies were higher than for all firms. Similar results were evident for employer firms.

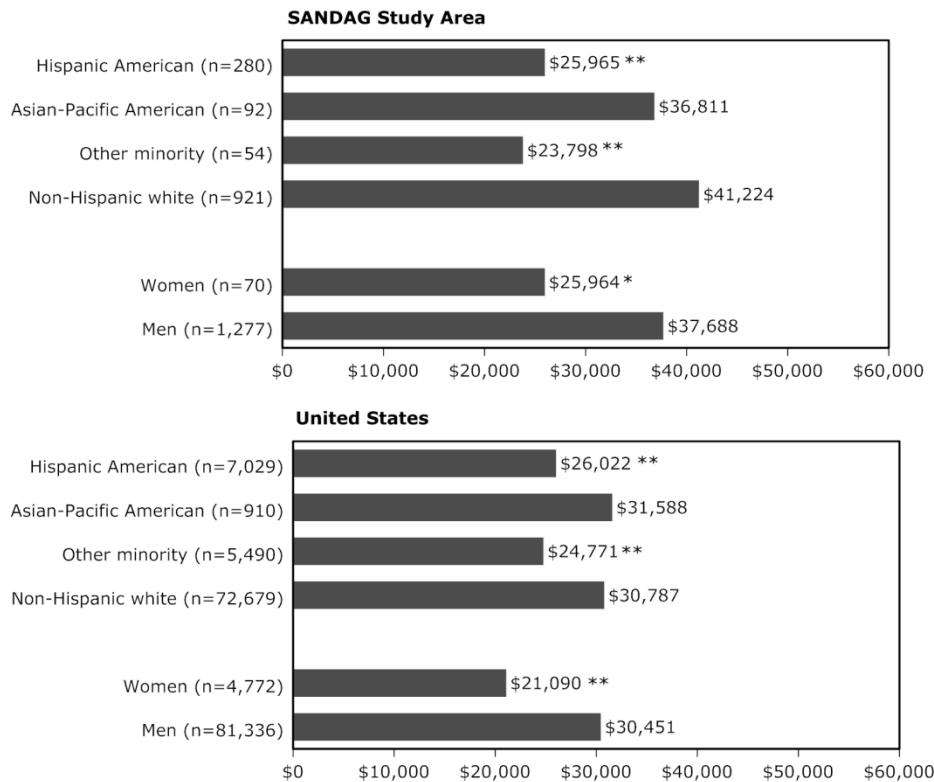
Business earnings. In order to assess the success of self-employed minorities and women in the transportation contracting industry, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2000 U.S. Census and 2009-2011 ACS. The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. For the construction industry, results are presented for the relevant geographic market area and the United States. However, due to small sample sizes for the engineering industry and the goods and services industry, results for those two industries are presented for California as a whole, along with the United States.²⁴

Construction business owner earnings, 1999. Figure H-23 shows average earnings in 1999 for business owners in the construction industry in the relevant geographic market area and in the United States. Due to small sample sizes for individual racial/ethnic groups, the study team grouped Black American, Subcontinent Asian American, Native American and “other race minority” business owners together into a single “other minority” category. Business earning results for 1999 were based on the 2000 Census, in which individuals were asked to give their business income for the previous year:

- On average, Hispanic American business owners in the relevant geographic market area (\$25,965) earned substantially less than non-Hispanic white construction business owners (\$41,224).
- “Other minority” construction business owner (\$23,798) also earned substantially less than non-Hispanic white business owners.
- The difference between average earnings for Asian-Pacific American construction business owners and non-Hispanic white construction business owners was not statistically significant in the relevant geographic market area or the nation as a whole.
- Female construction business owners in the relevant geographic market area (\$25,964) earned less, on average, than male construction business owners (\$37,688).

²⁴ In Appendix H and other appendices that present information about local marketplace conditions, “goods and services” refers to petroleum wholesalers, bus service and urban transit, and investigation and security services. These are the industries that most closely identify the petroleum, transit and security goods and services related to transportation contracting.

Figure H-23.
Mean annual business owner earnings in the construction industry, 1999



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars.
 *, ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Construction business owner earnings, 2008-2011. The 2009-2011 ACS also reports business owner earnings. Because of the way that the U.S. Census Bureau conducts each year's ACS, earnings for business owners reported in the 2009 through 2011 sample were for the previous 12 months between 2008 and 2011.²⁵ However, all dollar amounts are presented in 2011 dollars.

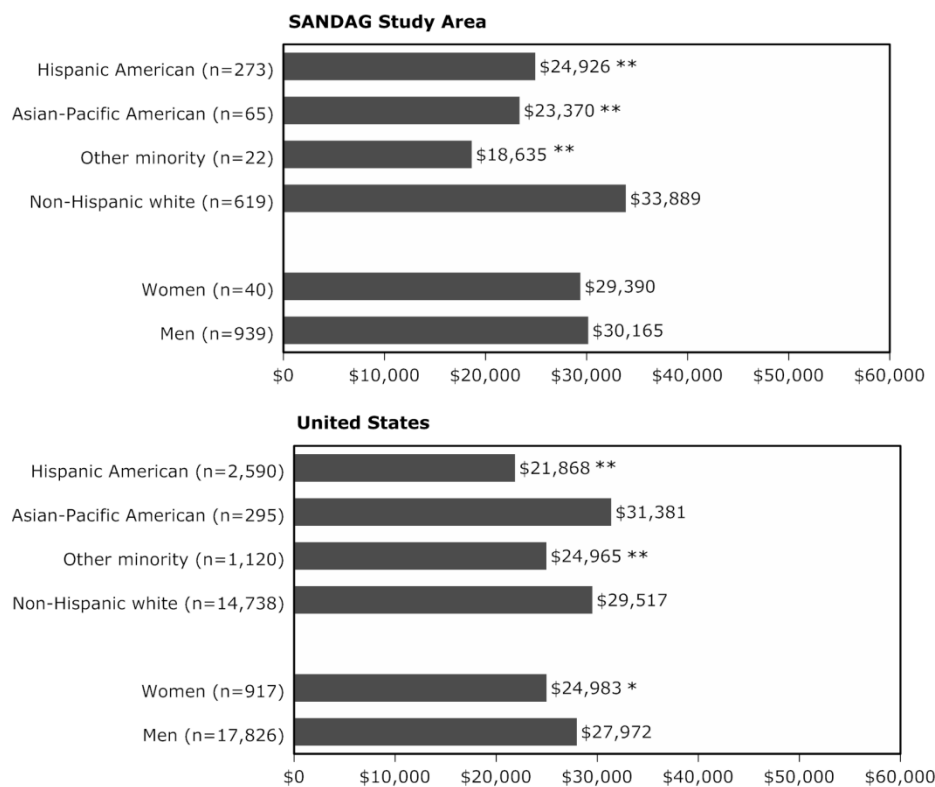
Figure H-24 shows earnings in 2008 through 2011 for business owners in the construction industry in the relevant geographic market area and the nation as a whole. Again, due to sample sizes for individual minority groups, Black Americans, Subcontinent Asian Americans, Native Americans and "other race minorities" were combined. Similar to 2000 earnings data, there were large differences in earnings between minority business owners and non-Hispanic white business owners, both in the relevant geographic market area and nationally. Results for the study area indicate:

²⁵ For example, if a business owner completed the survey on January 1, 2009, the figures for the previous 12 months would reference January 1, 2008 to December 31, 2008. Similarly, a business owner completing the survey December 31, 2011 would reference amounts since January 1, 2011.

- On average, Hispanic American construction business owners earned \$24,926 in 2008 through 2011, compared to \$33,889 for non-Hispanic white construction business owners.
- “Other minority” construction business owners (\$18,635) also had average earnings well below average earnings for non-Hispanic white construction business owners.
- Unlike results from 1999, in 2008 through 2011, the difference between average earnings for Asian-Pacific American (\$17,564) and non-Hispanic white construction business owners was statistically significant.
- Female construction business owners (\$29,390) earned slightly less, on average, than male construction business owners (\$30,165) but that difference was not statistically significant.

National results were similar except there was not a statistically significant difference between average earnings for Asian-Pacific American and non-Hispanic white construction business owners and there was a statistically significant disparity between average earnings for female and male construction business owners.

Figure H-24.
Mean annual business owner earnings in the construction industry, 2008 through 2011



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2011 dollars.
 *,** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

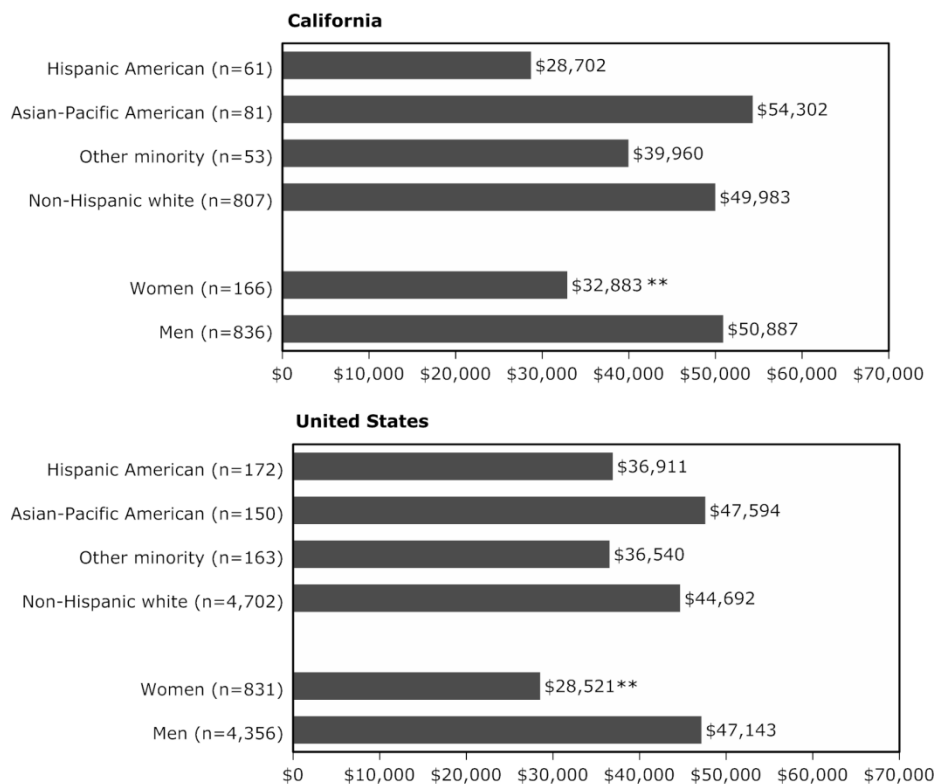
Source: BBC Research & Consulting from 2009-2011 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Engineering business owner earnings, 1999. As with the construction industry above, BBC examined average earnings in 1999 for engineering-related business owners. Due to small sample sizes, BBC was unable to report robust figures for average earnings of minority business

owners in the relevant geographic market area engineering industry. Instead, Figure H-25 shows average earnings in 1999 for engineering-related business owners in California as a whole. Due to small sample sizes for individual racial/ethnic groups in the engineering industry, BBC grouped Black Americans, Subcontinent Asian Americans, Native Americans and other race minorities. Again, the following results are based on the 2000 Census, in which individuals were asked to give their business income for the previous year:

- On average, Hispanic American and other minority engineering business owners in California earned less than non-Hispanic white engineering business owners in 1999, but those differences were not statistically significant. National results were similar.
- Female engineering business owners in California (\$32,883) earned substantially less than male business owners (\$50,887) in 1999. National results were similar.

Figure H-25.
Mean annual business owner earnings in the engineering industry, 1999



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars.

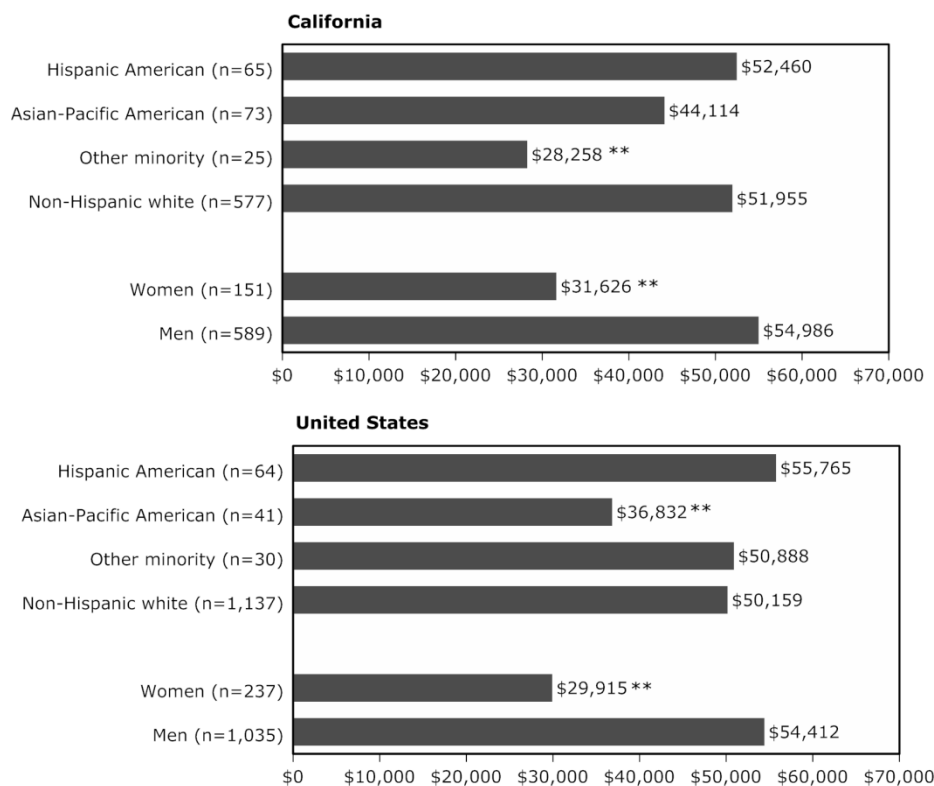
** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Engineering business owner earnings, 2008-2011. As with earnings data for the construction industry, earnings for engineering business owners that were reported in the 2009-2011 ACS data were for the time period between 2008 and 2011. All dollar amounts are presented in 2011 dollars. Again, due to small sample sizes, results are presented for California as a whole and the “other minority” category includes Black Americans, Subcontinent Asian Americans, Native Americans and other race minorities.

As shown in Figure H-26, in 2008 through 2011, earnings for other minority (\$28,258) and female (\$31,626) business owners in the California engineering industry were lower than for non-Hispanic white (\$51,955) business owners and male business owners (\$54,986), respectively. National results for the engineering industry in 2008 through 2011 indicate that average earnings for Asian-Pacific American owners were lower than for non-Hispanic white owners and average earnings for female business owners were lower than for male business owners.

Figure H-26.
Mean annual business owner earnings in the engineering industry, 2008 through 2011



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2011 dollars.
 ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

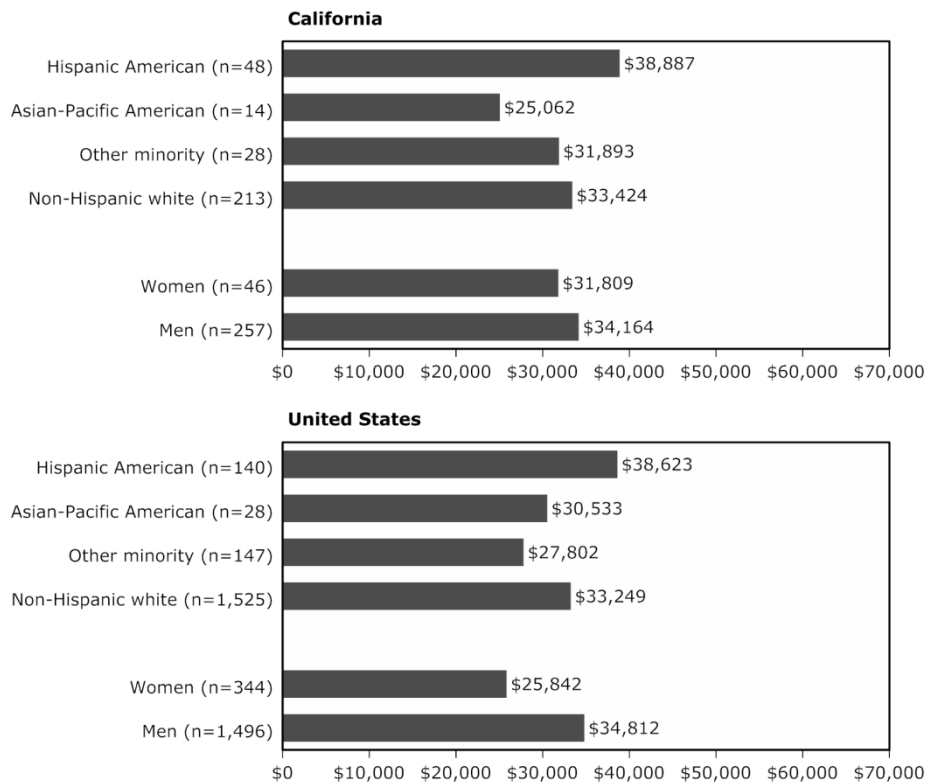
Source: BBC Research & Consulting from 2009-2011 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Goods and services business owner earnings, 1999. As with the construction and engineering industries, BBC examined average earnings in 1999 for goods and services business owners. Similar to the engineering industry, due to small sample sizes, BBC was unable to report robust figures for average earnings of minority business owners in the relevant geographic market area goods and services industry. Instead, Figure H-27 shows average earnings in 1999 for goods and services business owners in California as a whole. Due to small sample sizes for individual racial/ethnic groups in the industry, BBC grouped Black Americans, Subcontinent Asian Americans, Native Americans and other race minorities.

The results do not indicate any statistically significant differences between average earnings for minority-owned goods and services business and non-Hispanic white-owned goods and services

business in California. Nor did the analysis indicate any statistically significant differences between average earnings for female-owned goods and services business and male-owned businesses in California. Results for the United States were similar.

Figure H-27.
Mean annual business owner earnings in the goods and services industry, 1999



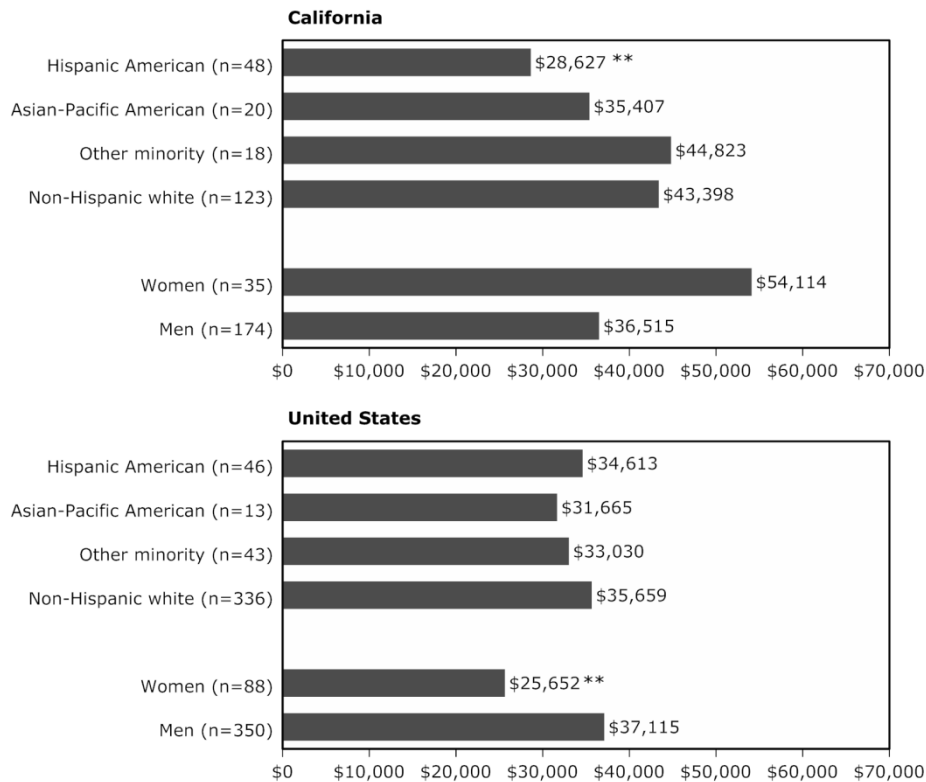
Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars.
 ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Goods and services business owner earnings, 2008-2011. As with earnings data for the construction and engineering industries, earnings for engineering business owners that were reported in the 2009-2011 ACS data were for the time period between 2008 and 2011. All dollar amounts are presented in 2011 dollars. Again, due to small sample sizes, results are presented for California as a whole and the “other minority” category includes Black Americans, Subcontinent Asian Americans, Native Americans and other race minorities.

As shown in Figure H-28, in 2008 through 2011, earnings for Hispanic American business owners (\$28,627) in the California goods and services industry were lower than for non-Hispanic white business owners (\$43,398). National results for the goods and services industry in 2008 through 2011 indicate that average earnings for female business owners were lower than for male business owners.

Figure H-28.
Mean annual business owner earnings in the goods and services industry, 2008 through 2011



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2011 dollars.
 ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2009-2011 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. BBC performed regression analyses using 2000 Census and 2009-2011 ACS data to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after statistically controlling for certain race- and gender-neutral factors.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.²⁶ 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

²⁶ For example, National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation; and National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition, and educational attainment.

For the construction industry, the study team developed two regression models:

- A model for business owner earnings in 1999 for the Relevant geographic market area construction industry that included 945 observations; and
- A model for business owner earnings in 2008 through 2011 for the relevant geographic market area construction industry that included 761 observations.

Due to small sample sizes, BBC took a different approach when examining business owner earnings in the engineering-related industry. BBC created an engineering-related industry model for California that included separate terms to account for the effect of business location in the relevant geographic market area. Those terms included an indicator variable for location and interaction variables that indicated minority or female business owners in the relevant geographic market area. That approach was similar to those used by other researchers. BBC created the following models for the engineering-related industry:

- A model for business owner earnings in 1999 for the California engineering industry that included 784 observations; and
- A model for business owner earnings in 2008 through 2011 for the California engineering industry that included 541 observations.

BBC did not conduct regression analyses for the goods and services industry due to small sample sizes (even at the state level).

Construction industry regression results, 1999. Figure H-29 shows the results of the regression model for 1999 earnings in the Relevant geographic market area construction industry. The model indicates that some neutral factors are statistically significant in predicting the earnings of business owners in the construction industry. Older business owners had greater earnings (but age had less of an effect for the oldest individuals). Married business owners and those who spoke English well also had greater earnings. Conversely, having a disability and having less than a high school degree were associated with lower earnings for business owners, on average.

After statistically controlling for race- and gender-neutral factors, there were still statistically significant effects of race and gender. Specifically, being Hispanic American or female was associated with lower business earnings in the relevant geographic market area in 1999.

Construction industry regression results, 2008 through 2011. Figure H-30 illustrates the results of the regression model for 2008 through 2011 earnings in the relevant geographic market area construction industry. Some of the same race- and gender-neutral variables that were significant in the 1999 model were also statistically significant predictors of business earnings in 2008 through 2011. Older business owners had higher earnings, on average (but age had less of an effect for the oldest individuals), as did married business owners. Owners with less than a high school degree tended to have lower earnings. After statistically controlling for race- and gender-neutral factors, effects of race/ethnicity and gender were not statistically significant.

Figure H-29.
Relevant geographic market area
construction business owner earnings
model, 1999

Note:

*,** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2000 Census. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	6.875 **
Age	0.123 **
Age-squared	-0.001 **
Married	0.337 **
Speaks English well	0.569 **
Disabled	-0.182 *
Less than high school	-0.298 **
Some college	0.006
Four-year degree	0.204
Advanced degree	0.713 **
Hispanic American	-0.247 **
Asian-Pacific American	0.068
Other Minority	0.144
Female	-0.514 **

Figure H-30.
Relevant geographic market area
construction business owner earnings
model, 2008-2011

Note:

*,** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2009-2011 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.014 **
Age	0.112 **
Age-squared	-0.001 **
Married	0.300 *
Speaks English well	0.088
Disabled	-0.604
Less than high school	-0.474 *
Some college	-0.044
Four-year degree	0.280
Advanced degree	0.793 **
Hispanic American	-0.103
Asian-Pacific American	-0.375
Other Minority	-0.504
Female	-0.095

Engineering industry regression results, 1999. Figure H-31 presents the results of the regression model of business owner earnings specific to the California engineering-related industry in 1999. As explained above, BBC created a statewide engineering-related industry model for California due to small sample sizes for the relevant geographic market area. This model, however, includes interaction terms for evaluating the effect of owning a business in the relevant geographic market area. Several neutral factors are statistically significant in explaining business earnings in the California engineering-related industry. As in the construction models, older business owners had greater earnings (but this marginal effect declined for the oldest individuals) as did married business owners.

After accounting for neutral factors, the model indicates that:

- Asian-Pacific American business owners in the California engineering industry earned less, on average, than non-Hispanic white business owners.
- Female business owners earned less, on average, than men in the California engineering-related industry.
- Overall, there were no statistically significant differences in business earnings for businesses located in the relevant geographic market area engineering industry. However, Asian-Pacific Americans and other minorities in the Relevant geographic market area engineering industry earned more, on average, than similarly situated Asian-Pacific American or other minority business owners in the engineering-related industry in California as a whole.

Figure H-31.
Relevant geographic market area
engineering industry business owner
earnings model, 1999

Note:

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2000 Census. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.282 **
Age	0.108 **
Age-squared	-0.001 **
Married	0.234 *
Speaks English well	0.643
Disabled	-0.500
Less than high school	0.236
Some college	0.032
Four-year degree	0.196
Advanced degree	0.223
Hispanic American	-0.140
Asian-Pacific American	-0.321 *
Other Minority	-0.112
Female	-0.581 **
Consortium study area	-0.311
Hispanic American in study area	0.210
Asian-Pacific American in study area	0.704 *
Other Minority in study area	0.908 **
Female in study area	-0.102

Engineering industry regression results, 2008 through 2011. Figure H-32 presents the results of the regression model of business owner earnings specific to the California engineering-related industry for 2008 through 2011. As in the model for 1999 earnings, this model indicates that some neutral factors are statistically significant in predicting the earnings of engineering-related business owners. Business owners who were older had greater earnings (but this marginal effect declined for the oldest individuals). Being married was also associated with higher earnings.

After accounting for neutral factors, the model indicated a statistically significant disparity in earnings for female business owners but not for minority business owners. Results for the relevant geographic market area appear consistent with statewide findings.

Figure H-32.
Relevant geographic market area
engineering industry business owner
earnings model, 2008 through 2011

Note:

*,** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2009-2011 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.280 **
Age	0.117 **
Age-squared	-0.001 **
Married	0.415 **
Speaks English well	0.240
Disabled	-0.158
Less than high school	-0.661
Some college	-0.445
Four-year degree	-0.273
Advanced degree	-0.220
Hispanic American	0.147
Asian-Pacific American	-0.181
Other Minority	-0.488
Female	-0.494 **
Consortium study area	0.311
Hispanic American in study area	-0.114
Asian-Pacific American in study area	0.087
Other Minority in study area	0.244
Female in study area	-0.453

Gross revenue of construction and engineering firms from availability interviews.

In the availability telephone interviews that BBC conducted for the study, firm owners and managers were asked to identify the size range for their annual gross revenue. A related question asked for gross revenue across all locations for multi-location firms, which is the result examined here.

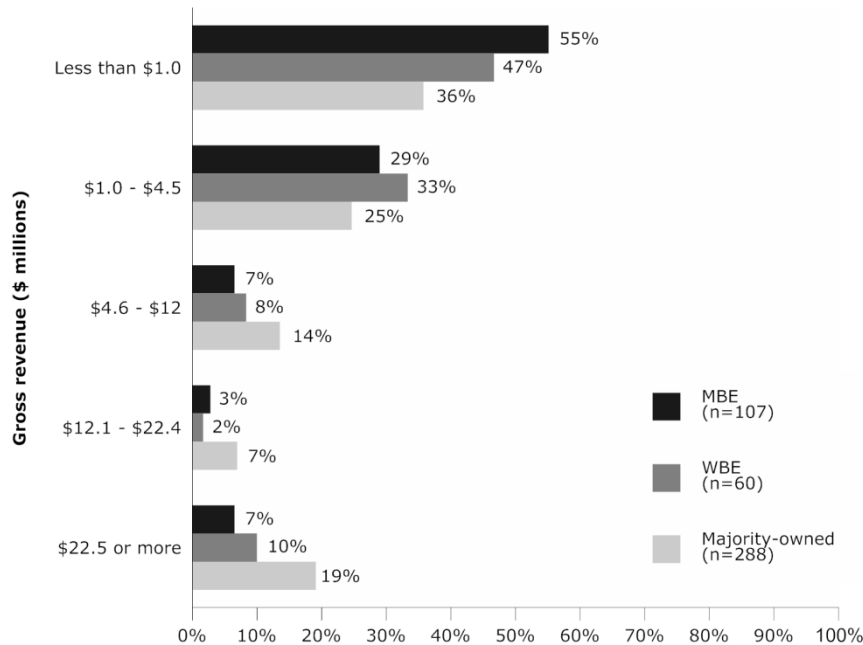
Within the transportation contracting industry in the relevant geographic market area, BBC separately examined gross revenue of construction and engineering businesses.²⁷

Construction. Figure H-33 presents the distribution of MBEs, WBEs, and majority-owned construction businesses by revenue class.

- A larger percentage of MBEs (55%) than WBEs (47%) and majority-owned businesses (36%) reported average revenue of less than \$1 million per year.
- A disproportionately small proportion of MBEs (16%) and WBEs (20%) reported average revenue of \$4.6 million or more per year compared with results for majority-owned businesses (40%).
- A larger percentage of majority-owned businesses (19%) reported average revenue of \$22.5 million or more than MBEs (7%) and WBEs (10%).

²⁷ The sample size of goods and services firms in the relevant geographic market area was too small to draw conclusions about that industry's gross revenue.

Figure H-33.
Gross revenue of company for all firm locations, construction industry



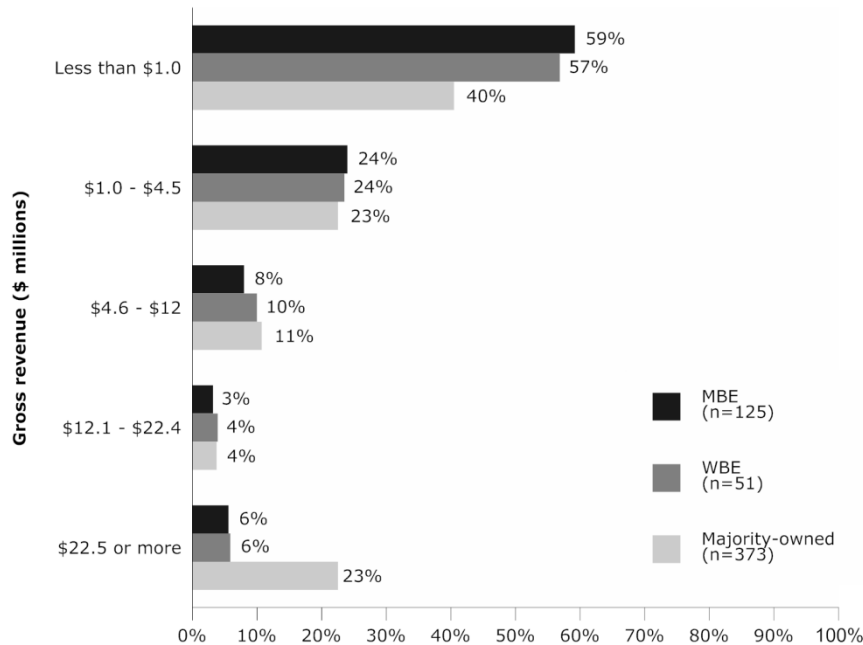
Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from Availability Interviews.

Engineering. Engineering businesses were also asked to report gross revenue across all firm locations. Figure H-34 summarizes the results.

- Compared to majority-owned firms (40%), a larger percentage of WBEs (57%) and MBEs (59%) reported average revenue of less than \$1 million per year.
- A smaller proportion of MBEs (17%) and WBEs (20%) reported average revenue of \$4.6 million or more than majority-owned businesses (37%).
- A larger percentage of majority-owned businesses (23%) reported average revenue of \$22.5 million or more than MBE/WBEs (6%).

Figure H-34.
Gross revenue of company for all firm locations, engineering industry



Note: "WBE" represents white women-owned firms.

Source: BBC Research & Consulting from 2013-2014 Availability Interviews.

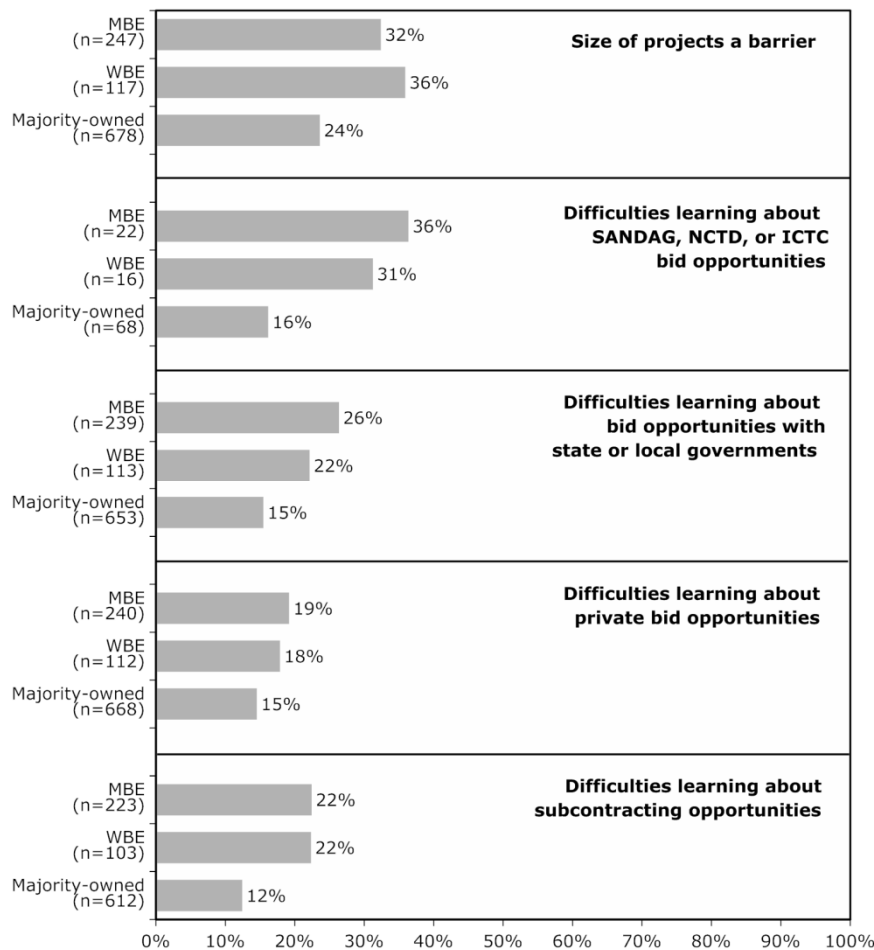
Potential Barriers to Starting or Expanding Businesses

As part of the availability interviews with businesses in the relevant geographic market area completed in the disparity study, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business. BBC asked if:

- The size of projects had presented a barrier to bidding;
- The firm had experienced difficulties learning about bid opportunities with SANDAG, NCTD, or ICTC;
- The firm had experienced difficulties learning about bid opportunities with local governments or private companies in California; and
- The firm had experienced difficulties learning about subcontracting opportunities in California.

Figure H-35 summarizes responses to those questions.

Figure H-35.
Responses to availability interview questions from MBE, WBE, and majority-owned construction, engineering, and goods and services firms in the relevant geographic market area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: BBC Research & Consulting.

