BBC RESEARCH & CONSULTING

2022 Montana Department of Transportation Disparity Study

FINAL REPORT

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Prepared for

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CHAPTER 1.
Introduction

The Montana Department of Transportation (MDT) is responsible for the planning, design, maintenance, operation, and management of Montana's state-owned roadways, walkways, rest areas, airports, and numerous public-use facilities, including federal and state highways as well as airports. As a United States Department of Transportation (USDOT) fund recipient, MDT implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded projects. MDT retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate:

- Whether minority- and woman-owned businesses face any barriers in MDT's and Montana National Plan of Integrated Airport Systems (NPIAS) airports' transportation-related contracting and procurement; and
- How effective MDT's and NPIAS airports' implementations of the Federal DBE Program are in encouraging minority- and woman-owned business participation in USDOT-funded work.

A disparity study examines whether there are any disparities between:

- The percentage of prime contract and subcontract dollars an agency awarded to minority- and woman-owned businesses during a particular time period (i.e., *utilization*); and
- The percentage of prime contract and subcontract dollars an agency might be expected to award to minority- and woman-owned businesses based on their availability to perform specific types and sizes of contracts and procurements the agency awards (i.e., *availability*).

Disparity studies also examine other quantitative and qualitative information related to:

- Marketplace conditions for minority- and woman-owned businesses;
- Contracting practices and business programs the agency currently has in place; and
- Implementing minority- and woman-owned business programs—such as the Federal DBE Program—effectively and in a legally-defensible manner.

There are several reasons why information from the 2022 MDT Disparity Study is potentially useful to MDT and NPIAS airports:

- The study provides information about how well minority- and woman-owned businesses fare in MDT's and NPIAS airports' transportation-related contracts and procurements relative to their availability for that work.
- The study assesses how effective MDT's and NPIAS airports' implementations of the Federal DBE Program are in improving outcomes for minority- and woman-owned businesses in their transportation-related contracts and procurements.

- The study identifies barriers minorities, women, and minority- and woman-owned businesses face in Montana that might affect minority- and woman-owned businesses' ability to compete for MDT's and NPIAS airports' transportation-related contracts and procurements.
- The study provides insights into how to refine contracting processes and program measures to better encourage the participation of minority- and woman-owned businesses in MDT's and NPIAS airports' transportation contracts and procurements and help address marketplace barriers.
- An independent review of the participation of minority- and woman-owned businesses in agency and airport work is valuable to MDT, NPIAS airports, and external groups that monitor their contracting practices.

BBC introduces the 2022 MDT Disparity Study in three parts:

A. Background;

B. Study scope; and

C. Study team members.

A. Background

The Federal DBE Program is designed to increase the participation of minority- and woman-owned businesses in USDOT-funded work. As a recipient of USDOT funds from the Federal Highway Administration (FHWA) and Federal Aviation Administration (FAA), MDT and NPIAS airports must implement the Federal DBE Program and comply with corresponding federal regulations.

1. Setting overall goals for DBE participation. As part of the Federal DBE Program, USDOT fund recipients are required to set overall aspirational goals for DBE participation in their USDOT-funded projects every three years.[1] If DBE participation in USDOT-funded work for a particular year is less than their overall DBE goals, then agencies must analyze the reasons for the difference and establish specific measures that enable them to meet the goals in the next year. The Federal DBE Program describes the steps agencies must follow in establishing their overall DBE goals. To begin the process, agencies must develop *base figures* based on demonstrable evidence of the availability of DBEs to participate in their USDOT-funded contracts and procurements. Then, they must consider conditions in their marketplaces for minority- and woman-owned businesses as well as other factors and determine whether adjustments to their base figures are necessary to ensure their overall DBE goals are as precise as possible (referred to as *step-2 adjustments*). Agencies are not required to make step-2 adjustments to their base figures, but they