Responses for construction, engineering, and goods and services businesses have been combined. As shown in Figure H-35, MBE/WBEs were more likely than majority-owned businesses to report that the size of projects had been a barrier to bidding. MBE/WBEs were also more likely than majority-owned businesses to report difficulties associated with learning about:

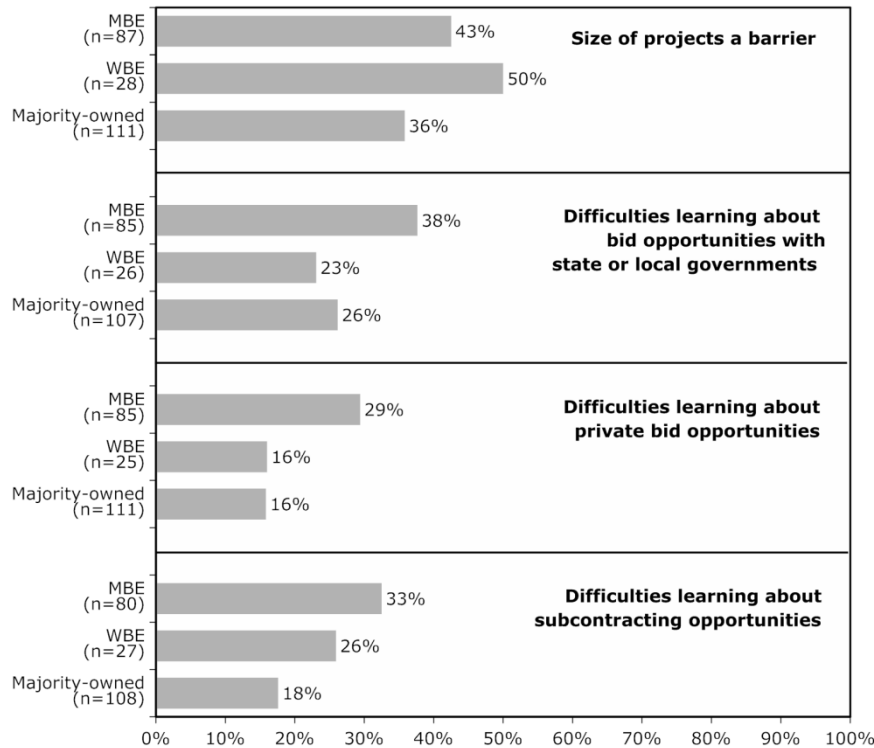
- SANDAG, NCTD, and ICTC bid opportunities;
- State and local government bid opportunities;
- Private sector bid opportunities; and
- Subcontracting opportunities.

Majority-owned firms were the least likely to report difficulties in all categories.

The study team also examined how barriers and difficulties associated with starting or expanding a business affected younger businesses. Figure H-36 shows that a larger percentage of younger MBEs and majority-owned businesses were more likely than all firms to report that the size of projects and difficulties leaning about bid opportunities were barriers to bidding.²⁸

Figure H-36.

Responses to availability interview questions from young MBE, WBE, and majority-owned construction, engineering, and goods and services firms in the relevant geographic market area



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: BBC Research & Consulting.

Overall, younger businesses were much more likely than all businesses considered together to report difficulties learning about bid opportunities in all categories with the exception of WBEs in learning about private sector bid opportunities and subcontracting opportunities.²⁹ A substantially larger percentage of young MBE/WBEs than young majority-owned businesses reported difficulties learning about bid opportunities in all categories.

²⁸ BBC included the youngest quartile of businesses in the young business analysis. This included businesses that were established in 2002 or later.

²⁹ There were not enough businesses that had answered whether they had experienced difficulties in learning about SANDAG, NCTD, or ICTC bid opportunities to draw conclusions for the young business analysis for that question.

Summary

The study team used the 2010 SBA study of minority business dynamics to examine business closures, expansions, and contractions. That study found that, between 2002 and 2006, 29 percent of non-publicly held U.S. businesses had expanded their employment, 24 percent had contracted their employment, and 30 percent had closed. In California:

- Black American-owned firms were more likely than non-Hispanic white-owned firms and other firms to close. Black American-owned firms were less likely than other firms to expand.
- Hispanic American-owned firms were also more likely than non-Hispanic white-owned firms to close or to contract. However, Hispanic American-owned firms were slightly more likely to expand than non-Hispanic white-owned firms.
- Overall, minority-owned firms were less likely to contract than non-Hispanic white-owned firms.

The study team examined several different datasets to analyze business receipts and earnings for minority- and female-owned businesses.

- Analysis of 2007 data indicated that, in the relevant geographic market area, average receipts for minority- and women-owned businesses were lower compared to those of all businesses.
- Those data also indicated that, in California, average receipts for Black American-, Asian American-, Hispanic American-, American Indian and Alaska Native-, and women-owned businesses were lower compared to those of all businesses in both the construction industry and the professional, scientific, and technical services industry. Similar results were evident in the goods and services industries, except for Black American firms in wholesale trade, which had higher average earnings compared to all businesses.
- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were statistically significant effects of race and gender on business earnings, after statistically controlling for certain gender-neutral factors:
 - Being female and being Hispanic were both associated with lower business earnings in the relevant geographic market area construction industry in 1999;
 - Being female was also associated with lower business earnings in the entire California engineering industry (including the Relevant geographic market area) in both 1999 and 2008-2011; and
 - Being Asian-Pacific American was associated with lower business earnings in the California engineering industry in 1999 but that disparity diminished in the Relevant geographic market area.

APPENDIX I.

Description of Data Sources for Marketplace Analyses

APPENDIX I.

Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, BBC used data from a range of sources, including:

- U.S. Census Bureau Public Use Microdata Samples (PUMS) from the 1990 Census, the 2000 Census and the 2009-2011 three-year American Community Survey (ACS);
- The Federal Reserve Board's 1998 and 2003 Survey of Small Business Finances (SSBF);
- The 2007 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 quantitative marketplace analyses.

U.S. Census Bureau PUMS Data

Focusing on the construction, engineering and goods and services industries, BBC 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).

BBC 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, BBC used the 1990 and 2000 Census 5 percent samples and the 2009-2011 ACS 1 percent and 3 percent samples.

¹ Steven Ruggles, J. Trent Alexander, Katie Genadek, Ronald Goeken, Matthew B. Schroeder, and Matthew Sobek. *Integrated Public Use Microdata Series: Version 5.0* [Machine-readable database]. Minneapolis: University of Minnesota, 2011.

2000 Census and 2009-2011 ACS. The 2000 U.S. Census 5 percent sample contains 14,081,466 observations. When applying the Census person-level population weights, the sample represents 281,421,906 people in the United States. The 2000 relevant geographic market area (Imperial, Orange and San Diego counties) sub-sample contains 289,706 individual observations, weighted to represent 5,794,600 people.

BBC also examined 2009-2011 ACS data from IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long-form.² Since 2005, the ACS has expanded to a roughly 1 percent sample of the population, based on a random sample of housing units in every county in the U.S. (along with the District of Columbia and Puerto Rico). The 2009-2011 ACS three-year estimates represent the average characteristics over the three-year period of time.

For national calculations, BBC used a 1 percent ACS sample and for study area calculations BBC used the 3 percent ACS sample. Applying the person-level population weights to the 3,068,522 observations included in the data, the 2009-2011 ACS dataset represents 309,703,908 people in the U.S. For the relevant geographic market area, the 2009-2011 ACS dataset includes 186,202 observations representing 6,305,380 individuals. With the exception of a few minor differences, the variables available for the 2009-2011 ACS are the same as those available for the 2000 Census.

Categorizing individual race/ethnicity. To define race/ethnicity, BBC used the IPUMS race/ethnicity variables—RACED and HISPAN—to categorize individuals into one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- Black American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only—not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual’s race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. BBC 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 BBC’s ordering. Black American is first, followed by

² U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing 2009. Available at http://www.census.gov/acs/www/SBasics/desgn_meth.htm

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 Black 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.
- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani, and Sri Lankan. Individuals who identified themselves as “Asian,” but were not clearly categorized as Subcontinent Asian were placed in the Asian-Pacific American group.
- American Indian, Alaska Native, 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.”

The 2000 Census 5 percent sample and the 2009-2011 ACS PUMS data use essentially the same numerical categories for the detailed race variable (RACED). However, in both samples, any category representing fewer than 10,000 people was combined with another category. As a result, some PUMS race/ethnicity categories that occur in one sample may not exist in the other, which could lead to inconsistencies between the two samples once the detailed race/ethnicity categories are grouped according to the seven broader categories. That issue is likely to affect only a very small number of observations. PUMS race/ethnicity categories that were available in 2000 but not in 2009-2011 (or vice versa) represented a very small percentage of the 2000 and 2009-2011 populations. Categories for the Hispanic variable (HISPAN) remained consistent between the two datasets.

Education variables. BBC used the variable indicating respondents’ highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate’s degree, and bachelor’s degree or higher.³

Home ownership and home value. Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of

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.

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 2000 Census, home value is reported in intervals and the median is estimated using an inferential equation to account for the jump in observations between the values above and below the midpoint. In the 2009-2011 ACS home value is a continuous variable (rounded to the nearest \$1,000) and median estimation is straightforward.

Definition of workers. The universe for the class of worker, industry, and occupation variables includes workers 16 years of age or older who are “gainfully employed” and those who are unemployed but seeking work. “Gainfully employed” means that the worker reported an occupation as defined by the Census code OCC.

Business ownership. BBC used the Census detailed “class of worker” variable (CLASSWKD) to determine self-employment. The variable classifies individuals into one eight categories, shown in Figure I-1. BBC counted individuals who reported being self-employed—either for an incorporated or a non-incorporated business—as business owners.

Figure I-1.
Class of worker variable
code in the 2000 Census
and 2009-2011 ACS

Source:

BBC Research & Consulting from the
IPUMS program:
<http://usa.ipums.org/usa/>.

Description	2000 Census and 2009-2011 ACS CLASSWKRD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at non-profit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

Business earnings. BBC used the Census “business earnings” variable (INCBUS00) to analyze business income by race/ethnicity and gender. BBC included business owners aged 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on three study industries: construction, engineering-related services and goods and services related to transportation (specifically petroleum wholesalers, transit, and security services). BBC used the IND variable to identify individuals as working in those 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.
2000 Census industry codes used for construction and engineering-related services

Study industry	2000 Census IND codes	2009-2011 ACS IND codes	Description
Construction	77	770	Construction industry
Engineering-related services	729	7290	Architectural, engineering and related services
Goods and services:			
Petroleum wholesalers	449	4490	Petroleum and petroleum products, merchant wholesalers
Transit	618	6180	Bus service and urban transit
Security Services	768	7680	Investigation and security services

Source: BBC Research & Consulting from the IPUMS program: <http://usa.ipums.org/usa/>.

Industry occupations. BBC also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2000 Census and 2009-2011 ACS OCC codes used in the study team's analyses.

Figure I-3.
2000 Census and 2009-2011 ACS occupation codes used to examine workers in construction

Census 2000 and 2009-2011 ACS occupational title and code	Job description
Construction managers 2000 Code: 22 2009-11 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 2000 Code: 620 2009-11 Code: 6200	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, Blockmasons and Stonemasons 2000 Code: 622 2009-11 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.

Figure I-3 (continued).
2000 Census and 2009-2011 ACS occupation codes used to examine workers in construction

Census 2000 and 2009-2011 ACS occupational title and code	Job description
Carpenters 2000 Code: 623 2009-11 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 2000 Code: 624 2009-11 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 2000 Code: 625 2009-11 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 2000 Code: 626 2009-11 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 2000 Code: 630 2009-11 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.
Miscellaneous construction equipment operators, including pile-driver operators 2000 Code: 632 2009-11 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.

Figure I-3 (continued).
2000 Census and 2009-2011 ACS occupation codes used to examine workers in construction

Census 2000 and 2009-2011 ACS occupational title and code	Job description
Drywall installers, ceiling tile installers and tapers 2000 Code: 633 2009-11 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 2000 Code: 635 2009-11 Code: 6350, 6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems, or electrical control systems. Exclude "Security and Fire Alarm Systems Installers." The 2000 category includes electrician apprentices.
Glaziers 2000 Code: 636 2009-11 Code: 6360	Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings, and tabletops.
Painters, construction and maintenance 2000 Code: 642 2009-11 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 2000 Code: 644 2009-11 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 2000 Code: 646 2009-11 Code: 6460	Apply interior or exterior plaster, cement, stucco, or similar materials and set ornamental plaster.
Roofers 2000 Code: 651 2009-11 Code: 6510, 6515	Cover roofs of structures with shingles, slate, asphalt, aluminum, and wood. Spray roofs, sidings, and walls with material to bind, seal, insulate, or soundproof sections of structures
Iron and steel workers, including reinforcing iron and rebar workers 2000 Code: 653 2009-11 Code: 6530	<i>Iron and steel workers</i> raise, place, and unite iron or steel girders, columns, and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. <i>Reinforcing iron and rebar workers</i> position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches, and hand tools. Include rod busters.

Figure I-3 (continued).
2000 Census and 2009-2011 ACS occupation codes used to examine workers in construction

Census 2000 and 2009-2011 ACS occupational title and code	Job description
Helpers, construction trades 2000 Code: 660 2009-11 Code: 6600	All construction trades helpers not listed separately.
Driver/sales workers and truck drivers 2000 Code: 913 2009-11 Code: 9130	<i>Driver/sales workers</i> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <i>Truck drivers (heavy)</i> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock, or materials in liquid, loose, or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers' license. <i>Truck drivers (light)</i> drive a truck or van with a capacity of less than 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 2000 Code: 951 2009-11 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."
Dredge, excavating and loading machine operators 2000 Code: 952 2009-11 Code: 9520	<i>Dredge operators</i> operate dredge to remove sand, gravel, or other materials from lakes, rivers, or streams; and to excavate and maintain navigable channels in waterways. <i>Excavating and loading machine and dragline operators</i> Operate or tend machinery equipped with scoops, shovels, or buckets, to excavate and load loose materials. <i>Loading machine operators, underground mining,</i> Operate underground loading machine to load coal, ore, or rock into shuttle or mine car or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scraper or scoop, or machines equipped with gathering arms and conveyor.

Source: 2000 Census occupational titles and codes at <http://usa.ipums.org/usa/volii/00occup.shtml>, 1980, job descriptions from the Bureau of Labor Statistics www.bls.gov.

1990 Census data. BBC compared 2000 Census data (and 2009-2011 ACS data) with data for the 1990 Census to analyze changes in worker demographics, educational attainment, and business ownership over time. The 1990 Census five percent sample includes 12,501,046 observations weighted to represent 248,107,628 people. The sample includes 249,337 observations in the relevant geographic market area, weighted to represent 5,011,073 individuals. Several changes in variables and coding took place between the 1990 and 2000 Censuses.

Changes in race/ethnicity categories between censuses. Figure I-4 lists the seven BBC-defined racial/ethnic categories with the corresponding 1990 and 2000 Census race groups. Combinations of race types are available in the 2000 Census but not in the 1990 Census. The U.S. Census Bureau introduced categories in 2000 representing a combination of race types to allow individuals to select multiple races when responding to the questionnaire.

For example, an individual who is primarily white with Native American ancestry could choose the “white and American Indian/Alaska Native” race group in 2000. However, if the same individual received the 1990 Census questionnaire, she would need to choose a single race group—either “white” or “American Indian/Alaska Native.” Such a choice would ultimately depend on unknowable factors including how strongly the individual identifies with her Native American heritage.

In addition, data analysts do not have information about the proportions of individual ancestry in 2000 and can only know that a particular individual has mixed ancestry. The variability introduced by allowing multiple race selection complicates direct comparisons between Census years with respect to race/ethnicity. Despite those issues, 98 percent of survey respondents in 2000 indicated a single race.⁴

Changes in industry codes between Censuses. The Census definitions of some industries and sub-industries changed between 1990 and 2000. As a result, the 1990 codes for the industry variable (IND) were not the same as the 2000 IND codes in all cases. However, for the construction, engineering-related and goods and services industries, the 1990 codes corresponded directly to equivalent 2000 codes.

Geographic variables. For the analyses presented in the marketplace appendices, there were no substantial changes in geographic variables between then 1990 Census and 2000 Census. BBC used the same variable (COUNTY) available for 2000 Census data to identify the relevant geographic market area in the 1990 data.

Changes in educational variables between Censuses. The 1990 Census PUMS data included the same educational variable found in the 2000 Census data, although the directions for answering the questions used for each Census to capture educational attainment differed between the two surveys. The 1990 census form provided detailed directions on what types of degrees “counted” for specific responses in the detailed variable coding. Persons educated in un-graded or foreign schools were to estimate the American equivalent of their educational attainment. Vocational, trade, and business certificates were to be reported only if they were college-level degrees. The instructions specifically excluded barber and cosmetology schools and other training schools. Honorary degrees were not to be reported. The form for the 2000 census provided examples of degrees that counted but did not specify what types of training should not be reported.

⁴ Grieco, Elizabeth M. & Rachel C. Cassidy. “Overview of Race and Hispanic Origin,” *Census 2000 Brief*, March 2001, page 3.

Figure I-4.
BBC racial/ethnic categories compared with Census race and Hispanic Origin survey questions

BBC racial/ethnic categories	2000 Census	1990 Census
Black American	Hispanic origin: no Race: Black/Negro alone or in combination with any other non-Hispanic group	Hispanic origin: no Race: Black/Negro
Asian-Pacific American	Hispanic origin: no Race: Chinese, Taiwanese, Japanese, Filipino, Korean, Vietnamese, Cambodian, Hmong, Laotian, Thai, Indonesian, Malaysian, Samoan, Tongan, Polynesian, Pacific Islander, Guamanian/Chamorro, Micronesian, Melanesian, or other Asian, either alone or in combination with any non-Hispanic, non-Black, or non-Native American groups	Hispanic origin: no Race: Chinese, Japanese, Filipino, Korean, Vietnamese, Pacific Islander or other Asian
Subcontinent Asian American	Hispanic origin: no Race: Asian Indian, Bangladeshi, Pakistani or Sri Lankan, alone or in combination with white or other groups only	Hispanic origin: no Race: Asian Indian
Hispanic American	Hispanic origin: yes Race: any race groups, alone or in combination with other groups	Hispanic origin: yes Race: any
Native American	Hispanic origin: no Race: American Indian or Alaskan Native tribe or Native Hawaiian, identified alone or in combination with any non-Hispanic, non-Black group	Hispanic origin: no Race: American Indian/Alaska Native or Native Hawaiian
Other minority group	Hispanic origin: no Race: other race alone or in combination with white only	Hispanic origin: no Race: other race
Non-Hispanic white	Hispanic origin: no Race: white alone	Hispanic origin: no Race: white

Source: BBC Research & Consulting 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 SSBF, which the Federal Reserve Board conducted every five years between 1987 and 2003, collected financial data from non-governmental for-profit firms with fewer than 500 employees. The survey used 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. The 2003 SSBF is the most recent information available from the SSBF because the survey was

discontinued after that year. For the purposes of this report, BBC used the surveys from 1998 and 2003, which are available at the Federal Reserve Board website.⁵

Data for 1998. The 1998 SSBF includes information from 3,561 small businesses. The survey oversampled minority-owned businesses, allowing for a more precise analysis of how race and ethnicity may affect loan and financial outcomes.

Categorizing owner race/ethnicity and gender. Definition of racial and ethnic groups in the 1998 SSBF are slightly different than the classifications used in the U.S. Census Bureau PUMS data. In the SSBF, businesses are classified into the following five groups:

- Non-Hispanic white;
- Hispanic American;
- Black American;
- Asian American;
- Native American; and
- Other (unspecified).

A business was considered Hispanic American-owned if more than 50 percent of the business was owned by Hispanic Americans, regardless of race. All businesses that reported 50 percent or less Hispanic American ownership were included in the racial group that owned more than half of the company. No firms reported the race/ethnicity of their owners as being “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 1998 SSBF, each business was classified according to SIC code and placed into one of eight industry categories:

- Construction;
- Mining;
- Transportation, communications, and utilities;
- Finance, insurance, and real estate;
- Trade;
- Engineering;
- Agriculture, forestry, and fishing (no businesses responding to the 1998 SSBF fell into this category); or
- Other industries.

⁵ The Federal Reserve Board. *Survey of Small Business Finances, 1998* and *Survey of Small Business Finances, 2003*. Available online at <http://www.federalreserve.gov/pubs/>.

Region variables. The SSBF divides the United States into nine Census Divisions. Along with Alaska, Oregon, Hawaii and Washington, California resides in the Pacific Census Division (referred to in marketplace appendices as the Pacific region).

Loan denial variables. 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 for 2003. The 2003 SSBF differs from previous SSBFs in terms of the population surveyed, the variables available, and the data reporting methodology.

Population differences. Similar to the 1998 survey, the 2003 survey records data from businesses with 500 or fewer employees. The sample contains data from 4,240 firms, but in 2003, minority-owned firms were not oversampled. In the 1998 data, 7.3 percent of the survey firms were owned by Hispanic Americans, but that number dropped to 4 percent in the 2003 data. Representation in the sample also dropped for Black American-owned firms (7.7% to 2.8%) and Asian American-owned firms (5.7% to 4.2%). The smaller sample sizes for minority groups in the 2003 SSBF affects the ability to conduct analyses related to differences in loan application outcomes for specific race/ethnic groups.

Variable differences. 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 that is a weighted average of other answers provided for each question. In order to define race/ethnicity and gender variables consistently for the 1998 to 2003 surveys, BBC used the final weighted average for variables on owner characteristics. Firms were then divided into race, ethnicity, and gender groups according to the same guidelines used for the 1998 data.

Industry, region, and loan denial variables for the 2003 survey were defined by the study team using the same guidelines as the 1998 survey, with one exception—the 2003 survey did not include any firms in the agriculture, forestry, and fishing industry.

Data reporting. Due to missing responses to survey questions in both the 1998 and 2003 datasets, data were imputed to fill in missing values. For the 1998 SSBF data, missing values were imputed using a randomized regression model to estimate values based on responses to other questions in the survey. A single variable includes both reported and imputed values. A separate “shadow variable” can be used to identify where missing values have been imputed. However, the missing values in the 2003 data set were imputed using a different method than in previous studies. In the 1998 survey data, the number of observations in the data set matches the number of firms surveyed. However, the 2003 data include five implicates, each with imputed values that have been filled in using a randomized regression model.⁶ Thus, there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. Across the five implicates, all non-missing values are identical, whereas imputed values may differ. In both data

⁶ For a more detailed explanation of imputation methods, see the “Technical Codebook” for the *2003 Survey of Small Business Finances*.

sets, therefore, when a firm answered a survey question, the response was not altered. However, the method for filling in missing values differed between surveys.

As discussed in a recent paper about the 2003 imputations by the Finance and Economics Discussion Series, missing survey values can lead to biased estimates and inaccurate variances and confidence intervals.⁷ Those problems can be corrected through the use of multiple imputates. For summary statistics using 2003 SSBF data, BBC utilized all five imputates provided with the 2003 data. For probit regressions presented in Appendix G, the study team did not include observations with imputed values for the dependent variables and used only the first impute for the analysis.

Multiple imputates were not provided with the 1998 data, making the method of analysis used for the 2003 data inapplicable. To address that issue, the study team performed analyses in two different ways—first, only with observations whose data were not imputed, and second, with all observations. Differences in results were insignificant. For summary statistics using SSBF data, BBC included observations with missing values in the analyses. For probit regressions presented in Appendix G, the study team did not include observations with imputed values for the dependent variables.

Survey of Business Owners (SBO)

BBC used data from the 2007 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2007. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2007, almost 8 million firms were surveyed. BBC examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. BBC analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction and engineering-related services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as female-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by Black 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. BBC reported business receipts for the following racial/ethnic and gender groups:

⁷ Lieu N. Hazelwood, Traci L. Mach and John D. Wolken. *Alternative Methods of Unit Nonresponse Weight Adjustments: An Application from the 2003 Survey of Small Businesses*. Finance and Economics Discussion Series Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board. Washington, D.C., 2007.
<http://www.federalreserve.gov/pubs/feds/2007/200710/200710pap.pdf>

- Black Americans;
- Asian Americans;
- Hispanic Americans;
- American Indian and Alaska Native;
- Native Hawaiian or other Pacific Islander; and
- Women.

Home Mortgage Disclosure Act (HMDA) Data

BBC analyzed mortgage lending in the relevant geographic market area and in the nation using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions, and some mortgage companies receive. Those data include information about the location, dollar amount, and types of loans made, as well as race/ethnicity, income, and credit characteristics of loan applicants. Data are available for home purchase, home improvement, and refinance loans.

Financial institutions were required to report 2012 HMDA data if they had assets of more than \$41 million (\$35 million for 2006 and \$39 million for 2009), had a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, were located in an MSA (or originated five or more home purchase loans in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

BBC used those data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2006, 2009, and 2012. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J.

Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings

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Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings

Appendix J presents qualitative information that BBC collected from in-depth personal interviews and meetings that the study team conducted as part of the disparity study. Appendix J also includes qualitative information that BBC collected as part of the 2012 California Department of Transportation (Caltrans) disparity study. BBC only included information from the Caltrans study that is directly relevant to SANDAG, ICTC and NCTD contracting and to the agencies' relevant geographic market area.

Appendix J is presented in 10 parts:

- **A. Introduction and Background**, which describes with whom the study team met to collect the information summarized in Appendix J and how that information was collected. *(page 2)*
- **B. Background on the Transportation Contracting Industry in the Relevant Geographic Area**,¹ which summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of the economic downturn and business owners' experiences pursuing public and private sector work. *(page 3)*
- **C. Doing Business as a Prime Contractor or as a Subcontractor**, which summarizes information about the mix of businesses' prime contract and subcontract work and how they obtain that work. *(page 19)*
- **D. Keys to Business Success**, which summarizes information about certain barriers to doing business and keys to success, including access to financing, bonding, and insurance *(page 34)*
- **E. Potential Barriers to Doing Business with Public Agencies**, which presents information about potential barriers to doing work for public agencies, including SANDAG, ICTC and NCTD. *(page 42)*
- **F. Allegations of Unfair Treatment**, which presents information about experiences with unfair treatment including bid shopping, treatment during performance of work, and allegations of unfavorable work environments for minorities and women. *(page 65)*
- **G. Additional Information Regarding any Racial/ethnic- or Gender-based Discrimination**, which includes additional information concerning potential race- or gender-based discrimination. Topics include stereotypical attitudes about minorities and women and allegations of a "good ol' boy" network that adversely affects opportunities for MBE/WBEs. *(page 70)*
- **H. Insights Regarding Neutral Measures**, which presents information about business assistance programs, efforts to open contracting processes, and other steps to remove barriers to all businesses or small business. *(page 75)*

¹ For the purposes of the disparity study, the relevant geographic market area included San Diego County, Orange County, and Imperial County.

- **I. Insights Regarding Race- or Gender-based Measures**, which presents information about general comments about the Federal DBE Program and allegations of fraud concerning DBE certification. *(page 90)*
- **J. DBE and other Certification Processes**, which presents information about the DBE certification process. It also presents information about advantages and disadvantages that subcontractors experience because of their DBE or MBE/WBE/SBE certifications. In addition, Part J presents information about false reporting of DBE/MBE/WBE participation and falsifying good faith efforts. *(Page 96)*

A. Introduction and Background

The BBC study team conducted in-depth personal interviews, public hearings, and other meetings throughout 2013. During the interviews, hearings, and meetings, participants had the opportunity to discuss their experiences working in the local transportation contracting industry; experiences working with SANDAG, ICTC, NCTD and other public agencies; and perceptions of the Federal DBE Program.

In-depth personal interviews. The BBC study team conducted in-depth anecdotal interviews with 39 businesses and 2 trade association representatives in the relevant geographic area. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local transportation contracting industry; the Federal DBE Program; and the contracting and procurement policies, practices and procedures of SANDAG, ICTC and NCTD. BBC, Action Research, Keen Independent Research and PDA Consulting Group conducted all of the interviews.

Interviewees included individuals representing construction businesses, engineering businesses, and trade associations. The study team identified interview participants primarily from a random sample of businesses that was stratified by business type, location, and the race/ethnicity and gender of the business owner. The study team conducted most of the interviews with the owner, president, chief executive officer, or other officer of the business or association. Of the businesses that the study team interviewed, some work exclusively or primarily as prime contractors or as subcontractors, and some work as both. All of the businesses that the study team interviewed are located in the relevant geographic area. All interviewees are identified in Appendix J by random interviewee numbers (i.e., #1, #2, #3, etc.). Interviewees from the Caltrans disparity study are identified by the prefix "Caltrans."

Interviewees were often quite specific in their comments. As a result, in many cases, the study team has reported them in more general form to minimize the chance that readers could identify interviewees or other individuals or businesses that were mentioned in the interviews. The study team reports whether each interviewee represents a DBE-certified business and also reports the race/ethnicity and gender of the business owner.²

Information from public hearings. As part of the disparity study the study team conducted three public hearings within the relevant geographic market area:

- San Diego County (October 9, 2013;); and
- Imperial County (December 6, 2013 8:30am and 5:30pm)

² Note that "male" or "white" are sometimes not included as identifiers to simplify the written descriptions of business owners.

In addition to public hearings, the study team attended four Mid-Coast Corridor Transit Project meetings to encourage local businesses to submit written and verbal testimony. Written testimony comments are identified with the prefix “WT.” Public hearing comments are identified with the prefix “PH.”

Trade association meetings. As part of the 2013 SANDAG, ICTC and NCTD disparity study, the study team also participated in meetings with the Imperial Valley Economic Development Corporation (IVEDC) and the Black Contractors Association (BCA). Both the IVEDC meeting and the BCA meeting provided opportunities for participants to discuss their experiences working in the local transportation contracting industry; experiences working with SANDAG, ICTC, NCTD and other public agencies; and perceptions of the Federal DBE Program. Comments that participants made in those meetings appear throughout Appendix J and are identified by the prefixes “TA”.

Written testimony. The study team and SANDAG, ICTC and NCTD encouraged business owners and others to submit written comments and testimony throughout the study process. Those comments appear throughout Appendix J and are identified by the prefix “WT.”

B. Background on the Transportation Contracting Industry in the Relevant Geographic Area

Part B summarizes information related to:

- How businesses become established (*page 3*);
- Fluid employment size of businesses (*page 4*);
- Flexibility of businesses to perform different types and sizes of contracts in different parts of the state (*page 5*);
- Local effects of the economic downturn (*page 9*);
- Current economic conditions (*page 12*); and
- Business owners’ experiences pursuing public and private sector work (*page 13*).

How businesses become established. Most interviewees representing construction and engineering businesses reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Most firm owners worked in the industry before starting their own businesses. Examples include the following:

- The Black American owner of an MBE-certified security company said that he is was in the military until he was injured. After his discharge, he returned to school and trained as a forensic technician. He was employed by a Police Department until health problems made him unable to continue; he started working in the security field in 1989. [#9]
- The owner of a WBE-certified engineering firm stated that her company started as a result of her layoff from a large defense contracting company in San Diego. She stated that her department was not well understood within the defense contracting company and was just starting to bring in clientele when it was dissolved. She reported that rather than leave the two potential clients

without the technical solutions that they were seeking, she and the engineers within her department formed a new company. [#10]

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he started out working in a very large company, then left to go work for a smaller firm. He said, "I always wanted to be part of a structure where I had some say in the way that a [firm] was run, and have some ownership." So he started his own company in 2007 and the firm became active in 2008. [#12]
- The president of a non-certified Native American-owned engineering firm was previously a Surveyor's Tech at Caltrans. He said, "Me and another Caltrans employee quit and opened up [our firm], and that's the story." [#15]
- The Caucasian male owner of a construction firm said, "I immigrated to the United States in 1985 and I had a background in construction. I met some friends here that had some concepts and we together planned to start a company in 1987 but my partners bailed out, so I did it myself." [#20]
- The Caucasian partner in a DBE-certified engineering firm reported that the firm's three partners worked together at another engineering firm. He left that firm and was working as a consultant by himself and then the other two left and the three of them decided to start the business together. [#24]
- The Operations Administrator of a WMBE certified consulting firm, said, "I worked at San Diego Gas and Electric for nine years as a designer. So I designed gas, overhead and underground electric systems. During that time I also learned from working with other utilities their engineering and design standards so that gave me this background as opposed to a pretty overall background." [#30]
- The Caucasian woman owner of a WBE-certified trucking company said "a friend of mine told me about a lady who was looking for a dispatcher and I went to work for her about 5-6 years and learned the business. She was an elderly lady and she sold the business. I then went on to work with several other trucking companies, but they went out of business too...then my husband said now it's time to go into business for yourself." [#36]

One interviewee explained that perceived incentives for DVBEs was one factor that encouraged starting their business. As an example, the Caucasian male owner of a DVBE-certified construction company said that prior to starting the company, he was a federal employee and project manager doing environmental restoration. "Then, about 8 years ago, the Federal government recognized disabled vets as a set-aside, so I took my government contract expertise and started [the company] to help meet the...disabled vet goals," he said. [#14]

Fluid employment size of businesses. The study team asked business owners about the number of people that they employed and whether their employment size fluctuated.

A number of companies reported that they expand and contract their employment size depending on work opportunities, season, market conditions, or other factors. Examples of those comments include the following:

- The owner a certified Black American-owned construction firm said that his crews tend to range from 16 to 17 guys on the high end or three to four guys on the low end. He said that members of his crew are not full time but on an as-needed basis. [#1a]
- The owner of a majority-owned goods and services firm said that there are 25 employees who currently work at his company. He said that this number of employees has gone down as technology has improved. He said, “When I started this business, there was no automation. Now we have computers [and] we have CNC equipment. So at one point, doing less business than we are, we had over 30 employees. Now, with automation, we’re doing much more business with much less employees.” [#11]
- The male Caucasian owner of a DVBE-certified construction company said his firm no longer has any permanent employees aside from himself and his business partner. He said they cater to the demands of the job, employing anywhere from eight to 35 people. He said, “Once you finish the job, you don’t need to be around anymore. We don’t have any full-time employees.” [#32]

Some interviewees said that they had reduced permanent staff because of poor market conditions.

For example:

- The owner of a certified Native American-owned construction firm indicated that his firm used to have more employees, but he now works alone. [#4]
- The Senior Engineer for a non-certified minority-owned engineering firm said that business is down due to the economic recession and remains down, with the San Diego office being most severely affected. He said they had approximately 28 employees at the San Diego office in 2007 and currently have seven. [#5]
- The Black American owner of an MBE-certified security company said the company was started in 2005 and maintains an average of about 30 employees. He says that the number of employees has been lower since the recession. [#9]
- The female owner of an SLBE-certified environmental consulting company stated that her biggest business challenge is related to the fluctuations in the marketplace. She reported that her firm depends on the residential and commercial development industry; therefore, when the economy is slow, it is challenging to keep employees busy. She said, “[You have to] keep enough employees to get the work done, but you can’t have too many people so you have people sitting around on overhead.” [#13]
- The Operations Administrator of a WMBE-certified consulting firm said his firm now has about five employees, down from 12. [#30]
- The Caucasian project manager of a HUBZone-certified construction company said that the number of employees is currently about 40, but has been as high as 75. He said that the drop in number of employees was in response to market conditions. [#35]

Flexibility of businesses to perform different types and sizes of contracts in different parts of the state. Interviewees discussed types, locations, and sizes of contracts that their firms perform.

Many firm owners reported flexibility in the locations and sizes of contracts that their firms perform.

- Many firm owners reported working state-wide. [For example, #19a, #27, #33, #37]
- A few firm owners reported working in California and other states. [For example, #10, #20, CALTRANS #1 and #26]
- A number of firm owners reported working throughout Southern California [For example, #18, #24 #25, #30, #34, #36]

Examples of specific comments include the following:

- The general manager of a certified Black American-owned construction firm said that the firm has gone after work “as far up as Monterey, California.” He continued to say that the firm will do work in “Northern California or all of California.” [#1b]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that she and her department support the San Diego headquarters, and also outlying offices in North Carolina, Virginia, Maine, Texas and other locations. [#7a]
- The owner of a WBE-certified engineering firm stated that her firm’s primary office is in San Diego, and that the firm employs eight staff in San Diego and five in St. Louis, Missouri. She also said that the firm has business nationwide, as well as a project that was completed in Afghanistan. She stated that if her firm works outside of the United States, the work is always tied to a military application, because obtaining security clearances are difficult for a small company. [#10]
- The owner of a majority-owned goods and services firm said that when he is out in the field installing signs, his company is considered a contractor, but when his firm is making signs, his company is considered a manufacturer. The range for his business as a manufacturer differs greatly from his range as a contractor. He said, “We’ve manufactured and shipped signs to every state in the union. We do national work on that level. When we’re contractors...we’ve worked as far north as San Francisco, but that was for a customer willing to pay us to go there and work there. So it’s pretty much regional. Southern California.” [#11]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that the firm typically conducts business in San Diego, Orange County, with limited work in Northern California. [#16]
- The Operations Administrator of a WMBE-certified consulting firm said his firm works primarily in San Diego because “you can’t spend a lot of money chasing projects.” [#30]
- The Caucasian woman owner of a WBE-certified trucking company stated that the company typically seeks work in San Diego County. She also stated that the company has drivers that have insurance to service Riverside, Imperial and San Bernardino counties. She said that her “insurance

will only allow me to drive my trucks in San Diego County...that's why I'll use other independent trucks with the correct insurances for those areas...this doesn't happen very often." [#36]

Other companies said that they prefer to perform projects close to their businesses, but will travel to worksites when necessary. For example:

- The owner of a certified Native American-owned construction firm said that he will pursue work as far away as Riverside, California. He said that this is the farthest he will typically go for work. [#4]
- The female Caucasian owner of a WBE-certified construction company said that the company operates between San Diego and Los Angeles. [#8]
- The Black American owner of an MBE-certified security company said that he has plans to extend his search for business beyond San Diego County and into Orange County and Los Angeles to better his chances of winning contracts. He said, "San Diego gets really small." [#9]

Some firm owners indicated that their companies perform both small and large contracts. For example:

- The Asian American owner of a DBE-certified engineering company said that the size of his company's projects ranges from about \$20,000 (which is most typical) to more than \$1 million (for the airport project and a large project for the County Water Authority). [#3]
- The owner of a majority-owned goods and services firm said that his company will take contracts "from \$0.5 million on down." He said, "We take orders for \$300 if we need to." [#11]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that the size of their contracts range between \$20,000 and \$25,000 and can go up to \$100,000. He stated that they also have contracts as low as \$5,000. He went on to say that with the Port of Oakland army base, "total billings were well over \$1 million." [#12]
- The Caucasian male owner of a DVBE-certified construction company said that the size of contracts his company performs on range from about \$50,000 up to \$5 million with the majority between \$250,000 and \$1.5 million. [#14]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that the firm's contracts range from \$12,000 to \$250,000. [#16]
- The co-owner of a WBE-certified construction firm said that the firm tends to go after work "from \$5,000 to \$20,000 and up to \$40,000 contracts. We have done bidding up to \$1 million." [#18]
- The Caucasian woman owner of a WBE-certified trucking company stated that the range of the cost of contracts "can run from \$350 to over \$1 million." She added, "We can work on small contracts where a homeowner needs a truck to haul off materials on a renovation to big projects up to \$1 million...depending on what the job is requiring." [#36]

Some business owners noted that their financial resources affected how large of contracts on which they typically bid. For example:

- The owner of a certified Black American-owned construction firm said his firm hasn't bid on projects with SANDAG because their jobs are "major jobs" of "\$2-3 million." He said that these jobs are too large for his firm. [#1a]
- The owner of a certified Native American-owned construction firm said that he does not bid on projects as a prime contractor because his business does not have the capacity to do the work for these projects. He said, "They're just too big." [#4]
- The male Caucasian owner of a DVBE-certified construction company said, "We went into working on military bases as a subcontractor because those contracts were way too big. I can't bond \$40 or \$50 million jobs. It's just too much. So I became a subcontractor even though I have a general contractor and engineering contractor's license. I am a poor man. So I could not do those big jobs." [#32]

Other business owners reported that they typically only perform small contracts. For example:

- The owner of a certified Native American-owned construction firm said that he tends to go after any contract that he feels he is able to successfully complete. He said that he will pursue contracts from \$1,000 to \$20,000 in size. [#4]
- The female owner of an SLBE-certified environmental consulting company reported that her firm's contracts "range from a \$1,000 archaeology project to an environmental-impact report that is \$390,000." She reported that usually they are in the \$2,000 to \$30,000 range. "We usually don't have the million dollar contract," she said. [#13]

Some companies reported that they work in several different fields, or that they had changed primary lines of work over time. For example:

- The general manager of a certified Black American-owned construction firm said, "We're primarily earthwork, site demolition, and construction concrete contracting." He went on to say that this work is "mostly the same" from year to year, unless the firm works as a prime contractor. [#1b]
- The owner of a certified Native American-owned construction firm said that he is having trouble keeping some of his business in his traditional practice areas. Because of this, he has started expanding his work into other areas. He said, "I'm starting to turn into the manufacturing of concrete dyes and stains. The big companies take over all of my work, so it's time to move on." When asked if he will continue to try to work in his traditional practice areas, he said that he would likely continue for a while because he has a client base that he would still work for. [#4]
- The female Hispanic Operations Manager of a DBE-certified towing company says that, in addition to towing, the company does repairs on cars, motorcycles, and trucks. [#2]
- The Black American owner of a DBE-certified security company said the company provides security guards but also has a sideline installing and maintaining security equipment, which is currently about 5 percent of the business. [#9]

- The co-owner of a WBE-certified construction firm said, “We do general contracting, general construction, which covers almost everything. We do water and mold remediation. That’s been the big one we’re trying to get going but it’s very difficult. We also do build backs if there’s mold, fire, or water damage. We go from cleaning it all up to putting it back to normal.” He also reported that general construction has been struggling over the past five years. Water and mold remediation accounts for 100 percent of [our] work right now,” he said. [#18]

Local effects of the economic downturn. Interviewees expressed many comments about the economic downturn.

Most interviewees indicated that market conditions since 2008 have made it difficult to stay in business. Examples include:

- The general manager of a certified Black American-owned construction firm said that the struggling economy makes it tougher for prime contractors to stay afloat. He explained how this results in prime contractors being more willing to skimp on payments or change orders with subcontractors. The general manager said that this mentality is being taught to the students he goes to school with. He says that it is being taught this way “because they make more money doing that...because they can spend less time when they don’t have to worry about this change or that change.” He also said, “It’s less of a headache; they spend less time going to the owner asking for more money. The industry just teaches that.” The owner of the firm added, “[The prime contractors] don’t want to go to an owner of a project for a subcontractor to get more money...it’s not good for them to get on the next project.” [#1b]
- The owner of a certified Native American-owned construction firm said that when he started his business eight years ago, business was good. He said that due to the economic downturn, his work has become scarcer. He said, “We had a bunch of trucks, and now I’m just down to one. It’s just me.” [#4]
- The female Hispanic Operations Manager of a DBE-certified towing company says the company is struggling to compete, even though it dropped the price of some services by 50 percent when the company changed ownership. She said that potential customers call for services and, when prices are quoted, tell them “Oh no, I can’t afford that. I’ll go to [Tijuana] instead.” [#2]
- The owner of a majority-owned goods and services firm said that the economic downturn hit his industry very hard. He said, “Up until the economic downturn, you could grow as much as you could afford to grow. Very few businesses were unscathed through the process of the downturn. It’s been hard to see any real lasting trend of improvement. We’ve adapted...more successfully than some of our competitors and maybe not as successfully as others. For us it hasn’t been great, but it hasn’t been bad. The good news is that this year and part of last year, the private work is starting to come back. For us, the private work is going to give us the opportunity to grow.” [#11]
- The female owner of an environmental consulting company stated that the economic downturn of the past several years impacted her firm. She said, “For the past seven years people haven’t been moving forward with development projects so they weren’t doing [environmental impact reports].” [#13]

- The Caucasian male owner of a construction firm said, “Since we have innovative products we used to have more rapid growth than most companies but during the recession, we went down like everybody but I was able to keep the company alive by putting back my pension and not taking salaries. My son who is also a P.E. took a pay cut.” He continued, “Nobody in the government takes pay cuts. Nobody in government says no. The underlings get \$1, the supervisor gets \$2 and the politician gets \$1,000. On a scale of 1-3, it’s totally unfair. In the industry, at least 50 percent of subcontractors filed for bankruptcy.” [#20]
- When asked what size of contracts his firm generally pursues, the Operations Administrator of a WMBE-certified consulting firm said it has been a “struggle just to keep the doors open.” He added, “We wouldn’t touch anything for less than \$5,000 and that [was] just the basic service type thing. Our largest contract was close to \$1 million and that was for Liberty Station over in Point Larimer. ... That was years ago. So we’re starting to see a little bit of movement and we are moving forward but not nearly the way we should.” [#30]
- The Caucasian estimator at an SBE-certified construction company said that the company has been affected by the recession and is working on a much smaller profit margin than it formerly did: “If a crane breaks, we’re in trouble.” [#33]

Many business owners and managers said they have seen much more competition during the economic downturn. They reported that more competitors are going after a smaller number of contracts in specific fields, with substantial downward pressure on prices. Larger firms have been bidding on work that typically went to smaller firms. Both construction and engineering companies have been affected. One reported that due to San Diego’s close proximity to Mexico, some people cross the border for services. For example:

- The female Hispanic Operations Manager of a DBE-certified towing company said, “Because we’re so close to the border, a majority of the people just [say] ‘Oh, I’ll go to Mexico instead.’ So we deal with the poverty here in San Diego right now, and we’re competing against TJ.” [#2]
- The Asian American owner of a DBE-certified engineering company indicated that there is a lot of competition in the local engineering industry right now and not enough work to support it. He said, “There’s quite a bit of competition [and] not too many RFPs/RFQs that come out these days compared to, let’s say, three years ago.” [#3]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said the market over the past few years has been “miserable.” She said, “It’s been a really tough slog the last five years. Companies...at every level have been contracting as a result of the economy.” [#7a]
- The Black American owner of an MBE-certified security company said part of the slowdown in business for his company is due to the economy, but that “most of it is they found somebody who is way cheaper than you are who does it for almost free.” He gave the example of a competing company that employs immigrant workers who live on the job site and work for very low wages. [#9]

- The owner of a WBE-certified engineering firm stated that her company has grown substantially since it started: “We’ve tripled our revenue every year since we started. This year, we’ll probably flatten out.” She was unable to compare her company growth to others: “I don’t know a lot of companies that do what we do except for the big guys... it’s a tough competitive market.” She stated that due to budget cuts, some big players are competing against them for smaller contracts (i.e., \$300,000 to \$400,000 size). [#10]
- The co-owner of a WBE-certified construction firm said that the economy has been the biggest challenge for his business. He said, “The big companies are the ones getting the work and not the small guys.” He reported that big companies charge more. He explained, “For example, I can’t compete against a guy who shows up to a job in a Pinto and tools. Just like I can’t compete against a big company with 20, 30, 40 trucks. I might be able to give a lower price, but I don’t have the backing. We just try to provide a more personalized approach to our work.” [#18]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “There have been many changes in our market. Many more competitors are doing the same thing. Primes have started to do the same thing, they want to do all the work.” [CALTRANS #1]

According to interviewees, a few businesses may have survived because they were well-capitalized going into the economic downturn. For example:

- The president of a non-certified Native American-owned engineering firm said, “Some firms that weren’t financially set had to close their doors during this downturn. The last downturn we had, back in the early ‘90s, 40 companies who do what I do folded up and merged with other companies, or left the state and some entered into another profession altogether. That weeded out a lot and that’s what helped us to stay in business. We kept a skeletal staff with low overhead. That was the only way we survived.” [#15]
- When asked how his company survived the economic downturn, the vice president of a WBE-certified Hispanic construction company said, “We are using a lot of savings at this time. We are waiting for the large job that we just got, but it was postponed for budgeting situation with the federal government. We are at this time using savings and back-ups.” [#37]

A few business owners and managers said that their companies did not see a decline in work due to the economic downturn. For example:

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said, “For us, we’ve been fortunate in getting the work we have.” He reported that work in the private sector has picked up and his firm has been awarded a contract in Chula Vista for work on a power plant. He went on to explain that this work is with a private company and the work will continue for one year. He said that, for his firm, “the marketplace has been good...but I’m aware that some firms have been struggling.” [#12]
- The Caucasian partner in a DBE-certified engineering firm reported that the economy was bad in the past few years but the down economy helped his firm because they were small and they could do things that the large firms could not do. He said that his firm’s success during the recession was opposite of the industry because of the niche that they have. [#24]

- The manager of a publicly traded engineering firm reported that the firm didn't lose much work during the economic downturn and they are now growing again. They are hiring one to two people per month. [#26]
- The Caucasian woman owner of a WBE-certified trucking company stated that the economy has not had much of an impact on the growth of the company. She stated that "the economy is so up and down and we prepare for that. ... That's really not a problem. ... It's usually just me in the office and my drivers are out on the road." [#36]
- The Native American male owner of non-certified environmental consulting firm said, "Actually we have expanded throughout the [recession]. We started out – my partner and I and two employees – the day we started the company and before we knew it, within let's say about a year and half, we had 10. That was 2008 I recall, and now we are up to 20. We've been as high as 24 because sometimes we do work outside of San Diego and Imperial County. [#38]

Current economic conditions. Some business owners and managers said that economic conditions were improving. For example:

- The Black American owner of a DBE-certified construction firm said, "Things are really sluggish right now." He went on to say, "It's better than it was five years ago." The financial officer of the firm added, "It's better, but it would be nice if it were more consistent." [#1a]
- The owner of a certified Native American-owned construction firm said that the marketplace for his line of work is starting to recover from the effects of the economic downturn. He said, "It's getting better. It's healing itself now." He went on to say that "more work and more bids are happening. It'll never be like it was, but it's on its way. People who survived the downturn will survive." [#4]
- When asked what it takes to be successful in his industry given the current marketplace conditions, the owner of a majority-owned goods and services firm said, "I think that's a real fluid situation. Again, I think the people who succeed are the ones that can either find the niche or find the opportunities...and find the people who are willing to negotiate to get the kind of product you want to deliver." [#11]
- The female owner of an SLBE-certified environmental consulting company reported that development projects are on the rise. "Like right now, all of a sudden everybody has decided, 'Okay, I think the economy is looking up,' so everybody, boom, wants to do stuff right now," she said. "There are various city projects that are happening right now. That balancing act [staffing] is one of the big challenges." [#13]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said, "The economy is improving, so you're seeing more projects coming up for bid." [#16]
- The manager of a publicly traded engineering firm reported that the marketplace is slowly starting to change. Things are starting to come back and they're seeing a few more solicitations. [#26]

Other business owners and managers said that they have not yet seen an upswing in market conditions. For example:

- The female Hispanic Operations Manager of a DBE-certified towing company feels that the market for the towing business is tough “because people don’t have money.” [#2]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that even in the federal sector, which is usually more consistent, “the effects of the sequester and the dysfunctional Congress was pretty debilitating.” She said that the firm had planned its graduation from the 8(a) program to include about \$20 million worth of “direct-award” work to get them through the first year of not being an 8(a), “...and that was all frozen with the sequester.” She said the firm ended up with about \$2.5 million out of an anticipated \$20 million. [#7a]
- The owner of a WBE-certified construction company said that the market for striping services has been down for the past three or four years. [#8]
- The project development manager of a majority-owned asphalt firm said, “The marketplace right now is depressed and it has been for the last three or four years, basically because the residential and the commercial end of the market have pretty much died and so anybody who is in the business typically has to go out and try and do agency work in order to get work. [#27]
- The Caucasian female co-owner of an SBE-certified construction company said, “In 2013 [the firm] had no projects, so [the market] is pretty bad. We had work in 2012 and 2011—a couple of small projects—so the market has been tough.” She added that the market for their type of work is down because of the economy: “There just aren’t any new housing projects out there.” [#34]
- The vice president of a WBE-certified Hispanic construction company said, “Actually we started in a very bad time in construction, 2007, but the first year was about two, three hundred thousand a year, and then in the past several years it’s been five to six hundred thousand. In 2013 it was very slow, only two hundred thousand.” [#37]

Business owners’ experiences pursuing public and private sector work. Interviewees discussed differences between public and private sector work.

Most interviewees indicated that their firms conduct both public sector and private sector work. [For example, #1, #4, #5, #11, #13, #16, #17, #19, #20, #22, CALTRANS #1, #25, #26, #27, #30, #31, #35, #36]

A number of interviewees noted that the slowdown in private sector work resulted in more companies pursuing public sector work. For example:

- The owner of a majority-owned goods and services firm said that before the recession, his company worked mostly in the private sector. He said, “We did very little public work until four years ago. The public work for us coincided with the downturn in the economy.” [#11]
- The project development manager of a majority-owned asphalt firm said, “Private sector work is down some, and one of the biggest areas is agency work but it’s awfully tough to get right now just because of the number of bidders.” [#27]

- The Operations Administrator of a WMBE-certified consulting firm stated that his firm used to work half in the public sector and half in the private sector, but that now it is split about 95 percent public and 5 percent private. He said the change was caused by the economy. He said that land development dried up, but that it is warming up again. [#30]
- The Caucasian project manager of a HUBZone-certified construction company said that approximately 70 percent of the company's present mix of work is in the public sector. He said, "Private is pretty slow." [#35]

However, a few interviewees noted a slowdown in public sector work. For example:

- The vice president of IVEDC said about 70 percent of his association's members' work comes from the private sector. He said, "I think it [has] changed as a result of the recession. The public sector has less money now to do the projects. So there are projects proposed but they haven't been pulled for quite a few years. Like water and wastewater projects and other ... projects." He added that many businesses in the area have been lost or have had to downsize as a result of money in the public sector drying up. He said, "We are bringing huge private projects in and they've had to downsize to the point where they can't ramp back up to perform on these large projects that we bring to them. They don't have the manpower. They don't have the access to capital. Or materials for the project. It's been very difficult. They also don't have insurance and bonding capacity enough anymore to work on these large projects. When I say large projects, I mean \$500 million projects." [TA#2]
- The Caucasian woman owner of a WBE-certified trucking company stated there's been more of a trend for her business toward the private sector. [#36]

Some interviewees reported that they preferred private sector work over public sector work. Some of the comments indicated that performing private sector contracts was easier, more profitable, and more straightforward, and included less paperwork than performing public sector contracts. For example:

- The owner of a certified Native American-owned construction firm said that it is easier to get work in the private sector because there is a lot of paperwork involved in getting work in the public sector. He said, "There is a lot [of paperwork] on the [military] bases [and with] the government agencies. There is just so much you have to go through." [#4]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that there are differences working in the public and private sectors. She said, "The contracting process in the private sector is a little easier and deliverables are more straightforward and they don't pay you by the constant and volume, they pay by the value." She added that in the public sector, "they're unfortunately trained to write more and deliver less and you just have to deal with it." [#16]
- The president of a non-certified Native American-owned engineering firm said that he hasn't worked in the public sector for many years "by design." He reported that in the public sector, "there is the expectation that your firm has depth and furthermore the paperwork is enormous. You need to have one or two people just to handle the paperwork and in a downturn, a small firm has to let those people go." [#15]

- The vice president of a DBE-certified Black American engineering firm said that there is a substantial difference between working in the public sector and in the private sector. He said, “In the private sector you don’t have to respond to RFPs which is good because writing proposals in response to an RFP is very expensive and time consuming for a small firm.” He added, “In the private sector, the process is more direct and you usually have access to the decision makers. In the public sector you can’t get around RFPs because that is the agency process and then you have a long wait to get a project awarded.” [#19]
- The Caucasian male owner of a construction firm said, “I would prefer private sector but I fear that this country is going to go more and more like East Germany and do more and more centralized government.” He said that in the downturn, his company went to the private sector. He feels that as the economy gets stronger, more private work will become available and the public sector will be held back and only be able to focus on freeways. [#20]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “It is an easier process getting work in the private sector. There is less paperwork.” She later added, “The private work tends to be more difficult because of the different types of work. There are more things to consider with our type of business. The private sector is definitely more profitable.” [CALTRANS #1]
- The Hispanic owner of a DBE-certified engineering firm said, “Sometimes it is easier to earn work in the private sector than it is in the public sector due to the RFP process. It’s also easier to do the work in the private sector than in the public sector. In the public sector, you have to ‘dot all your i’s and cross all your t’s.’” He added that there are inspectors on both sides but that the public sector has a more detailed review process. The review process on private projects is not as stringent. [#25]
- The manager of a publicly traded engineering firm reported that it’s easier to attempt to get work with the private sector than the public, when it’s available. He said, “Private work is schedule driven once you’re under a contract. The public work has a lot of other factors. The schedule is usually third or fourth priority. There’s an environmental element, politics are involved, etc.” He later added, “Private work is typically far more profitable. Public agencies have a cap on time and materials.” [#26]
- The project development manager of a majority-owned asphalt firm said, “Private jobs are more profitable just because of the fact that we have customers that will call us all the time to do their work so it’s not really a bid situation. If it is a bid situation on private jobs they typically will get a little bit higher markup than a public works job. Public works jobs, because of their size, typically will get a much lower markup on it and in today’s market, because of the number of bidders. You got to bid them cheap in order to get them and because of that profitability tends to be a little bit lower, on a percentage-wise basis.” [#27]
- When asked about substantial differences between working in the private sector versus working in the public sector, the vice president of a DBE-certified consulting firm said, “You make more money in private sector. ... The public sector has all sorts of rules that don’t allow for efficiencies. So if we price things right on the private sector, you’re allowed to keep the money. In the public sector, it’s

things that are priced for the median. Because it's not based on performance, but the average – between the high and the low." [#31]

- The Caucasian estimator at an SBE-certified construction company said that an advantage he has found working with the private sector is that payment is faster. He said, "[There is] less red tape, because usually with the private sector you're dealing with the bank. With the public sector, if the county's broke that year, or the fiscal year budget [runs out], you don't get paid." [#33]

A few interviewees said that current market conditions are such that there are more bidders on government contracts and that competitors sometimes submit low-ball bids on public sector work.

For example:

- The owner of a majority-owned goods and services firm said that the industry follows multiple year cycles in which clients will first select the cheaper, lower quality contractors, and then a few years later, when that work begins to degrade quickly, the clients will then invest in more expensive, but more quality contractors. He said, "When there's 20 [companies showing up for a job walk], there's always one idiot, someone who will not know what they're doing and will make a mistake. The problem...is that the agencies and the general contractors...really don't care. If the number's low enough, they're going to give them the contract and see what happens. [After] being in business 35 years, I do see these cycles. What happens is that budgets really only restrict what [the client] can spend, so everyone's really optimistic that they're going to get something really good for what they spend, even though it's too good to be true in pricing." [#11]
- The Caucasian male owner of a construction firm said, "Some of the public works jobs I would never have tried to get if it wasn't so sparse with work. Too many bidders, too much humbug manipulation." He added that there is more profitability in the private sector than in the public sector. He said, "There's no profit margin on public projects because of the number of bidders...incompetent and stupid bidders who low bid the work so the big boys don't get the job and some Joe Blow gets and [expletive] it up." [#20]

Other interviewees preferred obtaining public sector contracts because they were more certain that they would be paid. Certainty of payment on public sector projects was a frequent comment among those business owners and managers. Examples of those comments include the following:

- The Asian American owner of a DBE-certified engineering company reported that a motivating factor of his company doing more work in the public sector was greater security. He said that in the private sector, "you never know whether you're going to get paid or not. The developer could disappear in the middle of the night, and you're left holding the bag." [#3]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he feels that there's a bigger risk working in the private sector versus the public sector. He says in the private sector "the risk of not getting paid is greater." [#12]
- The Vice President of Estimating of a non-certified construction company said that they find that public work has benefits, primarily that payment is quicker. [#17]

- The Caucasian partner in a DBE-certified engineering firm said, “With the private sector, you have to worry about if you’re going to get paid. With the public sector, you know you’re going to get paid but you have to deal with the politics.” [#24]

Only a few interviewees said that they preferred public sector work because it is more profitable. For example:

- The owner of a certified Native American-owned construction firm said that profitability is higher with work in the public sector. He said, “The government pays a lot more. They’re overpriced.” He went on to say, “The work’s the same. I don’t know why they have to charge more.” [#4]

One interviewee said that pursuing private sector work in addition to her public sector contracts was difficult because she was a union employer. The owner of a WBE-certified construction company said that approximately 10 percent of her company’s work is in the private sector. The primary reason is that she is a union employer and most private work in San Diego is non-union for her type of business [striping]. This makes it difficult for her to be the low bidder in the private sector: “So mostly I bid where there’s prevailing wage.” [#8]

Interviewees with experience in both the private and public sectors identified advantages and disadvantages of private sector and public sector work. Examples of those comments include the following:

- The Senior Engineer for a non-certified minority-owned engineering firm said that a primary difference between public and private sector work is “the paperwork.” He said, “The whole concept between what you’re doing and getting paid [for] is just philosophically different between the two. Typically with the public it’s going to be at a negotiated rate, for a capped, negotiated fee, and then the overhead and everything else is going to be scrutinized. So you will get the least of whatever element of all of that pertains. With the private, it’s a price and they don’t care whether it took you 10 hours or a thousand hours to accomplish whatever it is for the price.” [#5]
- The owner of a WBE-certified engineering firm reported that there are challenges associated with public bidding because “you have to know somebody inside.” She stated, “We would love to work with NCTD ... [but] we don’t have contacts in there.” She stated, “You have to be in front of procurement groups.” She stated that if you don’t have a relationship with an agency, “don’t bother. ... If you’re not in there and don’t know anybody, you’re not going to win. That’s how our industry works.” [#10]
- The owner of a majority-owned goods and services firm said that there are significant differences in bidding on public projects versus private projects. He said, “In the private sector, they can decide that they want to use you, and they can figure out a way to negotiate the contract. In the public sector, if you aren’t the low bid, you don’t get the work. It’s a flawed process, but it’s how they do it.” [#11]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said, “In the private sector...in our industry...you talk about the private sector you are mainly working for governmental agency or contractors who work for governmental agencies like Boeing and Lockheed Martin who have contracts with governmental agencies.” He reported that he has not

seen much difference between the public and private sectors, “other than getting paid.” He believes that the profitability is about the same in both sectors. [#12]

- The female owner of an SLBE-certified environmental consulting company reported that there are differences between conducting business in the private and public sectors. She said, “On a lot of the private projects there isn’t any bureaucracy, you know, we have clients we have worked with for years. They call and say, ‘Do a proposal,’ we say, ‘Okay.’ Public projects take a lot of time and effort to get through the system. The proposal process takes a lot longer, the contract takes a lot longer, and getting paid takes a lot longer.” [#13]
- The Caucasian male owner of a DVBE-certified construction company said, “I would say that, contractually [i.e., the level of complexity of contracts], it is much more difficult in the public sector than it is in the private sector.” He gave the example of a potential job posted by the Department of Fish and Wildlife to replace a small section of fence, which included a 65-page RFP for a job that would be completed in one or two days. He later added that public works projects are more timely in their payments compared to the private sector due to the laws set up to protect small businesses. [#14]
- The president of a non-certified Native American-owned engineering firm said, “In the private sector, clients come looking for us. And in the public sector, it’s the other way around.” He later added that the biggest difference he has experienced between doing business in the public and private sector are the procedures. He said, “Agencies typically hire these large firms to write the bidding procedures for these large projects that make it difficult for smaller firms to actually bid the job. That’s by design.” He commented that in the private sector bidding is much simpler and to the point. [#15]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm reported that her experience doing work in the public sector is based upon a firm first getting a contract and having all the insurances and other requirements in place. In her opinion, it is a “scheduling issue and once you have that, it’s just going by the deliverables and of course, it depends on the scope of work.” She continued saying that in the private sector, “it’s much faster and you need to work often and it’s much faster. I like that. It’s more vibrant.” [#16]
- The co-owner of a WBE-certified construction firm said, “In the public sector, there is a larger quantity of work, but the pay is less so you tend to make it up because of you’re doing more work.” He later added, “It is easier to get work in the private sector because the amounts are not as large and you may only be bidding against one or two other firms. In the public sector you may be bidding against 30 other firms.” [#18]
- The vice president of a DBE-certified Black American engineering firm said that it is easier getting work in the private sector because it is less bureaucracy than the public sector. He also stated that in the public sector there is a larger pool of businesses competing for the work. [#19]
- The vice president of a DBE-certified Black American engineering firm said, “On the private side, we’ll get a phone call requesting that we submit a bid and if the price is right we can start work immediately.” The president of the firm added, “For example, we have a private company we’ve worked for a long time. Someone in the firm was asked to get three bids from companies to provide

some environmental services. The supervisor got wind of this and told the person, ‘Just contact [interviewee]. They know our business and I’m comfortable with the work they do.’ That happens frequently in the private sector.” The vice president of the firm said, “In the public sector, it’s all about relationships and the bureaucracy makes it difficult for small firms. The process for contracting is more cumbersome and you really need to know the project managers. In these cases, the engineer will kick you off the job if your rates get in the way of his objective, his bonus. It seems to me that the engineers tend to work more with white women-owned firms and they are making a large share of the diversity dollars.” [19a and 19b]

- The Caucasian partner in a DBE-certified engineering firm said, “Trying to get work on the public side lately has been difficult. I complained to the City of Brawly Council because we put in a proposal with the same scope as our competitor and were considerably cheaper and they selected the other firm. I complained to the Council and now they’ve cut us off completely.” He also reported that there are a lot of good things about working for the public sector. He said, “But, regardless if you are the best engineer and you are the cheapest, if they don’t like you, they’re going to go to the next person. That’s the bad part.” [#24]
- When asked about any key differences between working in the private sector and public sector, the vice president of IVEDC said, “The prevailing wage is always something that hinders a lot of our local folks. We’ve had a lot of occurrences where public sector has gone to states like Arizona and hired contractors that don’t have prevailing wage requirements, and that has negatively impacted our local contractors and subs. They can’t even perform on the job because they are hiring Arizona companies to come in and do them.” [TA#2]
- The Native American male owner of non-certified environmental consulting firm said, “The agencies sort of unanimously don’t really care about the subs, they really kick their subs around, they don’t listen to them. So the agencies can be quite difficult to deal with, and that’s more on a personal level; you can get a fantastic planner to work with and everything goes great or you get some planner who doesn’t know anything, or who is new, or is lazy and they will do nothing for you and it ends up costing everybody more time and money. Public varies and the positions change so often that it can be really hit or miss if you are going to get someone great or not.” [#38]

C. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Mix of prime contract and subcontract work (*page 20*);
- Prime contractors’ decisions to subcontract work (*page 22*);
- Subcontractors’ preferences to do business with certain prime contractors and avoid others (*page 28*); and
- Subcontractors’ methods for obtaining work from prime contractors (*page 31*).

Mix of prime contract and subcontract work. Many firms that the study team interviewed reported that they work as both prime contractors and as subcontractors.

- The general manager of a certified Black American-owned construction firm said that the firm works both as a subcontractor and a prime contractor. He said, “We recently got done...working with [a specific public agency] earlier this year.” He said that this contract “was a prime contract.” He continued to describe the firm’s prime work and briefly described a project that “had some site demolition work” that “was prime work as well.” [#1b]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that the firm works as both a prime contractor and a subcontractor: “We’re one of the go-to subs for a lot of the big firms here...but equally, just about equivalent dollar-to-dollar, we have also primed ... to those large companies.” [#7a]
- The owner of a majority-owned goods and services firm said that his company is generally a subcontractor in the public sector, but that in the past, his company would be the prime on public projects. He said, “I would say that about 80 percent of our contracts in the public sector currently are sub [contracts]. I would say, two years ago, 80 percent of our contracts in the public sector were prime [contracts].” [#11]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that the firm works both as a subcontractor and a prime contractor. She said, “Last year I had a \$50,000 contract with [a specific public agency] and they’re renewing that contract again this year. There, I’m a prime.” She added, “For the City of San Diego I’m ‘small fish’ so I have to be a sub.” [#16]
- The president of a DBE-certified Black American engineering firm said, “We work as a prime always in the private sector and we always work as a sub in the public sector.” [#19a]
- The manager of an SBE-certified consulting firm said his firm has been the prime contractor on private sector projects, “but not so much on public works [projects].” He added that he does not think his firm has been the prime contractor on other public works projects and that they are usually subcontractors. [#22]

Some firms reported that they primarily work as subcontractors because doing so fits the types of work that they typically perform. For example:

- The owner of a WBE-certified construction company said that due to the nature of their work, her company is always a subcontractor. [#8]
- The owner of a majority-owned street sweeping firm said he is a subcontractor 100 percent of the time and would never be a prime on a project. [#28]
- When asked why her firm typically performs work as a subcontractor, the Caucasian female owner of a WBE/SBE/DBE-certified company answered, “Due to the nature of the work and jobs, we normally work as a paving subcontractor.” [CALTRANS #1]

Some business owners and managers said that they mostly work as subcontractors because they cannot bid on the size and scope of the entire project, or find it difficult to compete with larger firms for those prime contracts. Examples of comments included:

- The owner of a WBE-certified engineering firm reported that performing as a prime contractor is difficult with state and local agencies because they require performance bonds. She stated that bonds are hard to get, because bonds requirements are stringent and her firm does not qualify (i.e., they do not have enough assets). [#10]
- The female owner of an SLBE-certified environmental consulting company reported that most of the public sector work her firm completes is as a subcontractor to a prime contractor. She said, “It works out okay for us because we don’t have to spend a bazillion hours doing the proposal. Usually the public sector projects [the agency] asks for a lot of stuff. When we are the prime [it] takes a lot of time. In that [way] we are disadvantaged. We subcontract to a lot of primes so we are okay with that.” [#13]
- The president of a DBE-certified Black American engineering firm said, “I have found that agencies bundle their projects so that they are so large small businesses don’t have the capabilities to prime these projects. A recent project we proposed on with the Port of Los Angeles...Some of the small businesses complained that the scope was too large so [Port of Los Angeles] went back and broke the project down into smaller scopes and encouraged small businesses to propose, but the scopes were still too large and the end effect was that very few, if any, small businesses were short listed for the project.” [#19a]
- The manager of an SBE-certified consulting firm said that his firm has not been a prime contractor on any contracts with SBE or DBE goals. He said, “We’re kind of deciding that unless we team up with other companies – and they can either be other small companies or a large prime or combination or both – bidding as ourselves alone on contracts ... is pretty difficult.” He added, “There’s too much competition and we just don’t have the capabilities or experience, especially on public works type projects, to win contracts based on our qualifications and our experience. We pretty much recognize the fact that we need to team with prime contractors, we need to team with other small businesses that have experience, and that makes us stronger and more credible on these bids.” [#22]
- The male Caucasian owner of a DVBE-certified construction company said, “We went into working on military bases as a subcontractor because those contracts were way too big. I can’t bond \$40 or \$50 million jobs. It’s just too much. So I became a subcontractor even though I have a general contractor and engineering contractor’s license. I am a poor man. So I could not do those big jobs.” [#32]

Some business owners and managers said that they mostly work as prime contractors. Examples of those comments include the following:

- The Senior Engineer for a non-certified minority-owned engineering firm said that they are the prime contractor approximately 70 percent of the time. [#5]

- The Caucasian male owner of a DVBE-certified construction company said that approximately 70 percent of his firm's work is as a prime contractor. He also reported that the experience is not greatly different between being a prime contractor versus a subcontractor. The major difference is that as a prime contractor, the firm has to be "very robust" in terms of cost accounting, insurance and other aspects of the contract. [#14]
- The manager of a publicly traded engineering firm reported that his firm primes 75 to 80 percent of their work. They don't often go after subconsulting work. [#26]

A few business owners said that their work is fairly evenly split between prime contracts and subcontracts. Comments about those experiences included the following:

- The general manager of a certified Black American-owned construction firm said that last year the firm's work was split about 50/50 between prime and sub contracts. [#1b]
- The owner of a WBE-certified engineering firm reported that her firm works as the prime contractor about 50 percent of the time. [#10]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that the firm's work is about 50/50 as a subconsultant and a prime consultant. He said that he prefers to work as a prime because "I like to deal directly with the client." He went on to say that he doesn't like having a "filter" between him and the client. [#12]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that last year, the firm's work was split about 50/50 between prime and sub contracts. [#16]
- The vice president of a DBE-certified consulting firm described his firm's work as split evenly between being a prime contractor and a subcontractor. [#31]
- The Caucasian project manager of a HUBZone-certified construction company said that the company does a mix of prime- and sub-contracting. Currently, the mix is about half of each type of work. [#35]

Prime contractors' decisions to subcontract work. The study team asked business owners whether and how they subcontract out work when they are the prime contractor.

Some prime contractors say that they usually perform all of the work or subcontract very little of a project. For example:

- The general manager of a certified Black American-owned construction firm said, "We do a lot of our work ourselves. For instance, we built a house and we self-performed the framing. So not only did we do the concrete, we did the framing, we did the drywall. So as of now we don't really reach out to anyone." [#1b]
- The owner of a WBE-certified engineering firm reported that when they are the prime contractor on a project they do not use subcontractors. [#10]

- The co-owner of a WBE-certified construction firm stated that he and his wife don't really sub any work out. He said they are really dedicated to their employees and conduct cross training with the existing employees. He added that at times, it may be required to sub out specific tasks on an as-needed basis, and on "very specific scopes of work, but it's not that often." [#18]
- The manager of a publicly traded engineering firm said, "As a prime, we don't typically like to give away core work that we would do. So, we look for specialties that we have relationships with or we know we can find." In reference to one project in particular, he said, "We could have done the whole thing but we have to look at it and see what we can break out. We took the architectural standards and found a DBE architect for it. Sometimes you have to get pretty creative. [#26]

Many interviewees from companies that use subcontractors indicated that they use the firms with which they have an existing relationship. Both majority-owned and MBE/WBE firms that use subcontractors made such comments. Examples of these comments include:

- The Senior Engineer for a non-certified minority-owned engineering firm said that there are several ways that they find subcontractors to work with. He said, "This is not that big a town, so you kind of are bumping into people ... those people that function in that Public Works world—we all kind of run into each other [at association events]." [#5]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said, "Our commitment to our customers is to provide the best service that we can, and it turns out that some of the best service providers are...very talented small companies. So we've maintained kind of a preferred subcontractor list of firms that have a history of providing superior performance, and then augmenting it is the City's own list ... which is available online." [#7a]
- The owner of a majority-owned goods and services firm said that there aren't necessarily any subcontractors that he won't work with. He said, "I guess because we ultimately have a choice of who we hire and who we don't hire, you could say there are subs we don't work with. It's not because we don't like them. It's because we chose not to work [with] them because...we have a better relationship or better price." [#11]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he usually solicits work from firms that he's worked with in the past as subconsultants. [#12]
- In regards to selecting subcontracts, the president of a non-certified Native American-owned engineering firm said, "I have a list of folks in different categories and disciplines who I've already worked with and depending on the project I select the best person or firm to complete the project." He later added, "There are a group of subs that I usually work with, when applicable. It's more job-driven because every project has its own personality and demands and you have to pick the right team for each project." [#15]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that the firm does sub out work in projects that may require drafting or an electrical engineer for example. In those instances, she will hire independent contractors that she considers "trusted friends." [#16]

- The co-owner of a WBE-certified construction firm said that are a few subs that he will consistently use, when needed. He said, “There’s a plumber in San Diego, a local electrician, and a local HVAC sub that I like to work with. I prefer to work with small businesses, a DBE or someone like that, because I’m a small business and I know how hard it is out here.” [#18]
- The President of a DBE-certified Black American engineering firm said that they select subcontractors based upon previous relationships. [#19a]
- The Caucasian project manager of a HUBZone-certified construction company said that most of their subcontractors simply send a quote on bid day. He said, “We have repeat subcontractors that we’ve worked with and, typically, if we’re bidding work, they’ll bid to us.” [#35]

Some interviewees said there were subcontractors they would not work with. For example:

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that the company has sometimes had firms that it no longer likes to work with: “People who don’t provide the quality or don’t meet the deadlines, or can’t manage a budget.” [#7a]
- The president of a non-certified Native American-owned engineering firm reported that there are some subs that he will not work with. He said, “The reason has to do with time and quality of the firm. They’re late or their work is not up to par. You learn who those people are by word of mouth or from an employee who used to work for these firms.” [#15]
- The manager of a publicly traded engineering firm reported that there are some subs they wouldn’t use again but said that it’s performance related or business practice related and it doesn’t have anything to do with their certifications. [#26]
- The vice president of a DBE-certified consulting firm said there are some subcontractors he will not work with. He said, “That’s personality-based, basically.” [#31]
- The Caucasian superintendent of a HUBZone-certified construction company said that there are some subcontractors that the firm will not work with anymore, due to business management issues. [#35]
- The Caucasian woman owner of a WBE-certified trucking company stated that there are subcontractors she will not work with. Not mentioning any company names, she stated “I will not work with anybody who solicits my contractor, anybody who won’t represent me well on the job, anybody who refuses to do my paperwork properly...I don’t like people who are dishonest. ... There are some truck drivers who are really heavy on the gas pedal...I don’t want to work with anyone who will endanger themselves or others...or if a contractor says I don’t want that S.O.B. back at my job,...these are the folks I won’t do business with.” [#36]
- When asked if there are subcontractors that his company won’t work with, the vice president of a WBE-certified Hispanic construction company said, “Yes. I have to give you an example to clarify what I mean. I asked a subcontractor....striping parking lot. I sent a letter that that when you come you have to wear work boots, long pants, no tank tops, and safety goggles, and they came with flips, shorts, and a tank top. That was the last time I was going to hire them because obviously I can’t

imagine OSHA comes there and sees a person with tank top and having the spray in her face without any goggles, it's not a matter of my choice, it's a law, and I'm going to be fined \$25,000, so as a result they are going to be not called again." [#37]

Some interviewees described similarities and differences between considering DBEs and considering other firms as subcontractors. Examples of those comments include:

- The general manager of a certified Black American-owned construction firm said that for the most part, he hasn't experienced much of a difference bidding or working for minority- or women-owned businesses as compared to majority-owned businesses. He did say that in his difficulties with change orders on contracts have been less pronounced with the minority and women-owned businesses. The financial officer for the firm said that the women owned businesses "recognized the fact that it was extra work and didn't try to say, 'This is included in your contract.'" The general manager explained that one of these women-owned businesses "worked as a subcontractor for the contractor that we had problems with, and they... hated working with them." [#1b]
- The owner of a majority-owned goods and services firm said that his company very rarely has goals on contracts. He said that in the past four years, his company has had goals three times. When asked if working with DBE subcontractors is different than working with other subcontractors, he said, "Yes. The truth is, they don't know what they're doing. Especially disabled veterans. I won't say they're all that way, but the ones that we've worked with, they're in this business because they know that they're supposed to get the work, not because they're good at it, [and] not because they're really good at running a business." When asked to provide an example, he said, "We hired a painter that was a DVBE, and at the end of the day we ended up finding employees for him to use...that he could employ to get it done. He did not have access to the employees with the skill sets to get the work done." [#11]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he usually solicits work from firms that he's worked with in the past as subconsultants. He said, "I really enjoy working with small businesses, for two reasons. ... One is ... I know that small businesses are basically a reflection of what I do. ... We put our heart and soul into [work] and what we have to offer is our name and we want to preserve that. So, if can find a small business that can do [work] for a reasonable price, and do a good job, which usually all three happens, then I will choose the small business every time." He stated that the larger the company he feels the less responsive they are as a sub. He said, "They act like they are doing you a favor for giving them the work." He later added, "I've had better luck working for other small businesses than I've had with larger businesses I've worked with...who will go un-named here...sometimes with large firms it takes six months before I get paid." He went on to say that "Small businesses on the other hand...that I've worked with...will try to pay you sometimes before they get paid." He also said, "I try to do the same thing unless it's a very big...invoice." [#12]
- The president of a non-certified Native American-owned engineering firm reported that he does not specifically solicit from DBE/MBE/WBE subs for bids or quotes. "I work with a few DVBEs, but it's because they do good work. I'll make a firm part of my team because they are capable to do the work. It makes no difference to me if a firm is DBE. It's not a qualifying factor and my projects don't have goals so there's no need to specify," he said. [#16]

- The Vice President of Estimating of a non-certified construction company said that the firm's only major complaint working with DBEs is that inexperienced small businesses may get into trouble with their estimates, particularly when they are bidding for the first time. He said they have had the experience of hiring a small company, only to have them not be able to meet requirements. [#17]
- The vice president of a DBE-certified Black American engineering firm stated that there really is not much difference in working with DBE/WBE/MBE firms and other firms. He said, "In most cases, the experience is the same and the quality of work is there. We prefer to work with DBE/MBE/WBE. We want to help these firms if we can. [#19b]
- The manager of a publicly traded engineering firm reported that there is no difference between DBE and non-DBE subs. However, he mentioned that they've had issues where people have dropped their certification. He said, "We're required to report that on public projects. On rare occasions we have subs tell us they have a certain certification and they don't. [#26]
- The project development manager of a majority-owned asphalt firm said, "Most of the time [DBEs] work out fine. I have had occasions where it has been an absolute nightmare. I had a subcontractor that I listed as a DVBE on a Caltrans project and bottom line he couldn't perform so he hired somebody else to come do the job and so we got in a hassle with Caltrans on having an unlisted subcontractor on the job. It turned into an absolute nightmare." [#27]
- The vice president of IVEDC said, "I have heard in the past that, you know, when there is a requirement to have minority-owned business on the job, that minority-owned businesses tend to not do such a thorough job on the project because they feel they have a right to be there and there's nothing you can do about getting rid of them. They don't necessarily need to perform well because they are just there helping you fulfill their DBE requirement." He added, "I just heard that from a couple of folks so I don't know how real that is. I mean, I've never experienced it firsthand myself. But yeah, if that perception is out there, I'm sure that would discourage usage of those folks, unfortunately." [TA#2]
- The Caucasian project manager of a HUBZone-certified construction company said that many of the certified MBEs and other disadvantaged businesses they solicit as subcontractors do not have the cash or bonding capacity necessary for the job: "They are not a qualified contractor, but they got a certification...and they think that's all they need." He added, "Usually when we get someone that's a certified DBE or some type of minority, we have to give them the extra care to bring them up to speed in how you actually do business." [#35]

Some business owners indicated that they based selection of subcontractors on low bid or on qualities that gave a team the best opportunity to win a contract. For example:

- The vice president of estimating of a non-certified construction company said that the overall process they use when locating a subcontractor is to go with the lowest bidder. [#17]

Some owners and managers of MBE/WBE/DBE prime contractors said they seek out other MBE/WBE/DBE firms or small businesses as subcontractors on their projects. For example:

- The Senior Engineer for a non-certified minority-owned engineering firm said that their own solicitation of DBEs and MBEs has been primarily for SANDAG contracts and RFPs. [#5]
- The Marketing/Proposal Coordinator for an MBE-certified engineering firm said they actively solicit bids from DBEs, MBEs, and WBEs when they are acting as the prime contractor, especially for contracts with the City of San Diego. “They have the Small Local Business Enterprise (SLBE) and the Emerging Local Business Enterprise (ELBE) programs, so we reach out to a lot of firms that are on their list.” He said, “We started out [as a DBE], so we kind of like to give back to smaller companies that are in the same boat that we were a few years ago.” He added that the firm has a large list of subcontractors they go to for particular skills and specialties, and many of them are WBEs, SLBEs, or companies with other types of certifications. He said, “It’s not just the requirements of the contract, we use them for other things, too.” [#7b]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm explained that in his experience, most of the small businesses he works with have been MBE, WBE, or DBE. He stated that it just tends to happen that way. [#12]
- The Caucasian male owner of a DVBE-certified construction company said that his firm does solicit bids from DBEs, although his primary focus is on other DVBEs. He feels that since they are benefitting from the set-asides for DVBEs that they should pass it along. Internally, he aims for about 40 percent of subcontractors to be DVBEs. He said, “The reality is, these set-aside programs, however well-intended, only help out one person—that’s us, the owner. It’s all based off of 51 percent ownership of the firm.” [#14]
- The president of a DBE-certified Black American engineering firm said, “I really like utilizing other women-owned and minority firms to work with because it’s all about creating synergy so that at one point we can team together up to go after bigger projects that can benefit all parties involved.” [#19a]
- The vice president of a DBE-certified consulting firm said that his firm selects DBEs for bids or quotes on a regular basis, not just to fulfill DBE goals on projects. He said, “We [have] a lot of good friends in the community that are small businesses. We can keep working with them because we know each other. Some of the subs practicing now, we’ve worked with them for 10 or 15 years.” [#31]

Most interviewees whose firms work as subcontractors reported that they rarely hire second-tier subcontractors. Most interviewees said that they never or rarely hire second-tier subcontractors when their firm is working as a subcontractor. Comments about using second-tier subcontractors included the following:

- The owner of a certified Native American-owned construction firm indicated that he does not ever hire subcontractors himself. He said, “I take care of all saw cutting and demolition [myself].” [#4]
- The president of a DBE-certified Black American engineering firm stated that they have rarely used lower tier subs when they are a sub. [#19a]

- The Caucasian male owner of a construction firm said, “I barely ever hire subcontractors. On occasion I’ll hire an owner operator as a scrapper but not that often.” [#20]
- The Caucasian partner in a DBE-certified engineering firm reported that he rarely hires second tier subs but does do it on occasion. [#24]
- The Hispanic owner of a DBE-certified engineering firm reported that when his firm works as a subconsultant, they do not hire second tier subs. [#25]
- The manager of a publicly traded engineering firm reported that his firm would rarely hire a second-tier sub. If they are hired as a subconsultant, it’s usually to fill a very specific role. [#26]

Subcontractors’ preferences to do business with certain prime contractors and avoid others. Owners and managers of firms that sometimes work as subcontractors indicated that they preferred to work with certain prime contractors and will avoid other prime contractors.

Interviewees frequently mentioned speed and reliability of payment as reasons to prefer certain prime contractors and avoid others. Examples of those comments include:

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said they prefer to work with prime contractors that pay in a timely manner. “It’s no fun having to go shake down your prime contractor for invoices that are 90 days outstanding or more.” She said the firm also appreciates prime contractors that honor their work-share agreements.” [#7a]
- The owner of a WBE-certified construction company said, “There are some contractors that are better—plan their work out better.” She said, “For me to make money the way we bid, it’s so much a foot for a stripe. If they chop the job up...I can’t make any money.” She also said that there are some primes that she will not work with again due to failure to pay. [#8]
- The Caucasian male owner of a construction firm stated there are primes that he likes working with, “primes who are big competent developers and the chemistry is right.” He also said that there are primes he will not work with because of incompetence and arrogance. He reported that there are some primes that have poor business ethics. He explained, “Some incompetent generals will tell you to cut the street. After you do it, they will say, ‘I never told you to do this,’ and then they won’t pay your change order.” [#20]
- The vice president of a DBE-certified consulting firm said there are prime contractors he prefers not to work with because of payment issues. He said, “We have some primes that didn’t pay as per the work, so we have to go shake them down. As long as they pay us, we will work with them again.” [#31]

In addition to prompt payment for their work, many firm owners and managers said that they preferred prime contractors that are organized and easy to deal with, maintain safe worksites, and treat them fairly. Examples of those comments include the following:

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said of their preferred prime contractors: “Safety is a big issue. Some companies have better track

records for managing their sites and insuring that our people are in a safe, reasonable working environment.” [#7a]

- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that there is one prime company she really enjoys working with. She said, “I really like working with that company and we are really in sync with each other.” [#16]
- The manager of an SBE-certified consulting firm said that there are a few prime contractors his firm prefers to work with. He said, “There are definitely some [prime contractors] that seem to be more receptive than others as far as teaming up, partnering, giving us the chance to be on one of their teams for projects. There are a handful [of] primes that we’ve developed relationships with that are pretty positive. A couple have taken action to add us to a team.” [#22]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “There are primes we prefer to work with based on our solid relationships.” [CALTRANS #1]
- The project development manager of a majority-owned asphalt firm said, “There are some [prime contractors] that we are a little more selective as far as our pricing goes because of the way they treat us.” [#27]

Some subcontractors said that they had good experiences working with DBE/MBE/WBE prime contractors. Examples of such comments include the following:

- The Asian American owner of a DBE-certified engineering company said that his company has worked with one minority-owned prime contractor. He said that it is possible that his firm was chosen as a subcontractor partly because he and the principal of the prime contracting firm were in the same community organizations. He reported that it was a positive experience and that his firm is still working with the prime contractor. [#3]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that there were a number of large primes that the firm has established good working relationships with, especially in the 8(a) program. He went on to also say that there are a few smaller primes that he likes to work with. He says he prefers working with these primes because “they express more of an interest to working with us, and they do good work!” He added, “They’re more to the point...like we are. ... They are more about serving the client.” He reported that it’s easier to work with these firms because the work is well defined and these firms focus on getting the work done and producing a good product. He also says that “with larger companies there are so many layers of bureaucracy, which is the reason why a lot of small businesses are created...because they want to just be better.” [#12]

A number of business owners and managers said that certain prime contractors had treated them unfairly, and they now avoided them. Several minority and female business owners, or managers of those firms, added that certain prime contractors had listed their firms but not given them any work. For example:

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said there are some primes that they won’t work with. He said, “One is [a large firm]...we had a long

relationship with the Port of San Diego and they wanted to get in with them...so they said, 'Hey, we need your help,' ... so we worked with the team, ... gave them intel, ... they used our DBE, ... soon as they got the job, they turned around and gave the work we were [going to] do to another company they had a relationship with. ... No phone call, no nothing." He reported that this happened twice with the same firm.

He provided another example where his firm was a lower tier sub to his former employer. He said, "I've been disappointed. They sort of strong-armed us into giving them a "quick pay" discount. He said, "We don't mind waiting to get paid until the prime gets paid, but the [large firm] would sometimes sit on the checks for a long while...and when we asked about getting paid there was always an excuse." He said at times this went on for months, until finally, he continued, "They told me if you really want to get paid fast, give us a 5 percent discount and we can pay you within 10 days." He said they really needed the cash flow at the time and by the end of the project his firm had paid out about \$45,000 in discounts. [#12]

- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that there is one prime that her firm will not work with. She said, "I had a relationship with a municipal agency and I brought the prime in to meet with the client. I brought them in, helped with the preparation of the proposal and she was in the project for 10 percent of the work. Once we won the job, the prime sidelined me. I met with the CEO and he told me that I didn't bring any benefit to the project and they don't really need my firm. He really pissed me off. I have a very good relationship with the [public agency]. They know me and trust me and I've continued to work with [public agency] on other projects. Now the CEO has accused me of trying to undermine 'his' relationship with 'his' client. But I never went to the [public agency] to complain." [#16]
- The president of a non-certified Native American-owned engineering firm said that there are a few primes he chooses not to work with. He reported that the reason is that a few have a history of abusing their subs, especially DBE firms they work with and also withholding final payments to subs. He said, "There is no reason for it to take more than six months for a sub to get paid." [#15]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, "Due to bid shopping and overall competition there are primes we just won't do business with." [CALTRANS #1]
- The Caucasian project manager of a HUBZone-certified construction company said that there are some prime contractors the firm would no longer work with, including an 8(a) firm that experienced some problems with a job and then decided not to pay the company. "We ended up having to put in a claim and we got our money. It was a federal highway project." [#35]
- The Caucasian woman owner of a WBE-certified trucking company stated there are a few primes that she would rather not do business with because of "their reputation for not paying on time...or they don't treat my drivers with respect when they come to the job site." She went on to say that "technically we are supposed to get paid within 10 days from the time [the contractors] get paid...but sometimes the contractors are too big for their britches and don't pay when they should...some have no regard for smaller guys." [#36]

Subcontractors' methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors.

Some business owners and managers rely on repeat customers and word-of-mouth to obtain work from prime contractors. Examples of such comments include the following:

- The Asian American owner of a DBE-certified engineering company said that marketing his firm to prime contractors has become easier since they have completed projects and are becoming more well-known. He stated, "We've demonstrated our capabilities, we've successfully completed several jobs, and we maintain our certification, so a lot of the large primes know us." He reported that prime contractors now regularly contact his firm for subcontracting opportunities. [#3]
- The Senior Engineer for a non-certified minority-owned engineering firm said another type of marketing occurs when "...There's sort of the long-term strategic [projects] where you know something is going to happen. It takes, sometimes, years for it to manifest into the place where the RFP is needed...[The firm is] sort of not trying to be a pest, but stay in touch with the organization that's putting it out, to monitor how it's going and remind them that you exist." [#5]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that there are firms which will say, "We want you to sub this one to [the company]. Sometimes it's that easy. Other times we'll go co-market a project with a client and then carve it up. Other times they just fall out of the sky...Primes will say we've got something that's in your wheelhouse..." [#7a]
- The owner of a WBE-certified engineering firm said, "Primes come to us ... that's been huge." She reported that she has found value in promoting her firm's work to large companies that do not have the bandwidth to do specialty design work. She further stated, "Finding large companies that understand your skill set is huge, [it's] win, win for both of us. [#10]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said he gets most of his subcontracts through existing relationships. He reported that he has relationships with Caltrans employees and some are people he's worked with previously. He added, "We've also been a sub to big companies that use our DBE status to get work. We never see anything from them. They will use other people." He said that because of his experience, he's convinced that relationships are the best way to get business. [#12]
- The president of a non-certified Native American-owned engineering firm said that word of mouth has been the best marketing tool for them. [#15]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that generally her firm finds out about projects through word of mouth or from larger firms contacting her firm. [#16]
- The manager of a publicly traded engineering firm reported that subconsulting projects are rare but they're all relationship-based. He said, "When we sub for other firms, we then use them to sub for us. Kind of, 'I'll scratch your back and you scratch mine.'" [#26]

Similarly, some business owners said that it was very difficult to solicit business from certain prime contractors because those contractors are going to automatically use the subcontractors they already know. Those comments included the following examples:

- The manager of an SBE-certified consulting firm described situations in which other firms are polite to meet with his firm, but the other firms never follow up. He said, “[Other firms] are polite about inviting us in and meeting with us and taking our information, sometimes asking us to buy them lunch or breakfast, and we never hear from them again. It’s ... pretty clear ... which of these companies are genuinely interested in maybe somewhere down the line working with you, and which are just doing lip service ... and you never hear from them again.” [#22]
- The Caucasian partner in a DBE-certified engineering firm said, “There is a [public agency in Imperial Valley] right now that I’m having difficulty with. They don’t even go to ‘request for proposals.’ They just go to a firm and ask for a proposal.” He also said that these agencies received CPG (Coordinated Prevention Grants) funds that require DBE usage and they fill the requirement with DBE contractors but not consultants. He later added that to receive work in his industry, you have to wine and dine the customers and get to know them. He added that he no longer does this with his clients and it has impacted his business. [#24]
- The president and CEO of the National Black Contractors Association expressed frustration with the fact that most contractors will not branch out to using different subcontractors on their jobs. [TA#1]

Some business owners said that they actively market to prime contractors. Those businesses reported that they sometimes identify prime contractors from bidders’ lists, planholders’ lists, at pre-bid or pre-proposal conferences, or through outreach events.

- The Asian American owner of a DBE-certified engineering company said that his firm reaches out to contact prime contractors about subcontracting opportunities when he feels that his firm “can offer something unique.” He said that his firm used that tactic on the Green Build airport project, because his firm had already been involved in previous projects there. [#3]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that his firm generally markets to primes through attending association meetings for “big projects with goals ... for DBE participation.” He also stated that they have one-on-one breakfast and lunch meetings with A&E firms and “brown bags” with these firms. He added, “So far [this] has not led to any more work yet, but we have work...we have plenty of work and maybe that’s why we’re not pounding on the door that hard.” [#12]
- The president of a non-certified Native American-owned engineering firm said that in the past, when he would market to primes, he would “get a list of the primes bidding on the project that has a goal, find out all the primes who have pulled plans and contact each [prime] on the list.” [#15]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said that she markets her firm to primes. She said, “I know who the big players are and who the PMs are. Many of them have been my peers in the past.” [#16]

- The vice president of a DBE-certified Black American engineering firm said that the firm pursues projects through pre-bid meetings, obtaining lists of primes and following-up with them, existing relationships, project look-a-heads, and agency/prime one-on-one meetings. [#19b]
- The Caucasian male owner of a construction firm stated that his company gets jobs as a subcontractor by “seeing the job and contacting the developer like [a specific company], who has the job. We will prepare a PowerPoint presentation and give them our exclusive brochures.” He continued, “We do a lot of work with the [specific company] for over 20 years because we have good skills and we are honest.” [#20]
- The manager of an SBE-certified consulting firm said that his firm markets their work by getting involved with different professional groups and organizations and they actively try to develop relationships with large prime contractors. He said, “[Our firm reaches] out to these different large companies to introduce ourselves and try to position ourselves for subcontracting opportunities to be added to teams where they need certified small businesses to be part of their teams on bids.” He reported that they have had limited success in these efforts. His firm also looks at public websites for bid opportunities. He said, “We’re trying to do as much as we can with the limited amount of staff and resources that we have here as a small business.” [#22]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “We find primes through their good work and then we show them that we do good work and then stick with them.” [CALTRANS #1]

Some business owners said that they are routinely solicited for bids from prime contractors and do not need to proactively market to them. Examples of those comments include the following:

- The owner of a WBE-certified construction company said that her company is solicited by fax. “If [a project] has [WBE or small business] goals, they’re going to ask me for a bid. I know ... when [Proposition] 209 was in play, it certainly made a difference.” [#8]
- When asked how his company finds subcontracts to bid on, the owner of a majority-owned goods and services firm said, “You know, candidly, we’re invited. We’re invited by a plethora of general contractors.” He went on to explain that this is because of his company’s previous work experience. He said, “In some cases [it’s] because we’ve worked with them, and they had a good experience. For SANDAG, for example, ... they know that we’ve got the plans and that we’re a specialty contractor, and they want our number. So they’ll contact us, even though we have every intention of contacting them. In the private sector, we’re [also] invited.” [#11]
- The female owner of an SLBE-certified environmental consulting company stated that they find out about public sector work when they are approached by a prime contractor. She said, “I don’t have time to search [projects] out. [I find out about public sector projects] usually [because] people approach us to be a part of their team. Or, since we’re certified with SANDAG and the water authority and the City of San Diego, I’ll get emails about upcoming things and then I can go to networking events or connect from primes from the lists I get from the City of San Diego or SANDAG.” [#13]

D. Keys to Business Success

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Topics that interviewers discussed with business owners and managers included:

- Employees (*page 34*);
- Equipment (*page 36*);
- Access to materials (*page 38*);
- Financing (*page 39*); and
- Other factors (*page 42*).

Employees. Business owners and managers shared many comments about the importance of employees.

Some business owners and managers said that it was difficult to find and hire skilled employees. They attributed that difficulty to several factors:

- When asked if finding qualified personnel/lab can be a barrier, the owner of a certified Native American-owned construction firm said that sometimes it can be. He said, “Years ago it wasn’t, nowadays it gets difficult sometimes. Everybody that knows anything is working. The ones you’re left with now...either don’t want to work, or they don’t know anything. And having somebody that doesn’t know anything is better than having someone who doesn’t want to work.” [#4]
- The female Hispanic Operations Manager of a DBE-certified towing company said that hiring experienced, responsible people is a constant problem in the towing industry, but that this really does not have anything to do with being an MBE. She said, “Trying to find someone with a clean background, a clean DMV, and [who] doesn’t use drugs...in this industry, is really hard, especially in this area.” [#2]
- The Black American owner of an MBE-certified security company said that finding qualified personnel is a challenge in his business. Potential employees may interview well but may not follow through with tasks such as filling out paperwork accurately. He said, “The client looks for that. Sometimes they purposely move stuff [on a job site] just to see if you put it in your paperwork.” [#9]
- When asked if finding qualified personnel can be a barrier, the owner of a majority-owned goods and services firm said that it is always a problem. He said, “You would think with unemployment the way it was, we would have some qualified applicant on just about any position we advertised for.” He went on to explain that this is certainly not the case. He said, “If we advertise for a designer, we would get hundreds of applications even though none of them are qualified for the most part. We could advertise for someone to work in the shop and get zero applicants. I could advertise for someone to work in the field ... and get zero applicants.” When asked what he thought the reason for this problem was, he said, “I think that with a hundred weeks of unemployment, why does anyone want to work?” [#11]

- The Caucasian estimator at an SBE-certified construction company said that finding skilled employees is challenging: “This particular job that we do takes experience, because if you don’t have it, one slip-up and you’re dead.” He feels that highly paid entry-level union jobs give younger workers unrealistic expectations of how much work they need to put in: “That’s why we hire and get rid of a lot [of workers.]” [#33]

Some interviewees reported no barriers related to getting qualified personnel. Examples of those comments included the following:

- The Asian American owner of a DBE-certified engineering company said that hiring qualified labor is not really an issue for his firm, because it has stayed small. He said that being a small company helped his firm weather the recession because he did not have to generate the amount of work that a bigger company would have to find to support its staff. [#3]
- The Senior Engineer for a non-certified minority-owned engineering firm said that labor has not been an issue for their business. They do not work with union employees (such as surveyors) in their line of work. [#5]
- The owner of a WBE-certified engineering firm stated that her firm experiences no challenges with obtaining or retaining qualified employees. She reported that in this region she is able to recruit employees with high levels of technical expertise and that many are former military. [#10]
- When asked about obtaining personnel/labor being a barrier, the president of a non-certified Native American-owned engineering firm stated he’s not experienced any problems. [#15]
- In regards to finding qualified personnel, the vice president of a DBE-certified Black American engineering firm said it’s not a problem for his firm. [#19b]

Some business owners commented on what they saw as a declining quality of workers. For example:

- The Hispanic owner of a DBE-certified engineering firm said, “It’s very difficult to find qualified personnel. A lot of students come out of school with loans and they want to earn good money to pay off those debts. My niece and my sons have said that it seems like the teachers now days are very jealous and they don’t teach what they are supposed to teach so the students don’t graduate well-trained. All of these electronic distractors impact the way they study. They don’t study the way we used to. The Internet makes them believe everything is instant and easy and it’s going to be right now and that’s not the case. There were two people we gave a two-week trial to and they were clueless on how to use AutoCAD. How do they expect to find a job when they don’t even know how to use AutoCAD? I think the way the media is bombarding them is leaving a lot of people behind.” [#25]
- When asked what it takes for a firm to be competitive and successful locally, the vice president of IVEDC said, “What I’ve seen and getting in the way of competitiveness is they don’t have the skilled labor.” He added, “It’s not difficult attracting people. It’s difficult attracting skilled labor.” He added, “There are plenty of people that are looking for work. We are in a region that has 29 percent unemployment. But the skills aren’t there. So lack of education and workforce training. So we try to

do everything we can to bring in workforce dollars from the federal government and employment training dollars from the state. But skilled workforce is limited.” [TA#2]

Some firm owners and managers indicated that hiring and retaining employees was more difficult for small businesses than for larger companies. For example:

- When asked about personnel being a barrier, the general manager of a certified Black American-owned construction firm said that if there isn’t enough work to keep workers busy, he can lose them. [#1b]
- The female Hispanic Operations Manager of a DBE-certified towing company said that qualified drivers are likely to be demanding and may quit or file complaints at the slightest provocation, because they know that they are in demand. [#2]

One firm owner related the quality of work to the wage rate. The Black American owner of an MBE-certified security company said that other companies in his business often pay their employees less than he does. He said, “If you want an eight-dollar-an-hour guard, that’s what you’re going to get. He’s going to come in disheveled; he’s not going to want to really work, because he’s not really making that much money anyway.” [#9]

One business founded a technical school to give employees the skills they need. The owner of a certified WMBE consulting firm said her firm founded a technical school to eliminate the barrier of personnel/labor being available. She said, “We came about starting the school because of some of the issues we were having with hiring other individuals who come from other vocational colleges. They didn’t have the skill. They didn’t have the training that was necessary. They may have had the book smarts but they did know how to apply it. So our vocational colleges have a lot of hands-on training.” [#30]

Equipment. Some businesses, especially in construction, require a substantial amount of equipment to perform their work. Some own their equipment and some rent equipment.

Some businesses reported that rather than owning equipment they rent pieces of equipment. For example:

- The general manager of a certified Black American-owned construction firm said that the only barrier regarding equipment “would be getting a loan.” He said, “We really haven’t tried to get any equipment. We’re renting our equipment because work is so scarce. We don’t want to have no work and have a bunch of equipment.” The owner of the firm said that he liquidated all of the equipment and now just rents equipment as needed. [#1b]
- The male Caucasian owner of a DVBE-certified construction company said, “I rent equipment. It’s cheaper to rent and lease equipment than to own it. And you could do a job and then you don’t have to store it.” [#32]
- When asked if obtaining equipment presents a barrier, the male Hispanic president of an MBE-certified environmental engineering firm said, “No, most of the equipment that we utilize we

basically rent out. People don't buy as much equipment as in the past, unless you are a very large contractor." [#29]

Some interviewees stated that acquiring needed equipment is not a barrier. [For example, #10, #11, #12, #18, #19b, #20, CALTRANS #1, #24 and #27] When asked if equipment is a barrier, the owner of a majority-owned street sweeping firm said, "No, there's equipment out there for a price and so at some point to become compliant I will have to buy that equipment and raise my prices, which I will." [#28]

However, some business owners reported that obtaining expensive equipment is a barrier. They reported that they did not have the cash to purchase the equipment outright and that financing can be a barrier. For example:

- The female owner of a WBE-certified construction company said that there are issues with obtaining equipment that are similar to borrowing money: "You're looked at twice if you're a woman and you're the owner of the company." [#8]
- The vice president of IVEDC said, "Obtaining equipment would be again back on access to capital. They've had to sell off a lot of equipment. They've had to downsize their facilities [and] downsize employees." He added, "They don't have the necessary equipment to perform on some of the big jobs that we have." [TA#2]
- When asked if securing equipment presents a barrier for his company, the vice president of a WBE-certified Hispanic construction company said, "Of course. That is always a challenge and expensive because we can't compete with the large corporations that they have their own equipment, they don't have to worry about hourly rentals, so they can leave the equipment there for days without paying anything. As soon as the equipment is rented for us we have to pay a very heavy price for it."

A few business owners reported that California smog and emissions requirements are a barrier. For example:

- The Caucasian estimator at an SBE-certified construction company said that new smog requirements for heavy equipment are a burden to small businesses: "This heavy equipment that we spent years buying—and only in California—it's no longer any good." [#33]
- The Caucasian female co-owner of an SBE-certified construction company said that a big issue for them as a small business has been California's emissions requirements on trucks. She said, "Not everyone can go out and buy \$200,000 trucks just because they don't comply with requirements." She said that requirements for other types of equipment have been easier to comply with because they have been phased-in more gradually. [#34]
- The Caucasian woman owner of a WBE-certified trucking company stated, "My personal opinion, along with other people in my business feel that the State of California is trying to put us out of business. ... They've made it impossible for us, ...our type of business, ... and small businesses are impacted the most." She said, "The State has decided to give useless jobs to a group of people working at the California Air Resources Board." She explained, "They've come up with this deal where you have to retrofit your trucks with a [particulate] filter that is supposed to clean the air...to add this to your trucks will cost us anywhere from \$18,000 to \$35,000 per vehicle. If we don't

retrofit your truck...that vehicle is considered by the State of California to be illegal and you cannot drive the truck on the road...so our trucks being as old as they are...our trucks could run forever because my husband takes very good care of them...they're in good condition...but our trucks are too old to retrofit." She continued, "Since our trucks are too old, by January 1, 2015 we will have to spend roughly \$150,000 to purchase a new truck or face going out of business. As a result of these regulations, I'm aware of many small trucking businesses who are closing their doors as of January 1, 2015...they can't afford to stay open." She also stated that "the State is offering truck owners a \$45,000 grant towards the purchase of a new truck...but it has to be brand new truck...with the cost of a truck around \$145,000...and you add the fees, and other cost associated with buying a new truck you're looking at about spending \$200,000...that's along with meeting all the State's requirements." [#36]

- The owner of a majority-owned street sweeping firm said, "Well a lot of the sweepers are now faced with the smog laws that will go into place in two weeks. Sweeper trucks have two problems that were specifically addressed in this law – number one is the diesel emissions and so every truck will have to have diesel particulate matter filter put on it, it will have to be retrofitted to the tune of \$5,000 to \$10,000 to be able to sweep going forward. The second issue is the dust and the compliance and again the older trucks that I have are not able to put hepa filters on or to control the dust and so basically these trucks are worth nothing. I know four or five sweeping companies in the last three or four years that have just left. That is a major capital investment that is being placed upon, not only the sweeping industry, but the whole industry, anybody that drives a diesel truck and it's going to break some of their backs. So, you know, it's a very difficult business environment for a street sweeper right now and people are folding. A lot of companies are folding as a result of that. It's under the California Environmental Protection Agency Air Resources Board, Truck and Bus Regulations, and there is page after page after page of compliance." [#28]

Access to materials. As with other potential barriers, interviewees reported a range of experiences with access to materials.

A few business owners and managers said that the ability to obtain credit or having sufficient cash on hand were factors in accessing materials and supplies, especially if they were not receiving timely payment from customers or prime contractors. For example:

- The male Caucasian owner of a DVBE-certified construction company said, "[Veteran-owned businesses] don't have the capital assets. The veterans that I have helped by basically advancing their money to buy the material and pay them on invoice right away so they can get on their feet. ... Very rarely do you find a contractor in the industry that will even do that." [#32]
- The Caucasian project manager of a HUBZone-certified construction company said that the major challenge for MBEs and other disadvantaged businesses that bid for projects is having enough cash to buy materials and for other expenses up front. [#35]

In general, minority and female business owners did not report instances of racial or gender discrimination by suppliers. Anecdotal evidence of disadvantages for minority- and women-owned business in obtaining materials and supplies in many cases related to the size, credit, and capitalization of those firms.

Obtaining inventory or other materials or supplies was not seen as a barrier to success by most interviewees. [For example, #12, #15, #18, #19b, #20, #24, #25, #28, #29, #31, #36]

Financing. As with other issues, interviewees' perceptions of financing as a barrier depended on their experiences. To some it was a barrier, and to others it was not.

Some firm owners and managers reported that obtaining financing was not a barrier, and some said that it was. Differences in answers were in part attributable to whether firms were construction or engineering companies, and whether the businesses were well-established. For example:

- The general manager of a certified Black American-owned construction firm said that it can be difficult to obtain financing because “we’ve been through a rough period” that could have potentially damaged credit. He went on to say, “I think the banks aren’t quite set up to...look at your history from a subjective perspective and say, ‘Oh, it was hard times here, so we’ll cut them a break.’” [#1b]
- The Asian American owner of a DBE-certified engineering company said that his firm has not experienced problems with financing, but, “In talking to my colleagues, yes, I’ve heard all kinds of stories [about financing barriers]. Some of them even said they were just completely turned away [for loans] from the very beginning.” He said that others went through a long and involved application process and then were turned down or given a lower amount than they requested. [#3]
- The Senior Engineer for a non-certified minority-owned engineering firm said that the downturn since 2008 has influenced the volume of their cash flow, which has made it a challenge to decide how much business the firm needs to take on, but that financing has not been an issue. [#5]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said obtaining financing was “pretty tight for a while, but recently we’ve got a little more flexibility with our bank and working with a credit line and bumping it up when we need it. But I think that’s just a reflection of the general economy more than anything specific to us.” [#7a]
- When asked if obtaining financing can be a barrier, the owner of a majority-owned goods and services firm said that he thought it is a barrier for all small businesses. He said, “I couldn’t get my first business loan until I was in my mid-thirties, and I started my business when I was in my twenties. There is no source of bank financing for any start-up business that doesn’t have collateral way beyond what you’re asking for. Since the recession it’s much worse. I had the ability, personally, to borrow \$300,000 on my signature. To borrow that same \$300,000, I have to give them a trust deed on my building, all my assets in my shop, all of my receivables, and I have to ...guarantee it with my personal trust. So I’m pledging roughly \$2.5 million of collateral to borrow \$300,000. Before the recession, I could do that with a signature.” He went on to say that he does not believe that this barrier is any different for minority-owned businesses. [#11]
- When asked about obtaining financing being a barrier, the president of a DBE-certified Subcontinent Asian American-owned engineering firm said they have not yet applied for any financing, and he is not aware of others experiencing barriers. He went on to say, “I’m assuming I won’t have any problems.” [#12]

- The president of a non-certified Native American-owned engineering firm said he's not experienced any barriers to obtaining financing, but "I heard of others having a problem. My dealings have been professional." [#15]
- The co-owner of a WBE-certified construction firm said that he's not generally seen or experienced any barriers to financing. [#18]
- When asked if obtaining financing is a barrier, the owner of a majority-owned street sweeping firm said, "No, financing is not a problem to anybody that's doing their homework. There [are] small business loans available." [#28]
- The president and CEO of the National Black Contractors Association said, "Having access to capital is one of the bigger inhibitors." [TA#1]
- The vice president of IVEDC said, "I think the first [issue] is [minority- and women-owned businesses] don't have a business plan. So when they go to some of our local lenders they are turned away if they don't have a business plan and rightly so. So you know, we could use assistance in that and helping these businesses get a business plan. You know, they've been running their business maybe they inherited it from their father or grandfather 50 years ago and they never needed one until now. And because of the economy they had to downsize. And so they're at the point where they need lines commitment and bid jobs. So I think that may be the largest hindrance in getting access to capital." [TA#2]
- The owner of a certified WMBE consulting firm said, "Financing is in one of the main priorities. It's difficult for small business especially one that can't get enough revenue to support an overhead." She added, "And it's been difficult because we can't go and get financial assistance from any of the banks because of our flexibility and our credit. So finance is very difficult for a small business especially if we don't have revenue coming in on a regular basis." [#30]
- The Caucasian estimator at an SBE-certified construction company said that financing can be challenging in his business. Because they do shoring work before the general contractor arrives, they often have to order supplies that need to be paid for long before his company will be paid for the completed work. He said, "In the public works contract they don't have to pay for 45 days. So, what happens is, unless I have the money to fund the project, I get behind [in paying his vendors]." He said that this can have a bad effect on his company's standing with vendors. [#33]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, "Our credit is great, the problem is the banks. The banks just wouldn't finance. We have had to work with manufactures directly on 'rental option purchase' deals. I don't believe this had anything to do with discrimination." [CALTRANS #1]

A few interviewees said that they had difficulty obtaining financing when starting their companies, but that financing was no longer a barrier for them. For example:

- The owner of a WBE-certified engineering firm stated that for the first two years of business, her firm was unable to get a line of credit from the bank. She stated, "No one got paid the first two

years.” She reported that she was able to obtain a larger line of credit within the past year. In addition, she stated, “You need a banker on your side.” [#10]

Some business owners explained the connection between personal assets and the ability to obtain financing. For example:

- The Black American owner of an MBE-certified security company said that obtaining financing has been difficult because “most minority small businesses don’t have good credit.” He feels that this impedes a lot of promising minority businesses from getting started: “If you don’t have a house or collateral or real good credit, you might as well hang it up.” He later added that potential creditors only base a small proportion of their decision on the merits of the business plan, and a larger proportion on credit and years of experience. He said, “Now, how are you going to get years of experience unless somebody gives you a chance?” [#9]
- The vice president of a DBE-certified Black American engineering firm explained that he’s experienced talking with a banker over the phone and he’s given favorable rates, but when he actually goes into the bank the story is different. He continued, “We’ve had to put up the equity of our home for collateral to get a line of credit.” [#19b]
- The owner of a DBE-certified Black American-owned goods and services firm said that obtaining financing has been a barrier for her business. She said, “I remember when I went to [a private bank], I was trying to get the seed money I needed, and they said my income wasn’t enough coming in. They needed to attach something, a home, something. So then I went to [two other private banks] and was turned down because my credit score wasn’t high enough. I had a job on the side that I was doing that I could pay back the money, but it didn’t work out.” [#21]

Several minority and female business owners indicated that race- and gender- discrimination affects financing. For example:

- When asked if price discrimination in obtaining financing affects business opportunities, the owner of a certified Black American-owned construction firm said, “There [are] times when [other subcontractors] would take that contract to a bank, and they could get a line [of credit] on that contract.” He went on to say, “We have tried that, and it never happens for us We had a vehicle with a 36-month loan payment, if we missed one payment, or you didn’t pay on that exact date, they’ll use that for an excuse not to give you a line...We are a lot more restricted...when it comes down to...going to banks.” When asked what he believed the reason for this was, he said, “The color of my skin!” [#1a]
- The female Hispanic Operations Manager of a DBE-certified towing company said that the Hispanic owner of the business has not been able to obtain loans. She said the institutions they have tried to work with keep requesting more collateral. She feels that the practices are probably discriminatory based on her past experiences when she was part-owner: “I got a lot of the ‘You’re a woman. You don’t belong in this industry. Why are you here?’” [#2]
- The female owner of a certified construction company said that “it’s very, very hard for a woman to get financing. ... If you’re married, they want your husband to come in and sign; and I don’t think that any man that owns a business has to take his wife in to sign, or is even asked to do that.” [#8]

- When asked if she believed that the barrier is related to racial discrimination, the owner of a DBE-certified Black American-owned goods and services firm said, “It depends on your skin color in a lot of these situations. And it really depends on how much money you have in the bank. There could be someone identical to me in the same situation, but because I’m an African American, they wouldn’t [give me the loan]. If I were white, or Filipino, or Asian, they would.” When asked if she believed that this discrimination is specific to Black Americans, she said that she believes it is against both Black Americans and people of Hispanic origin.

She also said that she believes women are discriminated against when trying to obtain financing. She said, “Women specifically are having a hard time, because if you’re not married, or [the banks] don’t see another source of income, they always want to pull from the husband or someone [else]. Well I don’t have any of that. I’m not married. I’m a single woman. I think of myself [as] being pretty educated. I’m a smart, articulate woman, and I’m self-sufficient, but that’s not enough. If I had a man behind me that was bringing in the check, then maybe it wouldn’t be an issue. [#21]

Other factors. Beyond the factors identified above, a few business owners identified other factors that contribute to or detract from business success. Examples include:

- The Caucasian male owner of a construction firm when asked the question can he give any other barriers said “power plays by bureaucrats across the board are a problem.” He continued “It’s a big barrier for the whole industry.” [#20]
- When asked if there were any other factors, the Operations Administrator of a certified WMBE consulting firm, said that Proposition 209 was a barrier. He said, “[Proposition 209] was for public education and every agency seemed to use that as the reason why they don’t have requirements except when there is federal money involved. The county is really bad. And even when there is federal money with county projects they still don’t put any requirements in.” [#30]
- The owner of a majority owned goods and services firm said that one specific barrier for small businesses is that most public work contracts do not have a prevailing party clause that allows for recovery of legal fees. He said, “Small businesses, small contractors, [and] people who get a small piece of that pie [can’t] afford to litigate.” [#11]

E. Potential Barriers to Doing Business with Public Agencies

The study team asked interviewees about potential barriers to doing work for public agencies, including SANDAG, NCTD, and ICTC. Topics included:

- Learning about work and marketing (*page 43*);
- Bonding requirements and obtaining bonds (*page 45*);
- Insurance requirements and obtaining insurance (*page 47*);
- Prevailing wage requirements (*page 48*);
- Prequalification requirements (*page 50*);
- Licenses and permits (*page 51*);
- Other unnecessarily restrictive contract specifications (*page 52*);

- Bidding processes (*page 53*);
- Non-price factors public agencies or others use to make contract awards (*page 54*);
- Timely payment by the customer or prime (*page 55*); and
- Experience with SANDAG, ICTC, and NCTD processes (*page 58*).

Learning about work and marketing. Interviewees discussed opportunities for firm owners and managers to identify public sector work and other contract opportunities, and to market themselves in the in-depth anecdotal interviews.

Many business owners and managers reported that it is easy to market in general and, specifically, to learn about public sector work. Examples of those comments included the following:

- When asked if learning about work can be barrier, the owner of a certified Native American-owned construction firm said that the public agencies in the area are “really good about getting the word out for work.” [#4]
- The Senior Engineer for a non-certified minority-owned engineering firm said that the method for obtaining work is generally to “follow the money” and current grants. He said there is also the “reactive” method of responding to RFPs that are sent to them because they are on an agency’s list or that they receive through a subscription to a marketing service. [#5]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that there are so many databases [for finding contracts to bid on] and “so much information that it almost becomes part of the problem.” [#7a]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm stated that they find out about specific projects from mostly from other firms. He said that there was a time when they paid for marketing services, but that didn’t really produce opportunities. He stated that in most cases, firms will contact him and ask, “Have you heard about this project, or are you going after this project?” He went to state that 99 percent of the time that’s how the firm usually hears about work. He stated some projects they hear about they’ll pursue and some they won’t pursue. [#12]
- The president of a DBE-certified Black American engineering firm said that the firm markets to businesses in the public sector through calling campaigns based upon lists from different regulatory agencies of firms who are in non-compliance with different types of regulations. She said, “We schedule one-on-one meetings and provide free consultations to these firms. This strategy has proved to be successful.” She later added, “Learning about the work is not so much the problem, but getting in the door is the problem.” [#19a]
- The owner of a DBE-certified Black American-owned goods and services firm said that this isn’t a barrier for her business. She said, “Because of all the states I’ve been [certified in], I know more than a lot of people do. When I walk in a room, I hear people [say], ‘Well there’s really no work.’ I’m like, ‘Yes there is. Let me tell you, [this firm] is having a pre-bid meeting over here, and this is over here, and this is over there.’ I receive the information. I sign up. I’m in people’s databases.” [#21]

- The manager of a publicly traded engineering firm reported that his firm lists themselves as a consultant or vendor on public agency websites so they receive bid invitations via email. The firm also goes out and talks to the agencies directly to find out what they have coming up. He added that ICTC has a technical advisory committee meeting that he attends to find out what types of projects will be funded in the future. He said, “We basically follow the money. That’s what consultants do.” [#26]
- The project development manager of a majority-owned asphalt firm said that finding out about work does not present a barrier. He added “Most, if not all of the opportunities are advertised on the AGC website and or other publications, so that typically is not a problem.” [#27]

Some business owners and managers reported that it is difficult learning about public sector work.

Examples of those comments included the following:

- The Caucasian partner in a DBE-certified engineering firm said, “Learning about work is a problem if you’re a DBE or a non-DBE. Some cities put out projects but don’t advertise them.” [#24]
- The Caucasian female co-owner of an SBE-certified construction company said that locating work has been difficult, because they have had to search for projects themselves; general contractors are not seeking them out. She said, “Obviously, no one’s going to be knocking at your door, but it would be nice if we knew of ways to find those projects. I know there are sources you can pay to find you projects, but are there sources out there that you don’t have to pay to find projects that are bidding?” She added that the most useful resource for her company would be a central place that they could go to find the types of projects they bid on, without have to pay a service like BidSync. [#34]

Some small business owners said that it was more difficult for smaller firms to market and identify contract opportunities. For example:

- The Asian American owner of a DBE-certified engineering company said that it is difficult for a small firm to learn about work, because small firms do not have sufficient capacity to effectively market and complete project work. He said it is difficult to “knock on doors,” attend pre-proposal meetings and outreach events, and also meet current project obligations. [#3]
- The owner of a WBE-certified engineering firm reported that competing for contracts is challenging. She stated, “You have to learn to play the game.” She reported that her firm doesn’t do any formal marketing because “we just don’t have the bandwidth.” [#10]
- The female owner of an SLBE-certified environmental consulting company reported that overall, running a small business is challenging and that there isn’t time to do all of the marketing and relationship-building she would like to do. “Just keeping up with the website is hard,” she said. [#13]
- The Subcontinent Asian American female owner of a certified engineering firm said, “It is difficult for a small firm to spend time marketing. Big firms can afford to hire someone to track opportunities.” [#16]

- The vice president of IVEDC said, “I don’t think some of our small business owners understand ... how to network, how to get the word out of what they do. I think it’s just a small town mentality. They just don’t know how to promote their services.” [TA#2]

Bonding requirements and obtaining bonds. Public agencies in Southern California typically require firms working as prime contractors to provide bid, payment, and performance bonds on public construction contracts.

Several interviewees reported little or no problem obtaining bonds, or that bonding was unnecessary for their work. For example:

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that the type of work his firm performs does not require bonding. [#13]
- The vice president of a DBE-certified Black American engineering firm said that his firm doesn’t need a bond. [#19b]
- The owner of a certified WMBE consulting firm, said, “We don’t have to be bonded.” [#30]
- The male Caucasian owner of a DVBE-certified construction company said, “I work as a subcontractor because basically most of the contracts, no matter how large, when I come in they don’t require us to bond.” [#32]
- The vice president of a WBE-certified Hispanic construction company said, “Well we work with our own bonding company and it is secured by the real estate and personal finances, so we don’t have a bonding problem.” [#37]
- The owner of a majority-owned street sweeping firm said “I’ve never been required to have a bond.” [#28]

A few firms reported that prime contractors sometimes covered the bonds for subcontractors. For example:

- The general manager of a certified Black American-owned construction firm said, “As a prime contractor we have to get a bond.” He went on to explain that when the firm works as a subcontractor, the general contractor will sometimes pick up the bond and sometimes they won’t. [#1b]
- The Caucasian superintendent of a HUBZone-certified construction company said that his firm’s subcontractors are usually covered by his company’s bond, so this is not a barrier for them. “Sometimes we can help that way because we have more bonding than we need, and the bonding company trusts our judgment.” [#35]

Some business owners and managers indicated that bonding requirements had adversely affected their growth and opportunities to bid on public contracts. For example:

- When asked about bonding requirements being a barrier, the general manager of a certified Black American-owned construction firm said that this was a barrier because bonding requirements are related to the problems with credit and obtaining financing. [#1b]
- The owner of a certified Native American-owned construction firm said that bonding requirements are one of the major barriers for small businesses in his line of work. He said, “The big [contracts] have too much bond money and insurance money. [The bond process] keeps a lot of small companies from [getting work]. Let’s say you’ve got a million dollar bond, you kick maybe...80 percent of minority businesses out. The big [companies] ... put up the bond and they get the job. A company half the size could do the job, and probably do it for less, but they don’t get the opportunity because of that bond. You’ve got to have \$100,000 sitting there. Nobody in a medium sized company has a hundred grand sitting in the bank. So, that’s the one problem. That’s probably the biggest problem.” When asked how he thought this could be improved, he said, “Lowering the bond.” He went on to explain that high bond requirements are not necessary. He said, “You don’t need that much money. They need enough money to operate, pay their bills, and get their material, and maybe 10 percent to keep them going. Other than that, keep all the money until the end of the job when it’s done. That’s going to put small people in the game. They just don’t need all that money. [For a] \$5 million contract, they might need a \$1-1.5 million to do the job and then the rest is on the back end. The way it works ... it keeps a lot of small companies out.” He added, “Once I see what the bonding requirement is...it goes straight to the trashcan. Unless they’re within what I have, I won’t even look at them.” [#4]
- The owner of a WBE-certified engineering firm stated that as a small business bonding is a challenge. She stated, “Even applying for a bond is a big pain.” She further reported, “There are [projects] we had to walk away from that I know we could have done.” [#10]
- When asked if bonding requirements can be a barrier, the owner of a majority-owned goods and services firm said that he thinks it is a barrier for all small businesses, whether or not that business is DBE-owned. He said, “Just about everyone can get a bond for a \$100,000 at 3 percent. If you want to do something different than that, then you have to prove your financial wherewithal. You have to...have a track record to get above that number, and you have to be profitable. You [also] have to keep your debt to equity ratio proper.” [#11]
- The co-owner of a WBE-certified construction firm reported that it’s difficult to get work in the public sector because of the “cost for obtaining a bid bond is way too high. The money I have to pay out up front is more than I can afford.” [#18]
- The Caucasian female co-owner of an SBE-certified construction company said, “Bonding is difficult. The only way we have been able to bond, so far, is to do a cash deposit...and we were only able to do that as a joint venture with our other company that is already established.” She added that having projects broken down into smaller pieces would be helpful because the bond required would not be so large. “In our situation we have to put up a 10 percent cash deposit, so, if we bid on a \$400,000 project, we have to put \$40,000 into a trust account until that project is done; so we’ve tied up \$40,000 of working capital for a year.” [#34]

Potential for discrimination against MBE/WBEs in acquiring bonding. A few minority and female business owners felt that racial or gender discrimination existed in obtaining bonding. Examples include:

- The female owner of a WBE-certified construction company said that she feels there is discrimination against women when it comes to bonding, similar to that faced when they are trying to obtain financing. [#8]
- The president and CEO of the National Black Contractors Association said, “Lending institutions have discriminated against the small companies and the Black Americans and what have you. They go in and give them their balance sheet and they don’t show a steady flow of cash and they don’t have an asset base. So they don’t get the bonding.” [TA#1]

Insurance requirements and obtaining insurance. The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to business success.

Most interviewees reported no instances in which insurance requirements and obtaining insurance were barriers. [For example, #1, #2, #3, #7a, #15, #16, #18, #20, #24, #25, #27, #31, #34, #36, #37] Examples of those comments include the following:

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that the firm has not had issues with obtaining insurance. A recently acquired project on a nuclear site required more insurance than they had in their base policy, but they were able to get it increased reasonably and quickly. [#7a]

Some interviewees said that they could obtain insurance, but that the cost of obtaining it, especially for small businesses, was a barrier. For example:

- The owner of a certified Native American-owned construction firm said that insurance requirements are one of the major barriers to small businesses in his line of work. He said that insurance requirements are too high. He said, “To get on a [military] base [job], and most public jobs now, it’s like \$5 million [in insurance requirements]. And that’s just the general liability. There’s no way a small company doing concrete cutting demolition is going to do \$5 million of damage. It’s going to be hard to do \$2 million of damage. And some of the contracts might only be \$3 million.” He later added, “I believe in insurance, but some ... insurance requirements are crazy. To get on a [military] base [job] now it’s \$5 million. I carry \$2 million. But let’s say you get one job out there a year, it doesn’t pay to carry \$5 million worth of insurance. Then you’re looking at another \$200-300 a month payment.” [#4]
- The Black American owner of an MBE-certified security company said that worker’s compensation insurance is a large burden for his type of business, specifically because rates are based on projected rather than actual numbers. [#9]
- The owner of a DBE-certified Black American-owned goods and services firm said that obtaining insurance can be a barrier because of the high prices. She said, “There are seven or eight different insurances that I need. They consider you new in business when you don’t have work or dollar

volume coming in. It's a huge barrier because then your insurance is so much more. It costs a ton." [#21]

- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, "Obtaining insurance is not difficult, just expensive. The barrier is the cost. Our rates have jumped to all-time highs due to our record year. Again, this has nothing to do with discrimination." [CALTRANS #1]
- The manager of a publicly traded engineering firm said, "The larger the agency, the larger the insurance requirements and we were required to take that down to all of our subs but a lot of these smaller firms don't carry that kind of insurance. That is the single biggest barrier on the consulting side." [#26]
- The Caucasian Estimator at a certified construction company said that payouts for workman's compensation claims have been a significant burden on his company and for small businesses, in general. [#33]
- The Vice President of Estimating of a non-certified construction company said insurance requirements are a challenge for small businesses; they often do not realize how much they will have to carry for the types of projects they are bidding on and this leads them to make bids that are too low. [#17]
- When asked if insurance presents a barrier for his company, the Native American male owner of non-certified environmental consulting firm said, "Obtaining it wasn't the issue, paying for it was. This was mostly when we were a new company." [#38]

One owner of a WBE-certified business stated that insurance was more difficult because of lawsuits, among several other reasons. She said that obtaining insurance is difficult, and "there are so many frivolous lawsuits now, that it's passed down to the smallest sub." She added that SANDAG has more protections for small businesses in its insurance requirements: "A prime cannot ask [their] sub to [cover] more than the portion of their work." She said, "I have to praise SANDAG for doing that, because it's something that I have been talking to Caltrans about for years [and] that has impeded small business from participating." She said that this is something that affects all small businesses, but particularly women and minorities.

She later advised that there needs to be more consideration of the needs and vulnerabilities of small businesses by insurance agencies: "They need to fight ... frivolous lawsuits in the insurance world and not pass that on to the weakest link in the chain." She said that fear of liability may be preventing more people from starting their own businesses: "The workman's comp ... is so high. Health insurance is going to be a tremendous thing that impedes small business." [#8]

Prevailing wage requirements. Contractors discussed prevailing wage requirements that government agencies place on certain public contracts.

Several interviewees explained barriers concerning union requirements, and other negative experiences. Examples of those comments include the following:

- The project development manager of a majority-owned asphalt firm said that his company is denied the opportunity to bid all the time when the prime contractor is a union company. He said,

“Union companies will not use us because we are non-union and we will not sign a project labor agreement and their agreements with the unions, particularly the operating engineers will not allow them to use subcontractors.” He added, “[That is] not necessarily [only in public sector work]. If the contractor themselves is a union contractor, and there is not too many private ones out there, but if they were a union contractor, such as TW Clark is a union contractor, they would not take our bid. We would not be allowed to work for them.” [#27]

- The owner of a majority-owned street sweeping firm said that unions are a big problem and barrier. He said, “[Companies] always say, ‘Well you can bid on this, you’ve got to pay prevailing wage.’ So here’s what it breaks out for prevailing wage. I have to pay my drivers like \$62 and some odd cents to drive because the union has forced these issues. When I say the union it’s either the Operators Engineers 12 or the Teamsters union, have determined that a street sweeper needs to make \$62 an hour to survive. Now I can get street sweepers all day long for anywhere from \$12 to \$17, but when I go certified payroll, prevailing wage, I have to go from my regular rate up much higher so I can just make a profit because I have to show that I have given these guys not only the \$40 something that is their certified, prevailing wage designation, but I also have to pay the union a training fee, and then I have to show that all their vacation pay, and 401K contributions have to be paid to them in cash, so that all rolls out to be \$62 per employee, whereas if I’m doing it normally and I’m paying my guys \$16 an hour, add a couple bucks on for taxes and such I’m at \$18. So the difference is between \$18 and \$62 and because it’s a federal project and the Davis-Bacon law applies somebody has decided that street sweepers need to be paid this much and so I have a hard time even getting in on these projects.” [#28]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that, in working with DBEs as a prime contractor, the firm has sometimes found that the smaller businesses had challenges getting bonded or understanding certified payroll requirements or the requirements of the Davis-Bacon Act. She said, “There’s a lot of variability in the level of sophistication with some of the smaller firms.” She later added that working with unions can be challenging due to requirements for breaks, holidays, overtime, and other issues. [#7a]
- The president of a non-certified Native American-owned engineering firm said that he does not have a very high esteem for unions “either working with or them or how they work with you.” He went on to say that “their demands are unreasonable. Unions do things and say things that are opposite of what really happens.” He went on to say his experience with unions have been “less than stellar.” [#15]
- The Caucasian male owner of a construction firm said, “I prefer non-union. Unions are too political. It is a barrier if there is a requirement to be union.” [#20]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “Working with the unions can be a barrier. We have had our issues with the Local 12 & 3 in the past.” [CALTRANS #1]
- When asked about working with unions, the vice president of IVEDC said, “The projects that we work with ... are very large so that means the unions are after just about every project that we work because they are large. They abuse the environmental system, ... process, to hold up projects in litigation long enough for them for the sole purpose of getting a project labor agreement signed by the project. And oftentimes they want 100 percent union involvement on the projects and ...

there are literally a handful of union shops here in Imperial Valley. So when the unions hold these projects up, they either hold them up for so long they lose their financing and the project goes away completely and the project goes to Nevada or Arizona.”

He went on to say that minority- and women-owned businesses are “very fearful of getting involved and sometimes the unions state that they are willing to sign a one project agreement so basically stating that they will leave that company alone after that project is done. They are still fearful of that. They won’t sign those agreements.” He added, “They are fearful that the union will take over their company and it’s a legitimate concern if 51 percent of the employees in a company vote – if they’ve signed one of those one project agreements, 51 percent of those employees that are working on that project vote that the company has to become unionized. And it will become unionized. The union can take over the company.” [TA#2]

- The male Caucasian owner of a DVBE-certified construction company said, “The ethics of it is a veteran finds it very difficult to be told to slow down. They don’t like that. They don’t like standing around. They don’t like slowing down. They like to show major production. And the union is still like that. So the veterans and the unions don’t get along too well.” [#32]

Some business owners and managers said that being a non-union company had not been a barrier to obtaining public sector projects. Examples include:

- When asked if working with unions is a barrier, the project development manager of a majority-owned asphalt firm said, “Definitely. I went to a meeting that SANDAG put on for the mid-coast transit project. It’s a big project with a lot of work for our business, the asphalt paving business, and they were seeking small businesses, disadvantaged businesses, and there was not one contractor at the meeting that is going to be doing work for that project that is non-union. So every non-union company in San Diego is not going to be allowed to work on that project. Right off the top of my head I am going to say it’s a \$1.5 billion project.” [#27]
- The Caucasian estimator at an SBE-certified construction company said that his firm does not bid on some types of public sector work, such as federal highway projects, because it is not a union company. [#33]

Prequalification requirements. Public agencies sometimes require construction contractors to prequalify in order to bid or propose on government contracts.

Some business owners and managers said that prequalification requirements presented a barrier. For example:

- The owner of a certified Native American-owned construction firm who said that there can be too much paperwork involved in prequalification requirements. He said, “Most of our jobs [are] \$10,000-25,000 on a \$5 million contract, and they want you to fill out paperwork for three days. There’s normally only one of us. It’s hard to go out and work and do the paperwork. Maybe they need an agency where somebody has all the forms filled out and you just sign your name.” [#4]
- The owner of a DBE-certified Black American-owned goods and services firm said that prequalification requirements are a barrier to new businesses because it is hard to prove your

capabilities without previous work experience. She said, “I need a break so I can at least get in the door and show you that I can get the job done for you.” She then went on to explain that many of the qualifications required in the bidding process are inhibitive to her business. She said, “If you don’t type the proposal specifically the way [the prime contractors] want it, then that means you’re not-responsive. If you don’t give a minimum of three references, that means you’re disqualified. When you go to fill out the [prequalification] screens that they set up in their database, a lot of it doesn’t pertain to goods and services.” [#21]

- When asked if prequalification requirements are a barrier for his firm the vice president of a WBE-certified Hispanic construction company said, “Absolutely. County of San Diego, for example, they are very heavy on the prequalifications. Sometimes Caltrans on the big projects.” [#37]
- The male Hispanic president of an MBE-certified environmental engineering firm said that prequalification requirements can be a barrier. [#29]
- The Asian-American owner of a DBE-certified engineering company said that his firm has been turned down for contracting opportunities, because it did not meet prequalification requirements. [#3]
- When asked if prequalification requirements can be a barrier, the vice-president of a certified Black American engineering firm said “it’s just too much paperwork.” [#19]

Some interviewees indicated that prequalification was not a barrier to pursuing public sector work.

[For example, #15, 18, CALTRANS #1, #24, #25, #27, #31, #36] One comment included:

- The female owner of a WBE-certified construction company said that her company has been in business long enough to have gained a reputation for good performance: “Maybe I’ve been in business long enough that I’m prequalified — I’ve proven myself.” [#8]

Some owners or managers of engineering companies said that prequalification was not typically required for their firms. One example included:

- When asked about prequalification requirements, the owner of a WMBE-certified consulting firm said, “They don’t get into our area. You are talking about multi-million-dollar projects and it’s not there for us.” [#30]

Licenses and permits. Certain licenses, permits and certifications are required for both public and private sector projects. The study team discussed whether licenses, permits, and certifications presented barriers to doing business for firms in the transportation contracting industry.

Overwhelmingly, business owners and managers reported that obtaining licenses and permits was not a barrier to doing business. [For example, #7a, #11, #12, #13, #16, #18, #19b, #20, #22, CALTRANS #1, #25, #30, #31, #32, #34, #36, #37] Some comments included:

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that about half of their workforce maintains some type of professional credential, but they have never had problems getting the required business licenses to work in different cities. [#7a]

- The project development manager of a majority-owned asphalt firm said, “That’s not a problem. Although trying to get permits sometimes is a real hassle but it’s just the way it is.” [#27]
- The owner of a majority-owned street sweeping firm said that his firm does not require many licenses or permits so it is not a problem. [#28]
- The male Caucasian owner of a DVBE-certified construction company said, “No, licenses are straightforward and permits are straightforward. Not subject to opinions.” [#32]

One interviewee indicated obtaining licenses and permits was not a barrier for her firm because they can rely on prime contractors to sponsor her company. The owner of a WBE-certified engineering firm stated that special licenses and permits are not a big challenge for her company, because larger companies with which her company works sponsor them for special clearances when needed. [#10]

Other unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications, particularly on public sector contracts, restrict opportunities to obtaining work.

Some owners and managers indicated that some contract specifications present barriers. Examples of those comments include the following:

- The female Hispanic Operations Manager of a DBE-certified towing company said there is a catch-22 for the company: They need contracts to show that they are eligible for further contracts, but do not currently have them because their business has shrunk to just a few areas. [#2]
- The vice president of a DBE-certified Black American engineering firm said, “When agencies require you to have a local office is a barrier or a certain area code. For instance, our offices are here in Orange County, but for us to bid on a public job in San Diego we had to open up an office. That is very expensive just to bid on work. Now they’re saying your headquarters have to be in San Diego County.” [#19b]
- The Caucasian male owner of a construction firm said, “It is unnecessary when [governments] dictate you must be union.” [#20]

Although also examined separately in Appendix J, indemnification and insurance requirements on public sector contracts were frequently mentioned as contract specifications that restricted access to public work. For example:

- The Asian American owner of a DBE-certified engineering company said, “Some agencies require very high [insurance] limits that are ... maybe not impossible but very difficult for the small DBEs to meet.” [#3]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm said, “The flow-down provisions for insurance is ridiculous, and how it applies to a small business. For a \$12,000 project as a sub, \$2 million in insurance is being required. This is definitely a barrier.” [#16]

- The manager of an SBE-certified consulting firm said that sometimes insurance requirements on public works projects are higher than what his firm typically offers and is not necessarily the same type of insurance his firm carries as far as general liability. He said, “I think specifically on transit projects, we’ve been asked if we can provide insurance at a certain level for transit-related work, and I think we’ve done some research on it and it does cost a considerable amount more money to carry the insurance. And of course we would if we got the opportunity to work on a transit project, but at this point, we haven’t had the opportunities.” He added that he feels that insurance requirements would be a barrier in the public sector but not in the private sector. [#22]

Several business owners and managers did not identify restrictive contract specifications as a barrier to doing business. [For example, #12, CALTRANS #1, #25, #31, #33, #34, #36] Some examples of those comments:

- The project development manager of a majority-owned asphalt firm said, “I’m not going to say that’s an issue because that’s something that all the contractors have to deal with and if you can’t step up to the plate then don’t bid the project.” [#27]
- When asked if unnecessarily restrictive contract specifications and bidding procedures can be a barrier, the owner of a majority-owned street sweeping firm said, “Yeah, and there are some. There are some, but we can work around that. Sometimes they want a specific kind of a brush or sometimes they want certain hours to go in, so it’s not too big of a barrier actually.” [#28]

Bidding processes. Interviewees shared a number of comments about bidding processes.

Many business owners said that bidding procedures presented a barrier to obtaining work. Examples of those comments include the following:

- In regards to the bidding process, the owner of a WBE-certified engineering firm stated that her firm does not have a sales staff, so marketing is not a primary effort. She stated that she relies on repeat business and has placed the company “on all bid lists.” She reported that she writes proposals on a regular basis and that “it’s a huge effort.” She further stated that she is careful to read the fine print on RFPs because many public entities will not accept limited liability insurance. [#10]
- The owner of a majority-owned goods and services firm said that the bidding process is often expensive, which can be inhibitive for small businesses. He said, “That’s the overhead that every one of your customers pays for even if you don’t get the work.” [#11]
- The co-owner of a WBE-certified construction firm said that the paperwork requirements in the public sector bidding can be over burdensome. [#18]
- When asked about barriers to the bidding process, the owner of a DBE-certified Black American-owned goods and services firm said that the design phase of construction projects is so long that often, when the construction phase starts, the construction firm has already decided who they want to utilize on a project. [#21]

- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “The bidding process has not always been smooth. Being a WBE caused some issues with the customers because the customers didn’t believe in the validity of our certification. But we worked to get around this barrier.” [CALTRANS #1]
- When asked about the bidding process for his firm, the male Caucasian owner of a DVBE-certified construction company said, “Pretty much negatively because normally when you bid and the prime sends your bid into SANDAG all of the subcontractors are listed. ... Usually they deal with the veteran after the fact once the contract has been awarded and they come looking for them. ... One little problem. The subcontractors have already been listed and the contracts have already been let, and the prime said yes and he has let his subcontracts out. The only way a disabled veteran can get involved as they will have to violate one of those subcontracts. And they are not going to do that. So then comes the phrase ‘Oh, we are sorry. We will get you next time.’ And that is where we are at.” [#32]

Several interviewees reported no problems with the bidding process. [For example, #3, #4, #5, #15, #16, #20, #31, #36, #37] Specifically, subcontractors reported that they are often not involved in the bidding process. Some comments include:

- The Asian American owner of a DBE-certified engineering company said that his firm is usually not directly involved in the bidding process because it typically works as a subcontractor. He said his firm submits its qualifications to the prime contractor and hopes that the prime contractor wins the bid.
- The project development manager of a majority-owned asphalt firm said that the bidding process is not a barrier. He added, “It’s much more detailed, much more time consuming, but it’s not a barrier, we can still bid on the jobs.” [#27]

Non-price factors public agencies or others use to make contract awards. Public agencies select firms for some construction-related contracts and most professional services contracts based on factors other than price. Many firm owners and managers made observations about those non-price factors.

Some business owners and managers had complaints about factors that public agencies use to make awards. For example:

- The Black American owner of an MBE-certified security company said that a contract for work with the city schools was given to another company even though his bid was lower. He said that he believes there was no real intention to give to the contract to anyone other than the large company that won it: “I went down there and I raised Cain, and they [said] ‘Oh, we’ll get you in on the next one’ In other words, they knew they were wrong. Why would you tell us you’re looking for an intelligent bid, and we give you an intelligent bid, and they give it to the same people?” [#9]
- When asked if he has had difficulties with the factors public agencies or others use to make contract awards, the Hispanic owner of a DBE-certified engineering firm said, “Yes, two contracts that I bid on ... I would get high scores from two of the three reviewers and then the third reviewer would

score me poorly.” He added that when he asked for feedback, he was told things weren’t included in his bid that he knew, for a fact, were actually included. [#25]

A few business owners said that experience requirements were a barrier to doing business with public agencies. Other examples include:

- The Black American owner of a DBE-certified security company said that he has felt that the bidding process has been unfair in some cases. He cited the San Diego City Schools, Qualcomm Stadium, the Convention Center, and the Sports Arena as potential clients who are monopolized by one security company. He said, “I went to ... apply for the stadium contract ... but the contract reads such that ... the only people who can get it is [a large security company]. ‘You must have NFL experience.’ How do we get that?” He said that his relevant personal experience with similar work, such as concerts and conventions, was not taken into account. [#9]
- “I have been to couple of these conferences where they encourage SBE participation. However, most of these projects (including the mid-coast project) require subs to have prior experience in large projects. For a small and emerging business such as myself, I feel it is almost impossible to get these jobs because of this requirement. Even though we are fully capable of doing the actual work, we do not have prior experience working on large projects (I started the company doing residential landscaping). I believe due to this requirement, only companies that get these jobs are the large companies (such as Valley Crest, Benchmark, etc...), and these meetings are useless.” [WT #1]
- The owner of an SBE-certified surveying firm said, “I know that it is all about establishing relationships and getting to know these people, and getting to know them well enough that they’ll trust you on a bid opportunity and put you on their team. However, it’s kind of a catch-22 for most of our companies that, we don’t have the experience and we are looking for that one chance for the experience, but we’re not going to get those opportunities because we don’t have the experience.” [PH #2]

Some interviewees reported no barriers related to experience and expertise. [For example, #28, #31, #36]

Timely payment by the customer or prime. Slow payment or non-payment by the customer or prime contractor was often mentioned by interviewees as a barrier to success in both public and private sector work.

Most interviewees said that slow payment by the customer or a prime contractor is an issue and can be damaging to companies in the transportation contracting industry. Interviewees reported that payment issues may have a greater effect on small or poorly capitalized businesses. Examples of such comments include the following:

- The owner of a certified Black American-owned construction firm said that after working 30 days, he will sign a contract that says his firm will get paid when the prime contractor gets paid. He said that this will often result in 60 days of work before his firm gets paid. He said, “We have to worry about paying guys \$60 an hour, 40 hours a week. ... We need to make sure we have that financial support to be able to carry that project.” He talked about how the amount owed to laborers can add up. He then said that he doesn’t “have a rich uncle” to help bail him out. [#1a]

- The Black American owner of a WBE-certified security company said that he sometimes has to wait 45 days to get paid, which is a burden on a small business that does not have a lot of cash on hand. [#9]
- When asked if he thought lack of timely payment was a barrier for the industry in general, the owner of a majority-owned goods and services firm said, “From what I understand from our legal counsel, it happens [fairly often]. For us it hasn’t been an issue except for one time. But let’s say we’ve done \$4 million worth of public work, 10 percent of it was a problem. If you had to take that and say 10 percent of the time [timely payment is an issue], that’s a barrier to small business.” [#11]
- The Caucasian male owner of a DVBE-certified construction company said, “The biggest challenge as a sub to the larger companies is payment terms. Their default language is, ‘We get paid when they get paid.’” He cited an example when his firm was a subcontractor on a high-speed rail project that, even though their work was completed in a very satisfactory way, they were not paid on time because the larger company had problems with its invoicing. [#14]
- In regards to timely payment, the Subcontinent Asian American female owner of a DBE-certified engineering firm said, “That’s an issue. They pay us when they get paid and that can string us out for at least 90 days. That is very difficult for a small business.” [#16]
- The Caucasian male owner of a construction firm said, “Yes, untimely payments are very common and for any business it’s a barrier. [Cash flow] is for expansion and you want to make your payroll and it can be a barrier.” [#20]

A few interviewees identified problems with agencies, not prime contractors, paying on time. For example:

- The president of a non-certified Native American-owned engineering firm said that in the public sector it takes too long to get paid. He said, “That is why I like working in the private sector because the turnaround time to get paid is 30 days.” He continued saying that by working in the public sector, “a small firm has no choice but to secure a line of credit to sustain themselves on projects because it takes three to six months to get paid. That was sure my experience.” [#15]
- The Hispanic owner of a DBE-certified engineering firm reported that he has had an issue with one public agency paying on time. He said that he was told that they sent the invoice to the accounting department. It’s been three months and they say they’re looking in to it but he has not been paid. [#25]
- When asked if timely payment can be a barrier, the owner of a majority-owned street sweeping firm said, “Once in a while [it’s a problem]. I actually had a public entity go bankrupt on me, a water district up in Marietta, and left me hanging for \$10,000. I had a couple go bankrupt on me in 2006, but since then I’ve been very careful.” [#28]
- The Caucasian Estimator at a certified construction company said that timely payment is an issue in public works contracts for “the bottom-tier folks.” [#33]

Interviewees were also concerned about timely payment for change orders on contracts. For example:

- The owner of a certified Black American-owned construction firm said that there was one prime contractor that his firm had an issue receiving payment from. He said, “There was a change order that they refused to pay.” He then went on to explain that this contract was a public contract and was eventually settled. [#1a]
- The Hispanic owner of a DBE-certified engineering firm reported that some public agencies want a lot of changes and don’t want to pay for them. He said, “The public entities are stewards of the tax money but sometimes they ask for things that are insensitive to the fact that it’s going to cost you more to do the changes.” [#25]

A few business owners and managers said that payment was sometimes more difficult on private sector contracts than public sector work. Examples of such comments include the following:

- The owner of a certified Native American-owned construction firm said that he has heard that it can take a long time to get paid on City contracts. He went on to say, “The government is normally pretty good about [paying in] 30 days. [With] private work, they’ll string you out four to six months sometimes.” [#4]
- The Senior Engineer for a non-certified minority-owned engineering firm said, “We know we will get paid with the public work. We don’t always have that assurance with the private.” [#5]
- The female owner of an SLBE-certified environmental consulting company reported that collecting payment from clients in the private sector is a challenge. She stated that sometimes it takes time for public sector money to get through the bureaucracy, but they do not worry about getting paid. [#13]
- The Caucasian male owner of a DVBE-certified construction company said that working for the Municipalities and Federal government is better than for some other entities because it has systems to ensure quick payment for small businesses. [#14]
- The Caucasian partner in a DBE-certified engineering firm said, “We’ve been paid by public agencies. There are a few on the private side that went on 90 to 120 days and we let it go on then they stopped paying altogether.” [#24]

Several business owners and managers said that slow payment is frequent and normal for the industry. Examples of such comments include the following:

- The female Hispanic Operations Manager of a DBE-certified towing company said that slow payments are the norm for the industry. She said they have had the most issues with the Motor Club and insurance companies, which take up to two months to get paid. [#2]
- The Asian American owner of a DBE-certified engineering company said that waiting anywhere from 60 to 90 days for payment is typical. He said that he does not feel that he can say that the specific reason for slow payment is related to being an MBE. He said, “All of our contracts have that language in there that ‘you get paid when [the prime contractors] get paid.’” [#3]

Potential for discrimination against MBE/WBEs. The study team asked minority and female business owners whether their firms were affected by slow payment or non-payment because of discrimination. Although some said that slow payment was due, at least in part, to race- or gender- based discrimination, most did not think that it was due to discrimination. Examples of those comments include the following:

- The Asian American owner of a DBE-certified engineering company said that he cannot tell whether payment issues are due to discrimination, because he does not know what goes on between the prime contractor and the client with regard to payment. [#3]
- The president and CEO of the National Black Contractors Association said that DBE businesses have an uphill battle. He said, “What they do is some of these contractors will slow pay you and no pay you and discourage you from doing work. So if you’ve been forced on them they will find a way to break you so you don’t want to come back. So they will red tape you. They will tell you you didn’t have all of your billing in, you don’t have your receipts. So there’s a lot of things that keep these contractors from even looking that way and they are afraid. And they are afraid – you don’t curse out the surgeon when you get under the knife. That is with the Association is supposed to do. But if I bring you to the table as a guy that I say is qualified then you are going to punish that guy so a lot of people just say I’m not a member of the BCA or he’s not speaking for me. I’m on my own, because they don’t want any retaliation.” [TA#1]

Several firms indicated timely payment was not an issue. [For example: #19b and CALTRANS #1] Examples of such comments include the following:

- The owner of a WBE-certified engineering firm reported that her firm has not experienced slow payment from its clients. She stated specifically, “[Large defense contractor] has been awesome in paying us.” [#10]
- The Caucasian female co-owner of an SBE-certified construction company said they have never had trouble getting timely payment, partly due to the fact that projects are generally grant-funded. She said, “The money’s there, so unless somebody absconds with it...it’s set aside to pay for the work.” [#34]
- When asked if timely payment was an issue for his firm, the vice president of a WBE-certified Hispanic construction company said, “Most ... agencies ... have some sort of timely payments. Caltrans, County of San Diego they are among the top.” [#37]

Experience with SANDAG, ICTC, and NCTD Processes. The majority of those interviewed had not had experience in working or bidding on ICTC or NCTD projects. Several had experience in bidding on SANDAG projects and fewer had experience working on them. However, some had comments specific to what experience they did have with the three agencies.

Some firms noted it was harder to obtain work with SANDAG, ICTC and NCTD. For example:

- The female Hispanic Operations Manager of a DBE-certified towing company said that the company does not want to do Freeway Service Program business as they did in the past. “That was the biggest headache ... loved the people I worked with at SANDAG [but] do not like the [FSP]

program.” She added that she misses working with SANDAG, but does not miss the FSP program. “It’s a really hard contract to stay up with,” due to multiple certification requirements and background requirements for drivers. [#2]

- The owner of a WBE-certified engineering firm stated that agencies such as SANDAG, NCTD, and ICTC need to know that firms like hers exist, and that they need to get familiar with what small businesses do instead of only hiring large companies that have sales forces. [#10]
- The owner of a majority-owned goods and services firm said that, because his firm is a specialty contractor, he didn’t expect to have the opportunity to bid on any prime contracts with SANDAG. He said, “As long as the trade is incorporated into the general scope, I don’t see us having that opportunity. There was rumor of [SANDAG] maybe putting signage out as its own package [in the bidding process]. If [that] did happen, I would certainly bid it.” [#11]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he would “like to have greater access to SANDAG project managers so that they can see what we can do. We don’t always want to go through the primes.” He added that he feels that there’s some kind of “disconnect happening with the DBE person, well-meaning as they are, they don’t make decisions for contracts. They say all the right things, but at the end of the day, has anything really changed? That’s really what they should be asking themselves.” [#12]
- The female owner of an SLBE-certified environmental consulting company stated that she attends networking events hosted by SANDAG, but has not yet received work directly from her attendance at those events. She said, “So far I don’t think I’ve gotten any work out of them, but I keep going trying to make the contacts.” [#13]
- The Caucasian male owner of a DVBE-certified construction company said, “SANDAG is a tough agency [to get work with]. It’s a convoluted process, especially in what we do.” He gave the example of the Mid-City Rail Line project as one where his firm would like to be able to bid to do environmental and/or mitigation work. [#14]
- The manager of an SBE-certified consulting firm said his firm worked for NCTD when they were added to a team by a large [prime contractor]. He said his firm is still trying to get on a team for SANDAG projects, but “it seems like most of the [prime contractors] are ... set and I’m assuming they’re using the same small businesses they’ve used all along.” He added, “It’s very hard to break into those types of team opportunities.” [#22]
- The manager of a publicly traded engineering firm said, “SANDAG is a fairly large agency so as a firm, you have to be of a certain size just to meet insurance requirements. If you haven’t worked for SANDAG before, it’s tough to break in. Because of the size of their contracts, they attract larger firms from Los Angeles and other areas. It’s a very long and expensive run-up to get work with SANDAG. You basically have to start as a sub and hopefully work your way up the ladder to where you have the resources and a relationship with the SANDAG staff and the technical qualifications.” [#26]
- When asked about his experiences performing work for SANDAG, the owner of a majority-owned street sweeping firm said, “They are real tight with the union and they say, ‘Yeah, we’ll take your

information, we'll put you on our mailing list,' blah, blah, blah, but you never get a call. You never get a call from them [because] they run it through the desk of the union and then make a selection. I fill out prequal information with them, I've filled out prequal information all the time [with SANDAG], they've got my prequal information, but on that it's non-union so it gets tossed to the side." [#28]

- The Caucasian male owner of a DVBE-certified construction company said that because each SANDAG project is separately funded and almost a stand-alone, it is difficult to know who the point of contact should be and where projects have been awarded, so that he knows which general contractor he might approach as a potential subcontractor. He said, "The problem is, post-award, 80 percent of the time the team is already set, so ... the challenge is to get ahead of time, to get on those teams." [#14]

One firm noted that it was easier to obtain work with ICTC as opposed to SANDAG. The manager of a publicly traded engineering firm said, "ICTC is different [as opposed to SANDAG] because they were fairly recently created, they're a smaller agency. It's only been the last couple of years that you've started to see solicitations. They're a little easier to break into. They're here in the Valley so they're a little better for a small, medium, or large firm. Their contracts are smaller so a small firm has a lot of the resources to go after one of their projects." [#26]

Some interviewees discussed completing work for SANDAG, ICTC ,and NCTD. For example:

- The Senior Engineer for a non-certified minority-owned engineering firm said that ICTC processes are complicated because "on one day you might be technically working for SCAG and on another contract you might be working for ICTC, and working for SCAG is a different thing than working for ICTC directly." He said that the SCAG process is more "formal and rigid." [#5]
- The owner of a majority-owned goods and services firm said that in his experience, working with SANDAG has been very easy. He said that the project in which he was involved was fairly unique in that his company worked directly with SANDAG, even though he was a subcontractor. He said, "Because everything was so messed up ... they decided to get the engineers and the contractors out of the way and just let us work direct[ly] with SANDAG and MTS, which was very unusual. In fact, my general contractor friends [said that] they've never seen it before." When asked if he felt this experience made working with SANDAG easier, he said, "Absolutely. Once you get to the agency who's making the decisions, it's efficient." [#11]
- The manager of a publicly traded engineering firm said, "[SANDAG is] a pretty large agency and there's a lot of people you end up working with. People skills are at a premium on something like that. I think that's a fairly accurate description of working with SANDAG. It's pretty bureaucratic at times. People get frustrated when there are delays. But they're pretty comparable to other large agencies." He added, "Timely payment used to be difficult with SANDAG. Invoices would just get lost. An automated tracking system would help." [#26]
- The president and CEO of the National Black Contractors Association said, "[SANDAG] did hire African Americans. Everybody else was making prevailing wages – \$45 an hour while on the payroll. But SANDAG turned around and hired some African Americans to hold signs for \$10 an hour. And so all the African Americans that they window dressed up and down the trolley weren't

doing any construction work but they were doing just holding signs. And so they do this bait and switch. When you pull the covers off and you expose them, they run for cover and they will ask you, 'Okay, send us a couple of guys.'" [TA#1]

- When asked about completing work with SANDAG and NCTD, the Native American male owner of non-certified environmental consulting firm said, "SANDAG is definitely the worst agency we have ever worked with. Just to the point of incompetence. NCTD is not too bad, they don't like listening to their consultants because it attaches a higher dollar number to it and they end up getting burned later, but that's really [typical] of agencies trying to save money." [#38]

Business owners had mixed reviews regarding SANDAG and NCTD staff. For example:

- The president of a DBE-certified Black American engineering firm said, "I talked to [SANDAG employee] about obtaining lists of primes who we can market to show our services. She asked me to send her an email and she would forward that information to me. I've sent her that email three different times and I've not received not nary a list. This is an example of someone who's just talking. I'm sending this to her per her instructions." [#19a]
- The Caucasian male owner of a construction firm said, "My impression of SANDAG has come from several AGC meetings. SANDAG representatives came out to talk about their projects. I met this one guy from SANDAG and he was great." [#20]
- The manager of an SBE-certified consulting firm said, "Most of the people at SANDAG and NCTD have been very pleasant to work with; they do genuinely seem interested in helping small businesses to succeed, but I know their power is limited." [#22]

Several business owners praised SANDAG, ICTC, and NCTD's notification system. For example:

- The owner of a certified Native American-owned construction firm said that finding information about projects available with these agencies is easy online. He said, "They do pretty good about getting the jobs out on the websites." [#4]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that SANDAG is "pretty good" at advertising opportunities to DBEs. [#7a]
- The female owner of a WBE-certified construction company said that her company has had several striping projects with SANDAG, specifically a SuperLoop project. She said, "SANDAG now advertises [projects] pretty well. At first it was a little more difficult." [#8]

A few interviewees commented that size of contracts at SANDAG presented a barrier to bidding, or that it was difficult for smaller firms to get work with SANDAG. For example:

- The president a DBE-certified Black American engineering firm said, "SANDAG opportunities are harder to find because most of their projects are too large for a firm like ours." [#19a]
- When asked about why his company did not bid on SANDAG project, the vice president of a WBE-certified Hispanic construction company said, "They make it so large that these small contractors cannot bid on those." [#37]

Some business owners had thoughts regarding SANDAG's Bench program for DBEs. For example:

- The Senior Engineer for a non-certified minority-owned engineering firm said that when the Bench program initially began they were not sure how to prepare for their submission. He said, "Classically, for an on-call kind of a thing you would compose your team, and put someone on ... for virtually everything you thought you were going to need ... and you're considering all the things like experience, whether or not there's preferential points or goals, as well as the needs and the quality of what's offered." He added that they were not sure whether they should come in with a minimal team and offer to go to the Bench for additional services if needed. He said, "It was a little bit of a strategic confusion ... about how dependent to make ourselves on the Bench and keep our team simpler and smaller, versus broaden our team and provide all of those services." [#5]
- In regards to the ease of learning about SANDAG projects, the president a DBE-certified Black American engineering firm said, "The bench we're on is a good example. We've never received any information about task orders or a call for project. Furthermore the firms on the bench are primes and subs. How does that work?" [#19a]
- When asked if he had any suggestions for SANDAG or NCTD to improve the issue of discrimination, the Operations Administrator of a certified WMBE consulting firm said, "Talk to people. It's kind of funny. On the bench they had all of the primes listed as members of this bench committee. Not one minority. Now the whole idea of the bench originally was to increase minority participation." [#30]
- When asked about his experiences working with SANDAG, the vice president of a DBE-certified consulting firm said, "They are really helpful. ... They put in that bench, which has been helpful. We've been able to pick up the type of work we like. We haven't pursued a ton of work with them; we have a limited amount of work and we like the work we're doing there. [It] was pretty straightforward to be able to work with them, what they say and what they do. There is no drama." [#31]

Most businesses reported that getting paid at SANDAG was not a problem. Examples included:

- The Senior Engineer for a non-certified minority-owned engineering firm said, "Our experience in directly getting paid with SANDAG is great ... 30 days virtually." [#5]
- The Caucasian owner of a WBE-certified construction company said that because she was a subcontractor on SANDAG projects, payment had to go through the prime contractor which led to some delays. She said, "I knew who to call at SANDAG to see if they had paid the prime." She made this connection through her involvement with a Caltrans advisory council. She continued by saying that getting paid on SANDAG projects was about the same as for other projects. She said it would be better for subcontractors if SANDAG posted what items they had paid the prime contractors for, and she believes they have started to do this. [#8]
- The owner of a majority-owned street sweeping firm said he has not had any problems getting paid on SANDAG jobs. [#28]

However, a few businesses reported that getting paid on SANDAG and NTCD projects was a problem. Examples included:

- The owner of a certified WMBE consulting firm said, “We are just waiting for checks to come in and the payment. And with SANDAG it’s outrageous. It is sometimes two or three months. One time it was like three or four months before we finally got paid and I don’t know if it was the cost of primes submitting the invoices late or whatever but being a small business, we can’t wait that long.”
- The Caucasian project manager of a HUBZone-certified construction company said that prompt payment is the company’s primary complaint when doing jobs for SANDAG and the NCTD. He compared the process to improvements made by the federal government, which now requires payment within 14 days as a result of the Prompt Payment Act. He said that although the law says that SANDAG contracts must pay within 30 days of an invoice, it often does not happen. [#35]

Some business owners who often work as subcontractors had positive comments about SANDAG, ICTC and NCTD’s bid processes and some had mixed comments. For example:

- The Senior Engineer for a non-certified minority-owned engineering firm said, “My impression is that [SANDAG, NCTD, and ICTC] are all trying to be transparent, and, particularly SANDAG is really trying to reach out, to make themselves reachable. Witness the fact that you’re here sitting with us. They’re working hard ... to be responsive.” He added that there is a lot of competitiveness in the bidding process for SANDAG contracts, but that he has never had a sense that it is unfair. [#5]
- The manager of a publicly traded engineering firm said, “ICTC is not fully automated like SANDAG is. It’s less sophisticated. They are emailing responses directly to people, which can be more dangerous. SANDAG posts their agendas, sign-in sheets, pre-proposal meetings, etc. Short of advertising in the newspaper, I don’t know what else they could do except for maybe getting in to some of the professional societies.” [#26]

Several interviewees had comments and recommendations regarding SANDAG’s DBE program. For example:

- The vice president of a DBE-certified Black American engineering firm said, “I think SANDAG has a very aggressive DBE Program. The problem is, I think those primes who commit to [the program] don’t pass that information down within their organization to the people that make the decisions to bring on subcontractors, and that’s where the bottle neck is. I go to this meeting and I’m asked if I’m a minority firm and I say yes. They say, ‘Good we’re going to put you on our team,’ and when the contract is awarded, our firm will get switched out with another firm they would prefer to work with or your scope of work is significantly changed.” [#19b]
- The Caucasian male owner of a construction firm stated that the only recommendation he has for SANDAG/NCTD/ICTC is to “get rid of [MBE/WBE/DBE] programs.” [#20]

Some interviewees recommended changes in SANDAG, ICTC, and NCTD processes. For example:

- The owner a certified Native American-owned construction firm said that his recommendation for SANDAG, NCTD, and ICTC is to continue to do outreach to small companies to see how they can utilize them more on their contracts. He said, “Just get out there and talk to [small businesses] more like this and figure out what would help get the smaller companies involved. Personally, I don’t

think it should be ... financial help. If [the business] needs financial help, they need more help than just getting the job.” [#4]

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said, “I wish agencies like SANDAG would establish or create Shelter Programs for small businesses for contracts of \$100,000 and under.” He said he was aware of the water district having a similar program and that this would allow small business to be more competitive and successful in getting contracts. He said, “If a public agency really wants to help small firms, they should set aside these contracts to help grow smaller firms. He said that he understands that it would be more work for the contracting staff, but “you have to put forth an effort if you want to help small business. Small businesses can’t compete for these millions of dollars projects. And [larger firms] only want to work with firms they already have relationships with,” he said. [#12]
- The president a DBE-certified Black American engineering firm said that she would recommend that SANDAG be more prudent in getting information about primes out to DBE firms. She said, “All we need is the information. We are very capable of marketing to the primes ourselves.” The firm’s vice president recommended that SANDAG unbundle projects in a way that smaller firms could bid as primes. [#19a]
- The owner of a DBE-certified Black American-owned goods and services firm said that she thinks that SANDAG should make a more concerted effort to follow up with small businesses to check whether prime contractors are actually conducting good faith efforts in their contracting processes. She said, “[SANDAG] can start reaching out to the small businesses and asking the small businesses, ‘Did this prime contact you? Did you receive anything from them?’ It might cost you to hire somebody to do this, but if this is so important to you to make sure that small businesses are being utilized then do what you have to do. Hire a firm to do it for you if you need to. You need to have a third party come in and check to make sure that there’s fairness across the board.” [#21]
- The manager of an SBE-certified consulting firm said he thinks the bidding process with SANDAG and NCTD could be improved. He said, “I think that they should seriously consider creating a more level playing field for small businesses of all types to compete for contracts, whether it’s creating a set-aside pool of funds so only small businesses can bid on that, [and] primes are not allowed to, [or] making a cap at \$150,000 to \$200,000, which ... is substantial for small businesses but it’s pretty much the borderline for [prime contractors].” He added, “I really think that there are lots of opportunities in developing a more equitable process for small businesses to break into these types of projects, and whether it’s breaking projects down into smaller pieces so that small businesses can do parts of it and the rest goes to the prime who has the resources and money and capital to do the heavy lifting end of things, but I still think that there needs to be a system set up so that the small businesses that have not gotten an opportunity to work on public agency projects get opportunities to bid.” [#22]
- When asked about recommendations for improving SANDAG’s notification or bid process, the vice president of a DBE-certified consulting firm said, “I think they should hold a workshop to explain to the SBE, DBE, WBE, disadvantaged vets community how they can actually get work within the project. ... I’m pretty smart; I know how to read; I know how to lay work and do work. And I haven’t been able to really crack the code on how you can get on with design build projects because normally it’s pushed out by third-party general contractors. And general contractors that might

come into San Diego may have been working in Denver and they'll take just the Denver relationships from what they were doing in Denver and bring it to San Diego. Now the local taxpayers, and voters, engineers in San Diego are trying to figure out how to get on teams and prime general contractors just use somebody they already know. So that has been a challenge for me. You go to these dog and pony shows where there are five or six general contractors ... and they go out and shake your hand and smile at you. ...But it's almost impossible to get somebody to call you back unless you already know somebody. You take in-town money and you're giving it to an out-of-town general contractor, then they bring in an SBE and they don't know anybody in San Diego and they just fly in and fly out." [#31]

- The male Caucasian owner of a DVBE-certified construction company said, "[SANDAG is] still not including veterans and disabled veterans and the state of California got the impression that SANDAG – we don't have problems with the public, we have problems with the government. And we figure SANDAG is one of those and I don't know why they are doing this but they are one of them. They're really harming us. Because every time SANDAG is involved we have to go to the mat with a big fight. So SANDAG is not our favorite person but I don't think that if you walk into SANDAG and you went up to a desk and sat down to talk to [someone], that person probably has no clue. And I find when I talked to a few people they not only have no clue, they really don't even relate to things like disabled veteran businesses. And have no idea what it is. And it's not that they are against it. They don't even know what it is."

F. Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Bid shopping (*page 65*);
- Bid manipulation (*page 66*);
- Potential for discrimination against minority- and women-owned subcontractors (*page 67*);
- Treatment by prime contractors and customers during performance of the work (*page 68*);
- Unfavorable work environment for minorities or women (*page 69*); and
- Approval of work by prime contractors and customers (*page 70*).

Bid shopping. Business owners and managers often reported being concerned about bid shopping and the opportunity for unfair denial of contracts and subcontracts through that practice.

Many interviewees indicated that bid shopping was prevalent in the local construction industry.

Examples of those comments include the following:

- The female owner of a WBE-certified construction company said, "In the past I have been bid shopped, where I've had primes come and say 'If you want this job, you'll do it for this amount.'" [#8]
- The vice president of a DBE-certified Black American engineering firm said that bid shopping does happen at times and usually it's because of race and attitudes around working with preferred firms. [#19b]

- When asked if bid shopping can be a barrier, the owner of a DBE-certified Black American-owned goods and services firm said that prime contractors will ask for her information, and then ask another firm if it can beat her price. She said that this blocks her from getting contracts. [#21]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “Bid shopping is a huge barrier. We can’t bid with certain primes. Recently, we posted a bid early to the website and we heard through the ‘grapevine’ that our bid was shopped.” [CALTRANS #1]
- The male Caucasian owner of a DVBE-certified construction company said, “Big time right at the moment. It used to be the contracts went in and you are listed at and they used only the listed subcontractors and if there was a change they had to show why. Now jobs are being signed by political correctness. And they already got the job and they are seeking subcontractors and you know they are bid shopping. They take your bid in right around and see if anybody can beat it.” [#32]
- When asked about bid shopping, the Caucasian woman owner of a WBE-certified trucking company stated, “That’s a big problem...they are not supposed to do that.” She went on to say, “If I know the reputation of the person [who calls] me for a quote, I ask them, ‘Are you shopping my quote?’” [#36]

A few interviewees reported that bid shopping occurs on public as well as private sector contracts.

Examples of such comments include the following:

- The project development manager of a majority-owned asphalt firm said that bid shopping does happen. He added, “If I find out that there is somebody that’s shopping my bid I won’t bid to them again. As far as us doing it, I won’t do it. It’s not part of the business. It happens in both [the private and public sector]. Let’s just say in my experience there are some contractors who will shop subcontractors, they have their favorites so they’ll tell them what they need to be at. It happens, but that goes on all the time, you just have to deal with it.” [#27]

Some owners and managers reported that they do not see bid shopping, or that it is not a big issue.

[For example, #9, #25, #28, #37] Other examples include:

- The Caucasian male owner of a construction firm said, “That’s not a barrier. Yes that happens. An owner doesn’t have a firm bid, he shops people against each other. That has nothing to do with race or gender. It has more to do with bad business practices.” [#20]
- The vice president of a DBE-certified consulting firm said, “I’m not really that familiar with that. We look at it like ... if you wanted to go to with somebody cheaper, then go ahead.” [#31]
- When asked about bid shopping, the owner of a majority-owned street sweeping firm said, “No, [it’s] not [an issue]. Not with me. I have a price and they either take it or leave it.”

Bid manipulation. Beyond bid shopping, a number of interviewees discussed bid manipulation.

Some interviewees said that bid manipulation affected their industry, and that it was common. For example:

- When asked if bid manipulation can be a barrier, the owner of a certified Native American-owned construction firm said that he did not consider it a barrier, but that it is a common part of the business he is in. He said, “[Prime contractors] all do it. They’ll call you up and say, ‘This company’s going to do [the job] for this amount, can you do it for cheaper than that?’ That’s the game we play. Unfortunately that’s the way it is.” [#4]
- The owner of a WBE-certified engineering firm reported that she has experienced bid manipulation. She said, “It’s not uncommon in our business.” She described a project for the City of San Diego where “we were clearly the best qualified bid.” She stated that her company lost the bid by one point. She added, “There was an inside person ... clearly rigged ... [but] if you contest, you get blackballed ... it was a hard pill to swallow.” She further explained that everyone faces bid manipulation, not just her company, and that “clearly, the best company doesn’t always win.” [#10]
- When asked if bid manipulation can be a barrier, the project development manager of a majority-owned asphalt firm said, “There are people you give a bid to, not necessarily agencies – I’m talking about private things, general contractors who will say, ‘Well, you need to go a little lower,’ well I don’t know if we need to go lower. It happens in the private market, but not in the agency market. No, I haven’t [seen that in the public sector].” [#27]

Some interviewees reported no experiences with bid manipulation, or that it is not a big issue. [For example, #11, CALTRANS #1, #25, #31, #36, #37] A number of business owners and managers said that they were not affected by bid manipulation:

- The female owner of an SLBE-certified environmental consulting company reported that she has heard allegations of bid manipulation in the field, but has never directly experienced it. [#13]

A few interviewees indicated that they had been denied prime contracts or subcontracts, and that they thought it was due to discrimination or their DBE status. For example include:

- The Black American owner of an MBE-certified security company said that he has considered getting an attorney on retainer to help him with contracts where he feels that he is not being treated fairly, but that this is an expense that the company cannot afford right now. [#9]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported that they have occasionally been denied the opportunity to submit a bid. She said, “This is because we are women-owned.” [CALTRANS #1]

Potential for discrimination against minority- and women-owned subcontractors.

Interviewees discussed whether prime contractors might discriminate against MBE/WBEs in their selection of subcontractors.

Some minority and female interviewees report that there may be discrimination but that prime contractors would not be blatant in any discrimination. Examples of such comments include the following:

- The Asian American owner of a DBE-certified engineering company said that stereotypes probably existed back in the '90s, but not now. He indicated that discrimination in such situations is subtle:

“It’s a sense that you get when you talk to people. You get a sense that they are not really interested in doing business with you.” [#3]

- The female Caucasian owner of a WBE-certified construction company said that she had never been denied the opportunity to submit a bid, but had sometimes not won contracts where she believed she was the lowest bidder. She said, “There’s still basic discrimination for women. It’s a silent, unspoken thing ... but I have to be better than my competitors. We have to do better work, I always feel, to be considered.” [#8]
- The Subcontinent Asian American female owner of a DBE-certified engineering firm reported that she doesn’t feel that there is blatant discrimination, but said, “I have experienced some discrimination in my industry as a young engineer, because I’m a woman in a male-dominated business.” [#16]

A few business owners reported that they have been unfairly treated by prime contractors, but noted they did not feel it was due to discrimination. For example:

- The Caucasian partner in a DBE-certified engineering firm said, “We all have those issues but it’s just normal business ... nothing to do with being a DBE.” [#24]

Treatment by prime contractors and customers during performance of the work. Many business owners and managers discussed unfair treatment by a prime contractor or customer.

A few business owners indicated that unfair treatment during performance of work had affected their businesses. Examples of those comments include the following:

- The owner of a certified Black American-owned construction firm said that on a particular contract, the prime contractor asked him to pick up “one-inch minus rocks,” which he described as typically unnecessary to pick up. He said, “The way he would do it, ... it was degrading. [A specific prime contractor] was disrespectful.” He added that the job was “the worst job I ever had.” He went on to explain, “The last day of work ... we get halfway to San Diego ... [and] the superintendent calls me up that there was a section there about 20 by 40 feet that was off a half a tenth.” He then said that he had offered to pay to get the problem corrected. He then said, “But you know what, he had me come up there and take care of it. Man, I tell you it was hard.” [#1a]
- When asked about treatment by a prime contractor, the project development manager of a majority-owned asphalt firm said, “It varies. By in large it’s never an issue. Sometimes you’ll run into a general contractor who is less than honorable, let me just put it that way.” [#27]
- When asked if treatment by prime has ever been an issue for his firm, the vice president of a WBE-certified Hispanic construction company said, “Yes. If the agency doesn’t like the contractor and is forced to accept that contractor because, for example, they were the lowest bid, they make their life so miserable so that contractor never goes back again to that agency. That happens all the time, especially in Southern California.” [#37]

Some interviewees indicated that unfair treatment was connected with their race/ethnicity or gender. Examples of those comments included the following:

- The female Hispanic Operations Manager of a DBE-certified towing company said, “I’m female and I’m Hispanic and I had my issues with saying that I was part-owner of [Company Name] especially in this industry. And my husband now is having a real hard time with acceptance, also, in this industry, which is really weird—nobody believes him, that he’s an owner. ... They just say, ‘You’re just a driver [or] you’re just a worker.’” She said that people now are more likely to assume that she is the owner than that her husband is the owner. [#2]
- The female owner of a WBE-certified construction company said that, as a woman, she has to demand respect from prime contractors that would be awarded more automatically to a man. “When I serve on construction committees, I can have an idea or express what’s going on in the field and it’s more or less ignored, but if a man says the same thing 10 minutes later, it’s his idea.” [#8]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that his previous employer would have him attend project interviews to be “the minority face” to present before a potential client. He added, “I found his behavior to be very offensive and I called him out on it.” He also reported that he heard jokes and “stuff like that.” [#12]

One majority-owned firm identified double standards they witnessed in favor of minority contractors.

The project development manager of a majority-owned asphalt firm said he does believe that there are double standards in performance. He said, “It seems to me, and I cannot detail this, but it certainly appears to me that there are certain minority contractors who get away with a lot more than other contractors when they are doing their work. Let me just give you one example. There was a paving job done in the City of San Diego by a minority contractor and it was so bad that they had to go back out and grind the work. And yet it was basically approved, I mean somebody else had to go back out and fix it, yet they got paid for doing it. That’s just one example, but I do believe that in the City of San Diego that their minority firms don’t have to do the same quality work as everybody else.” [#27]

Unfavorable work environment for minorities or women. The study team asked business owners if there was an unfavorable work environment for minorities or women, such as any harassment on jobsites.

Some interviewees indicated that there was harassment of minorities on jobsites. For example:

- The vice president of a DBE-certified Black American engineering firm said that he was on a job where they had to go inside a sewer and he saw a worker point at him and overheard him say, “Send that boy down there.” [#19b]
- When asked about whether there was an unfavorable work environment for women and minorities, the vice president of a WBE-certified Hispanic construction company said, “Generally speaking, yes. In Southern California, San Diego is known to be AGC white boy friends.” [#37]

Some interviewees said that they that had not experienced unfavorable work environments. [For instance, #3, #15, #25, #31, #36]

Approval of work by prime contractors and customers. Interviewees were asked if approval of work presents a barrier for businesses. Most interviewees indicated that the approval of work by a prime contractor or customer was not a barrier. Examples include:

- The male Caucasian owner of a DVBE-certified construction company said, “Actually it’s been very positive. They’ve been very surprised. They originally figured we would be a problem. And then they find out we are not. We are exactly the opposite.” [#32]
- The female Caucasian owner of a certified construction company said that her company rarely has anything that is not approved “because I probably have the best crew in the state.” [#8]

G. Additional Information Regarding any Racial/ethnic or Gender-based Discrimination

Interviewees discussed additional potential areas of any racial/ethnic or gender-based discrimination, including:

- Stereotypical attitudes about minorities and women (or MBEs, WBEs, and DBEs) (*page 70*);
- “Good ol’ boy” network or other closed networks (*page 71*); and
- Other allegations of discriminatory treatment (*page 74*).

Stereotypical attitudes about minorities and women (or MBE/WBE/DBEs). Several interviewees indicated that minorities, women, or MBE/WBE/DBEs are the subject of stereotypical attitudes. For example:

- The owner of a certified Black American-owned construction firm said that the stereotype is that “as a black minority, we don’t really know what we’re doing.” [#1a]
- The female owner of a WBE-certified construction company said, “I can tell you that we still have not ‘arrived’ as women, but it’s a lot better than it was in the beginning, because [it used to be] that you could not negotiate a contract or do anything without a male present. So that’s where I have come from.” [#8]
- The Black American owner of an MBE-certified security company said that he has had “a lot” of trouble convincing potential clients of his experience and expertise. He said, “People look at me and...they don’t know what to think about a guy like me Once I start talking they think, ‘Okay, he sounds like he knows what he’s talking about.’” [#9]
- The co-owner of a WBE-certified construction firm said, “I’ve gotten calls and people will say only send me workers who speak English. There have been times that I’ve sent someone to a job who was not white and the customer called and asked me to send someone else out to do the work.” [#18]
- When asked if stereotypical attitudes can be a barrier to women- and minority-owned businesses, the owner of a DBE-certified Black American-owned goods and services firm said that she has often experienced this. She said that she feels people perceive her differently because she is a woman, and because she is Black American. She said, “They sit there and just stare at you when you’re

talking to them, and they just nod their head. No interaction. When I say something to them about their interaction with me, [they say], ‘Oh no, that’s not what I’m doing.’” [#21]

One interviewee indicated that negative stereotypes had to do with being a disabled veteran-owned business. When asked if he thought whether it is a form of discrimination that firms choose not to work with disabled veterans, the male Caucasian owner of a DVBE-certified construction company said, “There is a stigma about disabled vets. It’s the same for all disabled people. The idea disabled and related to unable to, they don’t want disabled people. What they don’t understand there is a lot of the disabilities and wounds and so forth are not even visible to them. Missing arms – they have that problem.” [#32]

A few interviewees reported no instances of stereotypical attitudes on the part of customers or buyers. Some comments included:

- The owner of a WBE-certified engineering firm stated that she has not felt any gender discrimination from prime contractors. She reported, “Maybe it’s because I’ve been doing this for a long time.” She added, “There [are] hardly any women doing what we do so I think it was hard to break in, but I’ve been doing this for so long [and that helps].” [#10]
- When asked about experiencing any stereotypical attitudes on the parts of customers or buyers, The vice president of a DBE-certified consulting firm said, “No. Sometimes they stereotype because they’re good engineers, but that’s ok.” [#31]

“Good ol’ boy” network or other closed networks. Many interviewees had comments concerning the existence of a “good ol’ boy” network that affects business opportunities.

Those who reported the existence of a good ol’ boy network included minority, female, and white male interviewees. For example:

- The financial officer of a certified Black American-owned construction firm said, “We bid projects all day long...These people call me because they know our numbers are going to be the numbers that are competitive. But they’re going to give it to their boys, their man, their group. Our bids are shopped all day long. I don’t know what they do, but other people get the jobs.” The general manager of the firm said, “They give it to people they’ve worked with before.” The financial officer then went on to say, “I can’t say if it’s race related, but we’re not in that system with some people. We get out networking and build relationships, but most of our relationships have been built with companies that aren’t in that system.” [#1c]
- The female owner of a WBE-certified construction company said that she “very, very definitely” feels that there is an ol’ boy network in her business. She said, “They don’t want to talk to you as the [female] owner, they want to talk to your foreman.” She added that it is even harder for women selling construction-related product (e.g., signs and cones) than for those providing services. “I think it’s probably very hard for those women to get in to the buyers,” she said. [#8]
- The owner of a WBE-certified engineering firm stated that the “good ol’ boy network” does indeed exist but not for her company. She reported that dealing with “good ol’ boy network” was a

particularly difficult experience with her past employer. She further stated that she knows that it currently exists within the bidding process. "I know it happens, so yeah [it exists]." [#10]

- The owner of a majority-owned goods and services firm said that this network exists, and that he is sometimes a part of it. He said, "[The good ol' boy network] only happens in the private sector. There's no real "good ol' boy network" when it comes to low bid. When you call it the "good ol' boy network," how about just [call it] a relationship that we've built with that customer which means that they're going to negotiate the work with us, and not entertain other competitors. [#11]
- In regards to the "good ol' boy network," the Subcontinent Asian American female owner of a DBE-certified engineering firm said, "It's there. It feels odd to be in that group. I don't play golf. There's a guy in the water industry who really doesn't like me and I know that it's because I'm a female and I openly speak my mind and I'm not a part of that network." [#16]
- The vice president of a DBE-certified Black American engineering firm said, "The good ol' boy network is alive and well." He went on to say that so many deals are made out on the golf course or at the country clubs where you don't see many Black Americans there. He said, "Most of us can't afford a membership. We've tried to take potential clients out to dinner, but nothing has come of it. It is all on the surface." [#19b]
- When asked if the "good ol' boy network" can be a barrier to women- and minority-owned businesses, the owner of a DBE-certified Black American-owned goods and services firm said that this network is prominent in the construction industry. She said, "[Prime contractors] will go with the people that they know can get the work done because they've worked with them, and they've established that rapport. They wouldn't come to a new person such as myself to reach out to me, because they really don't know me." [#21]
- The manager of an SBE-certified consulting firm said, "In the end, it depends on how good of a networker [you are]. That's what I mean by the good ol' boy network, it's guys mainly, but I don't think it's racially or gender based. It's more [about knowing people.] That's the kind of business this is. Trying to formalize and break into new markets is very difficult, especially on the private side and I'm finding it's pretty challenging on the public side." [#22]
- When asked if he was aware of a good ol' boy network, the project development manager of a majority-owned asphalt firm said that he believes this network exists. He said, "I think that happens in construction all the time, although it's not near as prevalent as it was 20 years ago. There are certain general contractors who like to use certain suppliers and they've got good relationships and because of that they will talk pricing at bid time and work things out. I don't think there are, in the public area, I don't think that goes on near as much except for shopping of material prices, I think that still goes on in some instances." [#27]
- The owner of a majority-owned street sweeping firm said a good ol' boy network does exist. He added, "Especially some of the prime contractors are very close to the unions and they are, period." [#28]
- The president and CEO of the National Black Contractors Association said, "If it's EGCA or AGC they work within their membership and these are the good ol' boy networks, primary whites that are

coming together even with the ASA Small Business Association, these are the primes that are basically setting up.” He added, “And so these public agencies are giving this money over to good ol’ boy network group that basically have had their ears and basically saying that we’re the masters, we’re the engineers, we’re the builders and we will rebuild your cities and your infrastructure. And we don’t want a bunch of damn red tape. We want an easy path of resistance and we’re going to deliver what you want. So don’t tell us to hire who we want to hire. We will hire whoever we want to hire.” [TA#1]

- The Caucasian estimator at an SBE-certified construction company said that he feels that a lot of public work is given by general contractors to whatever subcontractors they are accustomed to working with, and also believes that union firms are preferred. He said, “I was studying who bids with who [and] when you get the big guys out there, the union people – no matter if I come in as non-union and my price is lower, they’re going to take their buddy who’s in the union. ... They don’t have to play on a fair field out there.” [#33]

Some minority and female interviewees indicated that the good ol’ boy network adversely affects their businesses. For example:

- The female Hispanic Operations Manager of a DBE-certified towing company said that the climate has shifted from Mexican immigrants coming into San Diego and offering low-cost towing and repair services, to Armenian family businesses “with the deep, deep pockets.” She said that no one else can compete with these businesses, because they do not have to get traditional loans, but can take over contracts using money and resources from other family members. She said that because the present owner is Mexican, rather than Armenian, he is not perceived as an insider in the business. [#2]
- The Black American owner of an MBE-certified security company said that public work is more difficult to obtain because it is hard to become a part of the network. He said, “It’s difficult to move into that next stage from where we are because everyone has that group of people who they normally like working with. I call it the good ol’ boy network. They say ‘we want the best bid,’ but when you put out your bid they go with the same company they’ve been going with.” He later added that he has been more likely to run into an ol’ boy network when attempting to get government contracts, including federal and city contracts. [#9]
- The president of a non-certified Native American-owned engineering firm said that his experience with the good ol’ boy network” has been in bidding to public agencies where he says “the big firms are hired to write the specifications for these jobs that edge out smaller companies.” [#15]
- The owner of a DBE-certified Black American-owned goods and services firm said that many people are surprised that she hasn’t won a contract yet. She explained that she thinks that this is largely due to the “good ol’ boy network.” She said, “I have a lot of people that say to me, ‘Why haven’t you received a contract yet? You’re an African American woman. You should have been on a project.’ Right, I know. I don’t know what to tell you at this point. It just appears that [prime contractors] know who they want. So I’m locked out.” [#21]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “The good ol’ boy network is a big deal in the construction business and we constantly have issues with this. It’s sad

because we don't give out our prices or do engage in this type of behavior; we are honest while others aren't." [CALTRANS #1]

One interviewee said that there was a good ol' boy network, but they have, over time, been able to enter the group. The Asian American owner of a DBE-certified engineering company said, "Oh, yes [there is a good ol' boy network] It took us a very long time to get our foot in the door with the prime contractors." He said that prime contractors tend to have a specific set of subcontractors that they use. He reported that he has heard from other companies that the situation is similar today. [#3]

Some interviewees reported they were not affected by any good ol' boy network or other closed networks or that the good ol' boy network no longer exists. For example:

- The Senior Engineer for a non-certified minority-owned engineering firm said that he would "put it differently" when asked about the presence of a good ol' boy network." He said that, instead, the project manager has to do the work of getting to know the important decision-makers before even writing the proposal. "Help them find a way to be 'prejudicial' on our behalf. Expose them to the fact of what we were doing so that we weren't such strangers for that particular discipline by the time we got there." [#5]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said, "Imperial County is somewhat of a good ol' boy network. You hear people say that. But it's not affected us. We got in as a subcontractor and it's working out alright." [#12]
- The female owner of an SLBE-certified environmental consulting company stated that she does not experience the good ol' boy network in conducting her business with other firms or agencies. [#13]
- In regards to the good ol' boy network, the manager of a publicly traded engineering firm said, "There's probably several networks. I think it's probably gone over more on the other side. There's more of an emphasis of women having more opportunities than there used to be." [#26]
- The Caucasian woman owner of a WBE-certified trucking company stated that since she's been doing this work for so long, the good ol' boy network is not a problem. She continued, "I know it exists, but it's not a problem for me." [#36]

Other allegations of discriminatory treatment. The study team also examined other comments about discriminatory treatment.

Some interviewees had other comments about what they perceived as discrimination against minorities or women. For example:

- The female Hispanic Operations Manager of a DBE-certified towing company said, "... There is a lot of discrimination, I feel, in the workplaces here [in San Diego]...against women and against [Hispanics]." [#2]
- The co-owner of a WBE-certified construction firm said, "Sometimes when we tell people we are a woman-owned business, they cock their heads like 'Huh!' I think they think I'm speaking some foreign language when I tell them that." [#18]

- The owner of a DBE-certified Black American-owned goods and services firm reported that she feels that Black American and Hispanic subcontractors experience this discrimination more than other races. She said, “I’ve noticed that...Asians are getting a lot of work, but African Americans [and] Hispanics, we’re getting left out. Now I hear a couple white folks that are complaining. They’re saying they’re getting locked out now by the Asians.” [#21]

Some interviewees reported that they do not feel as though they are discriminated against. For example:

- The owner of a certified Native American-owned construction firm said that he has not run into racial or gender discrimination in the workplace. He said, “I’ve never been discriminated against. I just never have.” [#4]
- The owner of a WBE-certified engineering firm stated that she had applied for 8(a) small business certification, but that she had to show a preponderance of evidence that she had been discriminated against and she did not feel that she was able to do so. [#10]
- The female owner of an SLBE-certified environmental consulting company reported that she does not experience gender discrimination in conducting her business with other firms or agencies. She said, “We have three principals and two of us are women, and most of the time it’s not an issue.” [#13]
- The Caucasian partner in a DBE-certified engineering firm reported that there are no issues with discrimination that he knows of. He said that his partners are Mexican American and his market is predominantly Mexican American. He’s never had any personal experiences with discrimination or heard of any from his partners. [#24]
- The Hispanic owner of a DBE-certified engineering firm reported that in general, competition is fair. [#25]
- The vice president of IVEDC said, “Really I would have to say the answer would be no. I have not heard of ... race or gender discrimination of any kind.” He added, “We are so heavily Hispanic here. I mean, if you don’t want to do business with Hispanics then who are you going to do business with? I don’t think it’s a factor here. I haven’t seen it. It all boils down to quality of work. If you aren’t quality then you are out the door.” [TA#2]

H. Insights Regarding Neutral Measures

The study team asked business owners and managers about their views of potential race- and gender-neutral measures that might help all small businesses, or all businesses, obtain work in the transportation contracting industry. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix review comments pertaining to:

- Technical assistance and support services (*page 76*);
- On-the-job training programs (*page 77*);
- Mentor-protégé relationships (*page 78*);

- Joint venture relationships (*page 79*);
- Financing assistance (*page 80*);
- Bonding assistance (*page 81*);
- Assistance in obtaining business insurance (*page 81*);
- Assistance in using emerging technology (*page 82*);
- Other small business start-up assistance (*page 82*);
- Information on public agency contracting procedures and bidding opportunities (*page 82*);
- On-line registration with a public agency as a potential bidder (*page 83*);
- Hard copy or electronic directory of potential subcontractors (*page 84*);
- Pre-bid conferences where subcontractors can meet prime contractors (*page 84*);
- Distribution of lists of planholders or other lists of possible prime bidders to potential subcontractors (*page 85*);
- Other agency outreach such as vendor fairs and events (*page 85*);
- Streamlining or simplification of bidding procedures (*page 87*);
- Breaking up large contracts into smaller pieces (*page 87*);
- Price or evaluation preferences for small businesses (*page 88*);
- Small business set-asides (*page 88*);
- Mandatory subcontracting minimums (*page 89*);
- Small business subcontracting goals (*page 89*);
- Formal complaint and grievance procedures (*page 90*); and
- Other measures (*page 90*).

Technical assistance and support services. The study team discussed different types of technical assistance and other business support programs.

Most business owners and managers reported being aware of technical assistance and support services programs and having used them. Examples of such comments include the following:

- The owner of a certified Black American-owned construction firm said that the Turner program was good. He went on to say, “I feel like it’s just learning. People can know a lot, but if they don’t have money to help them, it’s tough.” The financial officer of the firm went on to say, “We did learn about other companies through Turner It was a networking opportunity.” The general manager said that the expectation was that Turner would help the firm get work. He then said, “We were actually qualified for six hundred thousand out at the airport through Turner.” [#1a]
- The Asian American owner of a DBE-certified engineering company said that all agencies already have technical support services, including online courses. He said that most of them are free or

have only a nominal fee. He added that Caltrans and SANDAG have classes and seminars that he is aware of. He said, “The only agency that doesn’t do as much is the County of San Diego.” [#3]

- The Black American owner of an MBE-certified security company said, “I think that what the SBA is doing is really great for small businesses...who don’t know certain things that they should look out for.” He later added that the SBA was very helpful in learning about the process of getting certified as an MBE and a DVBE and about how those certifications could be useful. “I found out all the other different things that you have to do in order to make yourself marketable for SANDAG and some of the other companies” [#9]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that only program he’s familiar with is PTAC, which is a non-profit association. He thinks the association may be funded through the SBA and/or other local agencies, and is located in Mission Valley. He stated that [PTAC] teaches QuickBooks and other business software. [#12]
- The president of a non-certified Native American-owned engineering firm said that he attended a seminar sponsored by Caltrans that helped to change his firm’s processes and ultimately assisted them by making the process easier. [#15]
- The co-owner of a WBE-certified construction firm said, “My wife and I are aware of the SBA program and we’ve actually been in contact with SCORE to get advice and to bounce off some ideas with the folks over there.” He reported that he found these resources to be helpful because of their many years of business wisdom. [#18]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am aware of similar services. I attend a class at USC that teaches estimating, insurance, and safety. I think this type of class is very helpful to small businesses.” [CALTRANS #1]
- The owner of a majority-owned street sweeping firm was aware of technical assistance and said it was helpful. [#28]
- The Caucasian woman owner of a WBE-certified trucking company stated that she is aware that technical programs already exist and feels they would be helpful. [#36]

One firm owner recommended against such programs because they thought that small businesses should access any assistance on their own. The Caucasian male owner of a construction firm said, “You have schools for [technical assistance]. Education in those areas is the answer, not the [government] doing it for you. I believe in schools for carpenters and plumbers. They can be no fees or low fees, but not run by the government.” [#20]

On-the-job training programs. Nearly all business owners and managers interviewed were supportive of on-the-job training programs. Examples include:

- When asked if on-the-job training programs would be helpful, the vice president of IVEDC said, “It would be very helpful and we do have on-the-job training programs through the workforce development board office and the state of California employment training panel.”[TA#2]

- The vice president of a DBE-certified consulting firm said, “We have never really taken advantage of that but if we had the right contract, we’d be happy to hire some new people and use some on-the-job training grants to train them.” [#31]

One interviewee said that on-the-job training would only be useful in certain settings. The vice president of a DBE-certified Black American engineering firm said on-the-job training programs would be good for some industries. He added, “Our firm deals with regulatory compliance. You have to have experience.” [#19b]

Mentor-protégé relationships. Many interviewees commented on mentor-protégé programs.

There were many comments from interviewees in support of mentor-protégé programs. [For example, #12, #15, #18, #19b, #21, #25, #26, #31, #32] Examples of those comments include the following:

- When asked if he had heard of or participated in mentor-protégé programs, the owner of a certified Native American-owned construction firm said that he had heard of the existence of those programs, but that he had not participated in any. He said, “I think I heard it was good from one of the minority meetings that I went to.” [#4]
- The Asian American owner of a DBE-certified engineering company said the mentoring program with Caltrans and the protégé program with the Water Authority have helped his firm. He said that his firm participated in the Cal Mentor program three years ago and participated in the Water Authority program two years ago. He said that the Water Authority has since discontinued the program.

He added that when his firm first started with the Cal Mentor Program, it was paired with a big prime contractor and learned a lot about business development, financial issues, and marketing. He said that the prime contractor later used his firm as a sub for projects. He said, “Because of that relationship, we got to know a lot more of their senior staff.” He said that that, through the Water Authority program, his firm was paired with another large firm. He said, “We have a very good relationship with [that firm] and they use us quite a bit.” For the Cal Mentor program, “the main problem is that there are more protégés than mentors.” He said that that mentors participate in such programs to “show the agencies that they are serious about helping.” [#3]

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that the firm had two large business mentors, one through the Small Business Administration and one through the Department of Defense. They are also currently mentoring a WBE in Yuma, Arizona. She said, “Like anything, you can get as much or as little out of [mentoring programs] as both partners are willing to invest...The smaller companies go into these relationships with a lot of expectation and hope and it’s not always perhaps ‘as advertised.’” She added that in mentoring relationships, sometimes “the big company just doesn’t want to share.” She said that, for her firm, the relationship with their mentor was very beneficial. One company was “exceptionally ruthless – going through protégés and hogging the work, not growing their small partners, not sharing the work, not mentoring them in any meaningful way. ... I think the SBA is onto that now.” [#7a]
- The female owner of a WBE-certified construction company said that mentor/protégé programs could be helpful if the mentor company helps the protégé to learn the whole process from bidding

to completing the contract. She said, “A lot of times they [mentors] buy these big programs for them for bookkeeping ... but protégés have to understand ... that you have to be able to perform that job for what you say you’re going to.” [#8]

- The Black American owner of an MBE-certified security company said it would be useful to be able to learn more about opportunities for teaming up with other companies. [#9]
- The president of a non-certified Native American-owned engineering firm said that the “Mentoring Project” is a program that should be expanded.” He reported that he was helped from a mentoring program and said, “Any large agency that has funding should have something like this program.” [#15]
- The vice president of estimating of a non-certified construction company said the firm has participated in the City of San Diego mentoring program. He said they consider it a good opportunity to help educate small contractors. [#17]
- The manager of an SBE-certified consulting firm said that his firm is registered in the Cal Mentor program which matches [his firm] with a “big giant company to develop our business and help us with our marketing and operations.” He added that he feels this program is helpful and will be especially helpful in the future. [#22]

One interviewee had criticisms of the SANDAG mentor-protégé program. The vice president of a WBE-certified Hispanic construction company said, “The only mentor-protégé programs that they have are part of AGC, and SANDAG is proud of this, but AGC if you are not part of them then obviously you are not going to be in their mentor-protégé program. So indirectly it is related only to those people they are working with and generally speaking they are a son or a cousin of somebody.” [#37]

One interviewee was critical of government mentor-protégé programs in general. The Caucasian male owner of a construction firm said, “I believe in mentor-protégé programs. That’s the old school way. The father plumber brought his son or brother’s son. He said, ‘Go here, go there with me and learn from me.’ That’s not a formal program. It works best when you do not have bureaucratic/government involvement. [#20]

Joint venture relationships. Interviewees also discussed joint venture relationships.

Some of the business owners and managers interviewed had favorable comments about joint venture programs. Examples of those comments include the following:

- The Caucasian male owner of a DVBE-certified construction company reported that joint venture training would be useful. He said that, for example, he is not sure whether two DVBEs can register as a joint venture. He compared this to the SDUSD, which requires prime contractors to meet with small businesses. [#14]
- In regards to joint venture relationships, the Caucasian male owner of a construction firm said, “Yes, I endorse that concept. Two businesses getting together without bureaucratic/government involvement, that’s good.” [#20]

- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am not aware of any joint venture program but it would be helpful and a great opportunity for small businesses.” [CALTRANS #1]

Some interviewees expressed negative comments and anecdotes about joint venture programs. For example:

- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that the SBA has tightened rules for mentor-protégé relationships by requiring that for 8(a) joint ventures the protégé is to perform 40 percent of the work. She said, “There are a couple of companies that are just absolutely notorious for preying on these small companies and just using them. Because then you can compete ... like you’re small, but you have the forces of a 30,000 person company behind this little 8(a) joint venture.” [#7a]
- The male Caucasian owner of a DVBE-certified construction company said, “[Joint venture relationships] are dangerous.” He went on to say, “The problem with it is a requirement by the state of 51 percent ownership and management by disabled veterans. What corporation is going to get 51 percent of their stuff away to a disabled vet? ... You have to understand and of course the veteran learned real fast you get in bed with an elephant and he rolls over and what happens.” [#32]

Financing assistance. Many business owners and managers had comments about assistance obtaining business financing.

Many business owners and managers indicated that financing assistance would be helpful. Comments in favor of financing assistance programs included the following:

- The female owner of a WBE-certified construction company said “real” assistance with financing would be helpful. She said, “There’s a lot of programs out there, but I find that very few people can really enter those. ... I hear all these young businesses say, ‘Well, we can’t get financing.’” [#8]
- The Black American owner of an MBE-certified security company said help with obtaining financing would be useful. [#9]
- When asked if financial assistance would be helpful, the vice president of a DBE-certified Black American engineering firm said that lines of credit with low interest rates would be good. [#19b]
- In regards to financial assistance, the Caucasian male owner of a construction firm said, “That is very important! SBA loans are great, guarantees on loans. I certainly agree with that. It provides for expansion capital or working capital.” [#20]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am not aware of financing assistance but it would be helpful.” [CALTRANS #1]
- When asked what kind of financing assistance is available, the vice president of IVEDC said, “Very little. I really don’t know of any – I mean, we try – we connect local contractors with our local banks and lenders. But other than that, I don’t know of any instances.” He went on to say financing

assistance would definitely be helpful. He said, “That would probably be, in my opinion, the number one thing that could help our businesses.” [TA#2]

One business owner had attempted to use a financing assistance program and had negative

comments: The owner of a DBE-certified Black American-owned goods and services firm said that she participated in a financing assistance program hosted by a local career development center, but that the program was not helpful to her business. She said, “It was a waste of time.” [#21]

Bonding assistance. The study team asked business owners and managers about bonding assistance.

Many business owners and managers indicated that bonding assistance would be helpful. Examples of such comments include the following:

- The general manager of a certified Black American-owned construction firm said the program with Merriweather and Williams at the San Diego airport is helpful. He said, “This is a program where you can bid on projects at the San Diego airport, and they’ll help you with bonding. Not only will they help you with bonding, but if you need collateral for that bond they’ll provide that collateral for the ... performance bonds. As far as cash flow, they make sure you’re paid every 30 days or so. But they ... act as a liaison between the small contractor and the San Diego airport. I think they’re doing a lot.” [#1b]
- The Caucasian male owner of a construction firm said, “Bonding assistance I will endorse.” He also stated that bonding assistance would be helpful if it is reasonably priced. He went on to say, “Bonding agents are not the most generous.” [#20]
- In regards to bonding assistance, the Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am not aware of this program but it would be helpful.” [CALTRANS #1]

Some business owners said that they did not have difficulties dealing with bonding. [For example #13, #19, #28, #30, #32, #37]

Assistance in obtaining business insurance. Interviewees discussed assistance obtaining business insurance.

Only a few interviewees had any comment about assistance in obtaining business insurance. Examples of those comments include:

- The president of a non-certified Native American owned engineering firm stated that “underwriters are going to evaluate a firm based on their risk factors so if there’s assistance to minimize those risk factors...that would be good.” [#15]
- When asked about assistance in obtaining business insurance, the male Hispanic president of an MBE-certified environmental engineering firm said, “In private enterprise, the private insurers want just about everything that you’ve done. They want to see your financial statements and it makes it really tough to get insurance at good price. And here’s one I think SANDAG should be looking at, if I was their consultant I would say let’s provide insurance through a RAPA program. It’s where one insurance carrier provides all the insurance for all the contractors on the job, that will bring back major premium dividends back to SANDAG, I mean it’s a money maker for SANDAG,

[because] I mean they will pay premiums up front but they are going to get all the money back. If you have an effective safety and health program, overseeing those subcontracts under a RAPA program you're going to get money back." [#29]

Assistance in using emerging technology. Interviewees discussed assistance in the emerging technology.

Many business owners said that assistance using emerging technology would be helpful. Examples of those comments include the following:

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm stated that his firm takes advantage of services that are available to assist small businesses. He explained that he has worked with the NOREAS firm and he was telling him about the headaches he was having with his programs. Through the SBA Program, they found out about a technology that "allows you to upload to the 'cloud' where you can carry your programs with you wherever you go for \$50-\$60 per month." He stated that information has helped his firm very much. [#12]
- In regards to assistance in using emerging technology, the Caucasian female owner of a WBE/SBE/DBE-certified company reported, "I am not aware of this program but it would be helpful." [CALTRANS #1]

Other small business start-up assistance. Interviewees discussed other small business start-up assistance.

Only a few interviewees had any comment about other small business start-up assistance. Examples of those comments include:

- The president of a certified Subcontinent Asian American-owned engineering firm said that a small business incubation program would be helpful for start-up businesses. He went on to say that he is "familiar with this type of set-up in other cities and also in India...where programs like this offer funding for up to three years for emerging small businesses to help them get a leg up." [#12]
- The Caucasian woman owner of a WBE-certified trucking company stated that "small business start-up assistance for companies to learn more about banking, equipment financing, and maintaining a good credit score will be helpful." [#36]
- When asked about other small business start-up assistance, the president of a non-certified Native American-owned engineering firm said, "That's where the SBA comes in." [#15]

Information on public agency contracting procedures and bidding opportunities. Most interviewees indicated that information on public agency contracting procedures and bidding opportunities is helpful.

Many business owners and managers reported that they were already receiving information on bidding opportunities or knew how to search for them. For example:

- The owner of a certified Native American-owned construction firm said that the public agencies in the area are "really good about getting the word out for work." [#4]

- The Senior Engineer for a non-certified minority-owned engineering firm said that he responds to RFPs that are sent to them because they are on an agency's list or that they receive through a subscription to a marketing service. [#5]
- The Vice President of Marketing and Business Development for an MBE-certified engineering firm said that there are so many databases [for finding contracts to bid on] and "so much information that it almost becomes part of the problem." [#7a]
- The manager of a publicly traded engineering firm reported that his firm lists themselves as a consultant or vendor on public agency websites so they receive bid invitations via email. [#26]
- The project development manager of a majority-owned asphalt firm said, "Most, if not all, of the opportunities are advertised on the AGC website and or other publications, so that typically is not a problem." [#27]

A number of interviewees suggested that public agencies better coordinate how they provide information about contract opportunities. For example:

- The Black American owner of a certified security company said that he is not very well aware of how to get on lists of potential bidders for contracts. He also said that he had heard about an opportunity to take a course that would allow him to be on the list of bidders for an airport construction contractor, but has not been able to locate information about it. [#9]
- The vice president of a DBE-certified Black American engineering firm said, "Agencies should have a way to get the word out in a timely manner to especially small firms." [#19b]
- The Caucasian partner in a DBE-certified engineering firm said that information on public agency contracting procedures and bidding opportunities comes through occasionally from some local contractors and SANDAG but not from the cities. He said, "If it's not federally-funded, they don't have any concern regarding DBEs." [#24]

One interviewee cautioned that obtaining information when public agencies publicly announce bidding opportunities may not be helpful because it is then too late in the process. The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that so often, by the time bid information hits the street and the pre-bid meeting occurs, the primes already have their teams together. He added that there should be a better way to create a "level playing field" so that smaller firms were able to participate more. [#12]

On-line registration with a public agency as a potential bidder. Interviewees were asked to discuss on-line registration with a public agency as a potential bidder.

Very few interviewees had any comment on on-line registration as a potential bidder. Examples include:

- When asked about on-line registration as a potential bidder, the Caucasian woman owner of a WBE-certified trucking company stated, "This already is in place. ... You just have to be a go-getter to make it work for you." [#36]

One interviewee said on-line registration systems are too complicated for small businesses. The female owner of a WBE-certified construction company said that Internet sites and bid boards for locating projects may be intimidating to some small business owners: “We don’t have IT people to help us negotiate things.” [#8]

Hard copy or electronic directory of potential subcontractors. Most interviewees said that hard copy or electronic lists of potential subcontractors would be helpful.

Some business owners pointed out existing resources. Examples of such comments included the following:

- In regards to the hard copy or electronic director of potential subcontracts, the Caucasian male owner of a construction firm said, “Yes, I’m aware that this is available. It is positive because it gives you connections.” [#20]
- In regards to hard copy or electronic directories of potential subcontractors, the Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am aware of this because of the work we do with Caltrans. I like being able to look up other subcontractors.” [CALTRANS #1]
- The manager of a publicly traded engineering firm reported that SANDAG has BENCH, an electronic directory of subs. [#26]

Other business owners recommended an electronic directory of prime contractors. For example:

- The president of a non-certified Native American-owned engineering firm stated that it would be beneficial to have a directory. He also stated that “a directory of primes would also be beneficial because unless subs were going to team with each other, a list of who the primes are makes more sense.” [#15]

Pre-bid conferences where subs can meet primes. Many business owners and managers supported holding pre-bid conferences. For example:

- The female owner of a WBE-certified construction company said that she thinks “meet the primes” events can be a useful way to form personal relationships at the beginning of the process. [#8]
- When asked about pre-bid conferences where subs can meet primes, the president of a non-certified Native American-owned engineering firm responded, “That is very important.” He also said that a walk-through is very important because you may have the plans, but after a firm has actually walked a job site, the firm could decide they don’t want to bid the job.” [#15]
- The Caucasian female owner of a WBE/SBE/DBE-certified company said, “I am not aware of pre-bid conferences but it sounds like it might be helpful.” [CALTRANS #1]

A few interviewees did not think that pre-bid meetings were useful. For example:

- The owner of a DBE-certified Black American-owned goods and services firm said that she participated in a networking program called the Business Mastering Program that was intended to help small businesses win contracts with the large prime contractor that led the program. She went

on to say that she felt that one of the representatives of the prime contractor treated her with disrespect, and that the program was a waste of her time and resources. [#21]

- When asked about pre-bid conferences where subcontractors can meet prime contracts, the project development manager of a majority-owned asphalt firm said, “I think most of it is a waste of time. Like I said, I went to that one for the mid-city transit project for the union contractors, I am going to another one today for the east county transit job that SANDAG is doing, it will be interesting to me to see whether they have any non-union general contractors or if it is just another union show.” [#27]
- When asked about pre-bid conferences, the male Caucasian owner of a DVBE-certified construction company said, “I find they generally have no interest in they are just collecting business cards so they can tally up the sheet that ask amount of people attended. I have barely really seen anything come out of them.” [#32]
- The Caucasian estimator at an SBE-certified construction company said that he personally does not feel that attending events to meet prime contractors would be very useful to his business because the same thing can be accomplished by telephone. “Mostly [opportunities are located by] word of mouth through the vendors, because most of my competitors have to buy the steel [at] the same place I do. The steel guy is like the guy at the barbershop – he knows everybody.” [#33]

Distribution of lists of planholders or other lists of possible prime bidders to potential subcontractors. Most of the business owners and managers interviewed supported the distribution of planholders lists.

Some interviewee discussed the services that were already available. For example:

- The Caucasian male owner of a construction firm said, “You become a member of an organization and you can get all on the Internet. I am aware of it and it is positive, but no government please.” [#20]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am aware of planholders lists because of Caltrans project. These are helpful as we determine who to bid with.” [CALTRANS #1]
- The Hispanic owner of a DBE-certified engineering firm reported that lists of planholders or other lists of possible prime bidders are typically available. [#25]

Other agency outreach, such as vendor fairs and events. Some business owners and managers reported that outreach such as vendor fairs and events were useful. Others no longer regularly attend those events.

Examples of positive comments about agency outreach events include the following:

- The owner of a certified Native American-owned construction firm said that he attended an outreach event that brought minority business owners in contact with large prime contractors. He said, “Minority business owners were supposed to be there to meet people from [a large private

firm], the water district, things like that.” When asked if he found the event helpful, he said, “Yeah, it was okay. Anytime you get in front of somebody that holds the paycheck it’s a good thing.” When asked which organization hosted the event, he said, “The minority business council here in San Diego.” [#4]

- The Asian American owner of a DBE-certified engineering company said, “One of [the Water Authority’s] more popular classes is the “Get to Know the Primes ... where the Water Authority will invite four or five of the major primes to sit down as a panel and answer questions.” He said they also provide opportunities for networking. [#3]
- The Black American owner of an MBE-certified security company said that he has attended events for small businesses hosted by SANDAG and the San Diego Contractors Association and found them to be helpful. He found out about these events through his association with the SBA. [#9]
- The Caucasian male owner of a DVBE-certified construction company said that a recent SANDAG outreach event was one thing that got him interested in going after more work on SANDAG projects. [#14]
- The manager of an SBE-certified consulting firm said that members of his firm try to attend outreach events put on by large [prime contractors]. He described these events as being helpful in introducing his company to different agencies and learning about opportunities. [#22]
- In regards to agency outreach, the Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am not aware of this program but it would be helpful.” [CALTRANS #1]
- The manager of a publicly traded engineering firm said, “So much of it is relationship-based. DBEs ask me how to get more work with SANDAG and I ask them if they were at the last outreach event and they say, ‘No.’ If you don’t get out of the office that much, how do you get work? You need to do that. It’s about relationships. If I haven’t seen you in two years, the chances of me putting you on a team are pretty remote. We’ve been talking about having a brown bag and inviting DBEs to learn about their firms and introduce them to our Project Managers.” He later added, “Mixers and outreach are always good. They make a point that it’s for firms to build relationships and get their name out there. It’s not just for information.” [#26]

A number of business owners and managers indicated that outreach events were not useful. For example:

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he’s participated in these types of outreach events and he does not find them to be very useful. [#12]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said, “A lot of times when you go to these outreach things, you’re meeting with the small business liaisons or advocates, and that’s okay, but it would be better if the buyers are actually there, or the project managers or technical managers, because these are the people who really make the decisions.” He explained that it would be helpful if the opportunity to give capability briefings was available to

give small firms. He said, “What we need is access.” He believes more small firms would benefit, and possibly get more work. [#12]

- The president of a non-certified Native American-owned engineering firm stated that he has attended a few, but has never benefited, so he doesn’t attend any longer. [#15]
- When asked about other agency outreach, the project development manager of a majority-owned asphalt firm said, “We’re really not interested in that, wouldn’t do us any good.” [#27]

Streamlining/simplification of bidding procedures. Most business owners said that streamlining or simplifying bidding procedures would be helpful. Examples include:

- When asked about streamlining bidding procedures, the project development manager of a majority-owned asphalt firm said, “It would be nice, but based upon the litigation that goes on in contracts anymore, I don’t see that happening.” [#27]
- The president of a non-certified Native American-owned engineering firm said simplification would be helpful. [#15]
- When asked about streamlining the bidding process, the Caucasian male owner of a construction firm said, “Yes, of course the best way is for government is to stay out of it. ... Provide the paper, the plans, and we will take it from there.” [#20]
- The male Hispanic president of an MBE-certified environmental engineering firm said that streamlining or simplifying the bid process would be helpful. [#29]

Breaking up large contracts into smaller pieces. The size of contracts and unbundling of contracts were topics of interest to many interviewees.

Most business owners and managers interviewed indicated that breaking up large contracts into smaller components would be helpful. Examples of those comments include the following:

- The female Hispanic Operations Manager of a DBE-certified towing company said that the most helpful addition to MBE or other programs for their company would be to break up larger contracts for smaller businesses. For example, SANDAG might use the company for lighter jobs, if they have breakdowns or gaps to fill. She suggested the possibility of a short-term contract, such as 90 days, or to rotate contracts among small companies. [#2]
- The Asian American owner of a DBE-certified engineering company said that it would be helpful if larger contracts could be broken up into smaller pieces because smaller contractors cannot meet bonding and insurance requirements on large contracts. He referred to a program for contractors from the City of San Diego. He said, “They are trying to establish contracts under a certain dollar limit that are exclusively for the small business.” [#3]
- The female owner of a WBE-certified construction company said, “Another thing that affects us [small businesses], is bundling of the contracts ... and particularly SANDAG projects are pretty big. If they would break a big job up into three or four they would get a lot more participation.” [#8]

- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that another way to help small firms would be the “unbundling of contracts ... because the more you bid out the more complete bids will come in. ... This may be difficult for contract managers, but good for small firms.” [#12]
- The vice president of a DBE-certified Black American engineering firm said, “Breaking up larger contracts into smaller pieces will only make more sense if they’re broken into contracts that smaller firms can bid as primes.” [#19b]
- When asked about breaking up large contracts into smaller pieces, the project development manager of a majority-owned asphalt firm said, “I would be very much in favor of that.” [#27]

A few business owners saw both positive and negative aspects of unbundling contracts. For example:

- The Caucasian male owner of a DVBE-certified construction company said that breaking up larger contracts would not necessarily be useful for his business, since the breakdown is usually already done by the prime contractor who gets the award. [#14]
- The president of a non-certified Native American-owned engineering firm said that breaking up large contracts into smaller jobs would be great for small businesses, but may be a challenge for contract administrators. [#15]

Price or evaluation preferences for small businesses. Interviewees also discussed bid preferences for small businesses.

Many interviewees said that price or evaluation preferences for small businesses would be helpful. [For example, #12, #15, #19b, CALTRANS #1, #24 and #25]

Some interviewees identified advantages and disadvantages with preferences for small businesses. For example:

- When asked about price or evaluation preferences for small businesses, the project development manager of a majority-owned asphalt firm said, “I guess that all depends on how much you want small businesses to be involved. If you want small businesses to be involved then you are going to give them a little bit of a break. Caltrans used to have a small business advantage on some of their jobs but I haven’t seen that in quite some time. It would help the small businesses in that area for sure.” He added that he has not seen any small business preferences with SANDAG, NCTD, or ICTC. [#27]

Small business set-asides. The study team discussed the concept of small business set-asides with business owners and managers. That type of program would limit bidding for certain contracts to firms qualifying as small businesses.

Most business owners and managers supported small business set-asides. Examples of those comments include the following:

- The Asian American owner of a DBE-certified engineering company said that set-aside programs would be useful if they are “properly managed and put together.” [#3]

- The female owner of an SLBE-certified environmental consulting company reported that small business public sector programs help her business. She said, “Since public sector projects usually have a set aside for [a] small business or disadvantaged business, that helps us and whoever the prime is because we’re a small business ... and we can do the work.” [#13]
- The president of a non-certified Native American-owned engineering firm stated that small business set asides would allow small businesses to build a resume. He said, “Contracts for \$5 million plus will usually limit a small business to only performing as a subcontractor.” [#15]
- The manager of an SBE-certified consulting firm said that he would like to see a set-aside program for small businesses to help them win contracts and avoid competing with larger companies. He said, “There’s no competition, there’s no way we can win it. And we [wouldn’t] have to beg these primes to put us on a team or to give us a bid opportunity.” He added, “I just wish there were more programs that were set up for small businesses to have more opportunities to get involved on these larger projects.” [#22]
- In regards to small business set-asides, the Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am not aware of this program but it would be helpful.” [CALTRANS #1]

Mandatory subcontracting minimums. Interviewees were asked to discuss mandatory subcontracting minimums.

Only a few firms had any comments on mandatory subcontracting minimums; those interviewees felt minimums would be useful. [For example, #12, CALTRANS #1 and #25] The project development manager of a majority-owned asphalt firm said, “I don’t have a problem with that if they are reasonable. Caltrans has had that for a long time and typically you have a good faith effort, you do the very best that you can, although sometimes that’s very subjective, but you do the best that you can to get advertised, and put things out there. If it is reasonable then it’s not that difficult to find small businesses and women-owned businesses to bid on the project. But sometimes they are not low though so that’s where the good faith effort comes in.” [#27]

One business owner was unsure about how mandatory subcontracting minimums would work. The president of a non-certified Native American-owned engineering firm stated that he doesn’t know how mandatory subcontracting minimums would work. [#15]

Small business subcontracting goals. Interviewees discussed the concept of setting contract goals for small business participation.

Many business owners and managers indicated that small business subcontracting goals would be helpful. [For example, #12, #15, #19b and #25] Examples of such comments include the following:

- In regards to small business subcontracting goals, the Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am not aware of this program but it would be helpful.” [CALTRANS #1]
- When asked about small business subcontracting goals, the Caucasian woman owner of a WBE-certified trucking company stated, “They really need to do this so that contractors don’t just give all

the work to their friends...then their friends just get rich.” She added, “You should get a job based on merit, not just because we’re friends.” [#36]

Other business owners recommended against a small business subcontracting goals programs. For example:

- The Caucasian male owner of a construction firm said, “It is not necessary because I believe that a small business that has few employees is efficient. They can get their own market share.” [#20]

Formal complaint/grievance procedures. The study team discussed procedures for making complaints or outlining grievances.

Many business owners and managers said that formal complaint and grievance procedures would be a benefit. [For example, #12, #15, #19b, CALTRANS #1 and #25] Examples include:

- The Caucasian male owner of a DVBE-certified construction company said he has not yet directly experienced any issues regarding complaints and grievances, but would like to know who to talk to if the issue does come up. [#14]

Other business owners reported that they had used existing processes and did not find them to be helpful or that there were negative consequences associated with using them. For example:

- The Caucasian male owner of a construction firm said, “Yes I am aware of them. It is handled by the law and the building code. It’s generally in your contract. You already have a procedure; if you lie to me I sue you for fraud. There’s too much litigation here anyway.” [#20]
- The Caucasian partner in a DBE-certified engineering firm said, “There’s no formal grievance procedure but everybody knows that if you complain they’re going to blacklist you. Not formally, but it’s easy for them to find a way to not hire you.” [#24]
- The manager of a publicly traded engineering firm said, “Formal complaint or grievance procedures always exist but nobody wants to use them because there’s a stigma that you’re going to be black-balled if you use them, but the agencies have never done anything to address that perception.” [#26]

Other measures. The study team asked interviewees if there were any other measures that would be helpful. One interviewee recommended shelter programs. The president of a DBE-certified Subcontinent Asian American-owned engineering firm stated that neutral measures that would be helpful to small businesses, including minority- and women-owned firms, would be “Shelter Programs.” He added, “This would not be a sole source, like the Navy does, but would allow the small firms to compete for the work. This would help to build capacity.” [#12]

I. Insights Regarding Race-/ethnicity- or Gender-based Measures

Interviewees, participants in public hearings, and other individuals made a number of comments about race- and gender-based measures that public agencies use, including DBE contract goals, including comments regarding:

- Support for race-/ethnicity- or gender-based measures (*page 91*);
- Negativity toward race-/ethnicity- or gender-based measures (*page 91*);
- Criticism for aspects of the Implementation of the Federal DBE Program (*page 92*);
- MBE/WBE/DBE fronts or fraud (*page 92*); and
- False reporting of DBE participation or falsifying good faith efforts (*page 94*).

Support for race-/ethnicity- or gender-based measures. There were many comments in favor of the Federal DBE Program, including DBE contract goals.

Some individuals had positive comments about DBE contract goals and the Federal DBE Program overall. Examples of such comments include the following:

- The female owner of a WBE-certified construction company said, “When we have ‘race neutral’ [contracts], I don’t think that really works because women and minorities don’t get ... work when it’s race neutral.” [#8]
- The Black American owner of an MBE-certified security company said that he would prefer to get business based on merit and experience, but feels that race-/ethnicity-based measures are sometimes the only way to get business or to get in front of potential clients. [#9]
- When asked about her experience with DBE programs, the Caucasian female owner of a WBE/SBE/DBE-certified company said, “The programs are good and useful for my business. The best certification is the UDBE. This has led to the most work.” [CALTRANS #1]

Negativity toward race-/ethnicity- or gender-based measures. Some interviewees said that they did not support programs that gave advantages to MBE/WBEs.

Some interviewees were critical of race- and gender-based programs. For example,

- The Caucasian male owner of a construction firm said, “These programs are too bureaucratic and totally unnecessary. I don’t believe in them and they have no benefit. The government needs to eliminate it.” He also said, “I’m a small business and I don’t believe in these affirmative action programs. It’s misused. I run into these landscapers who are using their girlfriends and wives to get certified. It’s all a joke. Affirmative action is outdated.” [#20]
- When asked if there are any measures limited to certified MBE/WBE/DBE firms that would be helpful, the project development manager of a majority-owned asphalt firm said, “No. To be very honest with you, I think they need to compete on the same level as everybody else. I’m not for preference programs, even if it was small businesses. If you’re playing the game you gotta play by the rules, you better be able to compete.” [#27]
- The owner of an SBE-certified surveying firm said, “I know there are a lot of companies out there that are DBEs and have those designations that make them special and more valuable than just us lowly SBEs, but we need the business too in order to grow, and I just want to make sure that everyone in the room understands that just because we are not minority-owned or woman-owned

doesn't mean we are having any easier of a time getting on these big contracts. It's every bit as challenging and frustrating in a lot of ways." [PH #2]

Criticism for aspects of the Implementation of the Federal DBE Program. There were several comments criticizing how public agencies implement particular aspects of the Federal DBE Program.

Some interviewees were critical about key aspects of the implementation of the Federal DBE Program. For example:

- The Caucasian partner in a DBE-certified engineering firm said that he doesn't think that DBE requirements are being enforced in that there is no follow-up to ensure that the DBEs are actually getting work. [#24]
- The manager of a publicly traded engineering firm said, "There's some confusion between DVBE (a State certification) and DBE. As a prime, we have to require a copy of their certification. We rarely see a goal for SBEs even though the City of San Diego has started certifying SLBEs (Small Local Business Enterprise) and ELBE (Emerging Local Business Enterprise) but that counts towards City of San Diego projects. So now you need a scorecard to track all the different certifications and goals." [#26]

MBE/WBE/DBE fronts or fraud. Many interviewees with a diverse range of experiences and opinions commented on the existence of fronts or fraud.

Several interviewees reported knowledge of examples of fronts or fraud. Some gave first-person accounts of instances they witnessed, whereas others spoke of less-specific instances or those of which they had no first-hand knowledge. For example:

- The Senior Engineer for a non-certified minority-owned engineering firm said that he has experienced fronts or fraud involving DBE/WBE/MBE certifications a couple of times over the years. He said that, in both cases, the spouse of the person actually performing the services was made president of the firm and assigned some sort of administrative role in order to obtain WBE certification. He does not believe fronts or fraud in obtaining certifications is widespread, partly because it is not always easy to tell what a person's ethnic heritage might be. He also said that he knows some firms that would qualify but have chosen not to become certified because the owners felt they could be successful without it. [#5]
- The female owner of a WBE-certified construction company said that she has "occasionally" encountered WBEs that were fronts or frauds. She said, "I belong to Women Construction Owners and Executives and whenever we see one that we question we try to police that ourselves, because that's not good for anybody." [#8]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he thinks he may know of a firm that may be a front. He expressed that these firms should not be allowed to conduct business as a certified firm if they are not valid. [#12]
- The vice president of a DBE-certified Black American engineering firm said, "Oh God yes!" when asked about MBE/WBE/DBE fronts. He continued, "Many of the women-owned service firms are

fronts where the female owner doesn't have the education, knowledge, and experience to run the firm they're pushing for the industry." [#19b]

- The Caucasian male owner of a construction firm said, "People tell me, 'Why don't you have your daughter-in-law as president?' I can't do that because that's dishonest." I was recently on a job with this company where the wife of this guy is listed as the president and he told me all she does is sign the checks but having her as the president gets him in the door. That's not right." [#20]
- The owner of a DBE-certified Black American-owned goods and services firm said that she believes many male owners use their wives to get DBE certification. When asked to provide an example, she said, "I went to a networking meeting just the other day. [The speaker] asked how many DBE firms there were in the room. There were a ton of white men that raised their hands. Okay, yeah right, you used your wife who doesn't know anything about what you're doing. How you got certified, I don't know. They're not checking, and they don't care." She went on to explain, "I [recently] heard a man say, 'We got certified because of my wife.' I said, 'Let me ask you something. Does she run the daily operations?' And he said, 'No.' I said, 'If I was you, I wouldn't open my mouth about it again. I wouldn't go around broadcasting that because you've committed fraud.'" [#21]
- The manager of an SBE-certified consulting firm said he has heard of companies saying they are a small business or minority-owned, where in reality they are neither. [#22]
- When asked if the MBE/WBE/DBE fronts or frauds can be a barrier to women- and minority-owned businesses, the owner of a DBE-certified Black American-owned goods and services firm said that she believes that this is one of the biggest problems with the DBE program. [#21]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, "In my estimation one out of every 10 MBE/WBE/DBEs are fronts for other businesses. There are also others that are fishy." [CALTRANS #1]
- When asked about companies that are fronts or frauds, the male Caucasian owner of a DVBE-certified construction company said, "We see it all the time. Complete fraud. And we are concerned. We want honesty. In the veteran community is probably one of the most honest. But in any organization you have opportunities where prime contractors will find a veteran and take advantage of him and he has no idea of what he's doing. ... The guy signed up and he is a disabled vet. We can verify he's a disabled vet but what in the world is he in business for. He doesn't know anything about this. And then you have the address and you go to the address and there is no business there at that address. You go inside and maybe he has an office inside. And you ask the office manager if they know so-and-so's business and they look at you like 'What?' You find out that the prime contractor set him up and did all the paperwork and gave him an address of his architect and that's how they solicited the job. This happens all the time." [#32]

Some interviewees explained the impact of alleged DBE fronts on their companies. Examples of such comments included the following:

- The Caucasian male owner of a construction firm said that if those [DBE] programs were gone and somebody had to shore up and give the best bid, and hire the right people [generals] really wanted, I believe the public could get projects that are built much better and cheaper. Let's just say you and

I are bidding but you hire your wife for president of the company so you can deduct 10 percent off your bid so that you get the job. That's bad news, really bad news because the big companies who really know what they are doing can't have their wives as president to run the company." [#20]

- The owner of a majority-owned street sweeping firm said the MBE/WBE/DBE fronts or frauds exist and are a problem. He said, "For example, I'm a GSA contractor, I spent \$6,000, \$7,000 to get on a GSA contract and I'm on a preferred vendor list for the federal government. I go up to Camp Pendleton and I talk with their maintenance department and they say, 'Look, unless you are a disabled vet or you've got some designation as an economically disparaged business don't even talk to us.' So I said, 'Well, I'm a small business,' and they said, 'That's not enough.' What they are doing is they are hiring companies out there that throw up a front that they are woman-owned or they are HUB Zone 8a or they're some sort of a minority and then they sub it all out to other people and they get around that subcontracting percentage somehow with smoke and mirrors, and a lot of these minority-owned businesses are in fact not run by minorities even though on paper they are purported to be so." [#28]

A few firms indicated that they had not experienced "Front Companies." [For example, #2 and #7a]

For example:

- The Caucasian project manager of a HUBZone-certified construction company said that the firm has not encountered any fronts or frauds in certified subcontractors, because the firm rules out any companies that do not have an up-to-date certification number. [#35]

False reporting of DBE participation or falsifying good faith efforts. Some public agencies in Southern California, including SANDAG, set DBE contract goals on certain projects. Prime contractors can meet the goals through subcontracting commitments or show good faith efforts to do so. The study team asked business owners and managers if they know of any false reporting of DBE participation or whether prime contractors falsify good faith efforts submissions.

Some business owners reported widespread abuse of the DBE Program through false reporting of DBE participation or falsifying good faith efforts. For example:

- The female owner of a WBE-certified construction company said, "This 'good faith effort' [process], where they just make a good faith effort but they don't really intend to use you is a waste of time to a lot of people." She does feel that it helps to ensure that small businesses are aware of upcoming projects. [#8]
- The owner of a DBE-certified Black American-owned goods and services firm said that firms will often try to get her DBE number, even if they have no intention of using her as a subcontractor. She said, "They want your certification number so that they can add you and say, 'I reached out to her, and I didn't get enough qualified people.' Then they could say that I was just a good faith effort. I've become a good faith effort so much." She went on to explain that she no longer gives prime contractors her DBE number unless they say that they can use her services. She said, "If you cannot utilize my services, I will not be sending you a bid nor will you get my information. You will not add me as somebody saying I was a good faith effort, and I was non-responsive." [#21]

- The Caucasian female owner of a WBE/SBE/DBE-certified company reported, “I am aware of false reporting and falsifying good faith efforts. Overall, the good faith program is not good.” [CALTRANS #1]
- In regards to false reporting, the manager of a publicly traded engineering firm said, “I’ve heard of that happening in the past. The biggest complaint is that DBEs are listed on a submittal and never see any work out of it. I’ve heard that’s happened fairly frequently.” [#26]
- When asked about experiencing discrimination, the president and CEO of the National Black Contractors Association said, “Because of Proposition 209 the message has gone out to many of these primes that they [no longer have to] do good faith efforts. They don’t have to fake it. They don’t have to even hire – they don’t have to even reach out. All they have to do is say we put an invitation out to bid in the mainstream newspaper and the Negroes didn’t see it. So fine, they’re not here. So there’s no penalty, there’s no mandate, there’s no teeth in the program so these federal dollars are being spent. You know, it was supposed to be part of the American Recovery Act but African Americans have seen little or no participation when it comes down to federal contracting and we have people that are shovel ready. Some of them are hurt and have been harmed because of the economy, and they may not have the financial wherewithal or some of the strengths that they had in the past because they’re continuing to get less and less opportunities until they decide to just close up and go out of business.”

He went on to refer to good faith efforts as “good fake efforts.” When asked about this, he gave an example about being required to run advertisements for projects in a newspaper, but agencies can choose to run advertisements in only the “mainstream white newspaper that promotes opportunities for other whites.” He added, “And good fake efforts is also – they will call us two days before bid day and say are your contractors bidding on at the trolley expansion. Or they will call us or send a notice out and we sometimes document that the notice of invitation to bid is tomorrow. They’ll fax the notice out the day before. And so we’re supposed to get on the phone and start calling these contractors to run down there and get plans and permits and specifications and start estimating and figuring out how much the job is going to cost and calling their suppliers and all of this in 24 hours. So there’s an intentional mean-spirited behavior that takes place in the construction industry that’s crude.” [TA#1]

- The owner of a DBE-certified Black American-owned goods and services firm said, “We have this constant problem with the firms, they love to send you a bid request, you respond back to that bid and it turns out, ‘Oh, we don’t need your services.’ But they can use us as a good faith effort, but they never actually give us a contract.” She added, “As we come in, and a lot of these firms, we see them over and over again, we show up to these pre-bid meetings, we give them our information, we go into their database, we are never utilized, never called. But somehow they meet their goal and it baffles my mind, how are you meeting your goal? But they meet their goal and the primary reason I believe they are meeting their goal, again, I have learned this at the EEOC at the City of San Diego, is that they use their employees. That’s how they are currently meeting their goals. To me, it should be illegal for them to do that, to use their own employees when you have a goal set, saying that I need women or minorities to come and work on these projects, they really, they pump us up.” [PH#1]

Some interviewees representing MBE/WBEs said that prime contractors would list them on a contract to comply with the program, and then reduce or eliminate their work without informing the public agency. For example:

- The owner of a certified Black American-owned construction firm said that he heard that he was “listed for a job” where the prime contractor was saying that they would use his firm. He said that he never bid on the project, and that when the prime got work, he never got the work. He was never notified that he was listed on the project. He said, “I didn’t know I was listed until...three or four months later.” The general manager of the firm mentioned that the contract “was federally-funded.” [#1a]
- The female owner of a WBE-certified construction company said there have been occasions where her company was listed on a contract, but has not been used. “If there are listing laws ... if a prime has to list the subs [in a public way], that usually doesn’t happen.” [#8]
- The president of a DBE-certified Black American engineering firm said, “These primes will use you to enhance their chance to win a job with no intention of actually using you on the job.” The firm’s vice president later cited an example when the firm was awarded a job as a sub on a SANDAG San Diego Airport project. He said, “We were given the run around. They sent emails back and forth and had us send all our insurance information and after we kept calling them about when the job would start and finally they told us, ‘The economy is bad so we’re going to do all the work in house.’ We had a signed contract.” He went on to say that the original firm was bought out by another firm and he spoke with the firm’s president. “The next thing I know, I’m getting a threatening letter from [the firm’s] attorney saying if we contact the airport about what was going on we would get sued,” he said. He continued, “What shocked me was they actually put on their letterhead that they only put us on the team for proposal enhancement. We were just a black company to help them win the contract, now screw you. What makes me so angry is that we spent so much money going after this job.” [#19a, #19b]
- The Hispanic owner of a DBE-certified engineering firm said, “A couple of times they have called us because of our DBE status and we have submitted our proposals. In one case, I don’t know if they won the project or the RFP because they never called us back to let us know. On the other occasion, I knew they won the project but they never called us. It seems like some of these firms submit the DBE requirement so they can participate on the RFPs and then they don’t use us on the project. That’s okay; it’s just that it’s cumbersome because on some of these larger projects, it takes a long time to prepare your documentation for the RFP. I guess that goes with any project that you bid. There’s no follow-up.” [#25]

J. DBE and other Certification Processes

Business owners and managers discussed the process for DBE certification and other certifications, including comments related to:

- Ease or difficulty of becoming certified (*page 97*); and
- Advantages and disadvantages of DBE certification (*page 98*).

Ease or difficulty of becoming certified. Many interviewees commented on how easy or difficult it was to become certified.

A few interviewees said that the DBE certification process was reasonable and some reported that it was relatively easy. For example:

- The female owner of a WBE-certified construction company said that she did not have any difficulty providing the information required to obtain her certifications. [#8]
- The Black American owner of an MBE-certified security company said that he received assistance from the Small Business Association (SBA) in obtaining his company's certifications. He said that the most difficult part of the process to negotiate was the System for Award Management (SAM). [#9]
- The vice president of a DBE-certified consulting firm said that becoming certified was easy and just required following the forms that are provided. He said one of the main benefits of being certified is that "it lets some people listen to you." [#30]

Many interviewees reported difficulties with the DBE certification process. Several interviewees indicated that the certification process was difficult. Examples of such comments included the following:

- The female Hispanic Operations Manager of a DBE-certified towing company said that the DBE certification process was very time consuming. The current owner was helped through the process by the previous owner. She said, "The paperwork and stuff like that – he was having a hard time understanding a lot of it." [#2]
- The owner of a WBE-certified engineering firm stated that she believes that a lot of small businesses do not go through the certification process because it is a lot of work. She stated that it is challenging to conduct the research needed to go through the certification process and renew certifications when needed. [#10]
- The president of a non-certified Native American-owned engineering firm said that he's only faced stereotypical attitudes in the certification process where the reviewers from the SBA and Caltrans questioned his status as a Native American. He said, "[Caltrans] had me provide more documentation when all they had to do was to verify my status through the Bureau of Indian Affairs. He added, "Certification reviewers need more training. A lot of time goes into gathering this information when they could pick up the phone and make a call." [#15]
- The Caucasian partner in a DBE-certified engineering firm reported that becoming DBE-certified was "difficult at best." He explained that the paperwork took two weeks and then there was an interview. [#24]
- The Hispanic owner of a DBE-certified engineering firm said, "Originally I was under the impression that Caltrans was the only agency you could certify through as a DBE and then I've learned through the State Parks Department that they have their own certification process. I learned because when I gave them my DBE number they said my number was incorrect because they have their own certification process. So I sort of wonder, 'How many certification processes do

we have to go through to be certified as DBE, small business and DBE with others?’ That is information that has never been disclosed to me.” He added that there should be some information somewhere on all the different agencies there are to become certified as a DBE. He said that he would also like to know the difference between being a small business and a DBE and why one would be more important than another. [#25]

- The Caucasian woman owner of a WBE-certified trucking company said the certification process “was the most invasive and intrusive process. ... It is really a pain in the [expletive].” [#36]

Advantages and disadvantages of DBE certification. Interviews included broad discussion of whether and how DBE certification helped subcontractors obtain work from prime contractors.

Many of the owners and managers of DBE-certified firms interviewed indicated that certification helped their business get an initial opportunity to work with a prime contractor. For example:

- The Black American owner of an MBE-certified security company said that he decided to become certified because he had heard that it was helpful for getting certain types of contracts where the client may get a tax break or other incentive for using certified contractors. He also said that he feels that certifications may be helpful when a small business is trying to “get known.” [#9]
- The owner of a WBE-certified engineering firm stated that her firm is WBE-certified with the State of California, as well as the Cities of Los Angeles and San Diego. She stated that certification has been positive for her business. She reported, “It gives us opportunities that we didn’t know we had. This year, probably a third of our business has come from that.” [#10]
- The president of a DBE-certified Subcontinent Asian American-owned engineering firm said that he believes certification is good if you are an outsider. “Certification opens the door for firms to prove themselves,” he said. “Unless you grow up with friends, and they go on into positions where they can help you get work, it’s hard to get in.” He added, “Certification helps you get the door open to prove yourself and elicit interest from larger firms.” [#12]
- The female owner of an SLBE-certified environmental consulting company reported that the small business certification has been positive for her business. She said, “Having the certification brings you to the attention of primes because they do need that extra boost [proposal requirements] for working with small and disadvantages businesses.” [#13]
- The Caucasian male owner of a DVBE-certified construction company said that their success in getting recent contracts has partly been due to the fact that the City and County of San Diego and the San Diego Unified School District (SDUSD) recognize DVBEs. He said, “Though they don’t have DVBE set-asides, it’s allowed us to get subcontracts with the larger contractors that do work with [the City, County, and SDUSD]. It’s allowed us a foot in the door to bid and then they find out that, hey, we are cost-effective and we can help them win programs.” [#14]
- The Caucasian female owner of a WBE/SBE/DBE-certified company reported that the benefits of certification were not realized until this past year. She said, “Last year made the certification all worth it.” She later added, “Normally about 20 percent of our sales come from certification goals, but last year was much higher.” [CALTRANS #1]

- The Hispanic owner of a DBE-certified engineering firm was asked about the benefits and difficulties with being a DBE. He responded, “The pro is that we do receive faxes from different contractors when they’re doing different projects. We get them from all over the state. That is good. We have got some projects from the faxes that they have sent us. That is definitely a pro. If we wanted to grow or get involved in larger projects, it’s also good to [be] a DBE because then you can partner with a larger firm. [#25]

Some interviewees indicated that there are limited advantages, or even disadvantages, to being DBE certified. For example:

- The female Hispanic Operations Manager of a DBE-certified towing company said that her husband completed the MBE certification process, but that it has not produced any new business for them or helped them when they tried to get business loans. She said, “It’s been very difficult for him... a very difficult start-up for him. I feel like I’m starting the company all over again with my dad...” She later added said that the company has not seen any disadvantages of going through the MBE certification process, just no advantages. [#2]
- In addition to the advantages he listed, the president of a DBE-certified Subcontinent Asian American-owned engineering firm said that there are disadvantages associated with certification, especially SBA 8(a). He said the process with 8(a) certification requires you to recertify every year. “Unless you already have relationships, it’s still difficult to get work,” he said. He also said that his certifications have not really helped him outside of what he has talked about earlier in the interview. He understands the reasons for certification, but he feels that the “stigma associated with being socially and economically disadvantaged” can sometimes be a hindrance for small businesses. [#12]
- The president of a non-certified Native American-owned engineering firm stated that there are disadvantages associated with DBE certification. He said, “As a sub you’re treated sometimes less than stellar by the primes because you’re like a necessary evil. On some projects, it’s a very distinct feeling you get. For instance, ‘We’ll pay you when we want or when we get paid,’ or ‘You get out here now or we’ll get somebody else and back charge you.’” [#15]
- The owner of a DBE-certified Black American-owned goods and services firm said that she expected to get work as a result of her DBE certification, but that this expectation has not been fulfilled. She said, “I realize that the DBE was supposed to do so many different things for a small business owner, [but] it offered nothing.” She went on to say, “It’s just another piece of paper. It doesn’t give you that little in like they all try and say.” [#21]
- The Caucasian partner in a DBE-certified engineering firm said, “Being a DBE is more beneficial in the contracting market. They don’t seem to value it as much in the consulting market. Although there are DBE requirements, they don’t seem to be adhered to as well in the consulting market.” He added, “[Being a DBE] has been a slight advantage. I don’t see it being a big advantage at all.” [#24]
- When asked about the DBE program, the president and CEO of the National Black Contractors Association said, “The DBE program is weak and toothless. It has been actually engineered and crafted by the aforementioned organizations, who are pretty much the hooded organizations of San

Diego, the Associated General Contractors of America who have been sued by the NAACP and lost. They are a very racist group that looks out for white men and white males.” [TA#1]

- When asked if he’s heard of any disadvantages with being DBE-certified, the vice president of IVEDC said, “I have never heard of any. I have heard a couple of folks say it never did anything for them. But that doesn’t say that it did anything.” [TA#2]
- The Caucasian woman owner of a WBE-certified trucking company stated that the reason she decided to pursue certification was “to get more work with the government. ... Certification is supposed to get you a foot in the door...but it clearly doesn’t.” She went on to say, “There is absolutely no benefit to certification. ... It only allows me to recertify every year.” [#36]
- The vice president of a WBE-certified Hispanic construction company said, “Except the HUB Zone [certification], I don’t have any benefit seen as a certified or non-certified.” [#37]
- The owner of a consulting firm said, “I don’t think being a DBE we’ve been discriminated against, but I don’t think it has helped us very much at all in the Imperial Valley. Once a month or twice a month we get advertisements from SANDAG, from North County to bid and propose on their projects, but here in the Imperial County we have found that there is hardly any, or zero, outreach for DBEs from the federally funded projects here. In fact some of the projects that are federally funded here we aren’t even aware of.” [PH #3]

APPENDIX K.

Detailed Disparity Results

Figure K-1 ICTC

Figure K- : 2 3		
Funding		
FTA-funded	X	X
Time period		
2008-2012	X	X
Type		
Transportation contracting	X	X
Construction		
Engineering		
Goods and services		
Contract role		
Prime/Sub	X	X
Prime		
Sub		
Contract size		
All	X	X
Small prime contracts*		
Large prime contracts**		
Components of DBE goal		
Analysis of potential DBEs	X	
* \$2M and under for construction, \$500K and under for engineering and goods and services ** Greater than \$2M for construction, greater than \$500K for engineering and goods and services		

Figure K-2.

Funding source: FTA-funded

Time period: 2008-2012

Type: Transportation contracting (construction, engineering and goods and services)

Role: Prime Contractors and Subcontractors

Firm Type	(a) Number of contracts (subcontracts) in sample	(b) Dollars in sample (thousands)	(c) Estimated total dollars (thousands)*	(d) Actual utilization (column c / column c, row1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	47	\$18,741	\$18,741				
(2) MBE/WBE	16	\$594	\$594	3.2	9.6	-6.4	33.1
(3) WBE	1	\$15	\$15	0.1	2.9	-2.9	2.7
(4) MBE	15	\$579	\$579	3.1	6.7	-3.6	46.4
(5) Black American-owned	0	\$0	\$0	0.0	0.9	-0.9	0.0
(6) Asian-Pacific American-owned	2	\$31	\$31	0.2	1.3	-1.1	12.8
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.7	-0.7	0.0
(8) Hispanic American-owned	9	\$474	\$474	2.5	3.1	-0.6	81.7
(9) Native American-owned	4	\$74	\$74	0.4	0.6	-0.2	63.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	6	\$90	\$90	0.5			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	6	\$90	\$90	0.5			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian-Pacific American-owned DBE	2	\$31	\$31	0.2			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	4	\$59	\$59	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0	\$0	0.0			
(20) White male-owned DBE	0	\$0					
(21) Unknown DBE	0	\$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.

Figure K-3.

Funding source: FTA-funded

Time period: 2008-2012

Type: Transportation contracting

Role: Prime Contractors and Subcontractors

Analysis of potential DBEs

Firm Type	(a) Number of contracts (subcontracts) in sample	(b) Dollars in sample (thousands)	(c) Estimated total dollars (thousands)*	(d) Actual utilization (column c / column e, row 1) %	(e) Utilization benchmark (availability) %	(f) Difference (column d - column e) %	(g) Disparity index (d / e) x 100
(1) All firms	47	\$18,741	\$18,741				
(2) MBE/WBE	16	\$594	\$594	3.2	7.2	-4.1	43.9
(3) WBE	1	\$15	\$15	0.1	2.7	-2.7	2.9
(4) MBE	15	\$579	\$579	3.1	4.5	-1.4	69.0
(5) Black American-owned	0	\$0	\$0	0.0	0.5	-0.5	0.0
(6) Asian-Pacific American-owned	2	\$31	\$31	0.2	1.1	-0.9	15.8
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.5	-0.5	0.0
(8) Hispanic American-owned	9	\$474	\$474	2.5	1.8	0.7	137.1
(9) Native American-owned	4	\$74	\$74	0.4	0.6	-0.2	63.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	6	\$90	\$90	0.5			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	6	\$90	\$90	0.5			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian-Pacific American-owned DBE	2	\$31	\$31	0.2			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	4	\$59	\$59	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0	\$0	0.0			
(20) White male-owned DBE	0	\$0					
(21) Unknown DBE	0	\$0					

Note: Spreadsheet rounds numbers to nearest thousand dollars or tenth of one percent. WBE is white women-owned firms.

* Unknown MBE, Unknown DBE-MBE, and Unknown DBE dollars were allocated to MBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned firms (column b, row 5) accounted for 25 percent of total MBE dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5.

Source: BBC Research & Consulting Disparity Analysis.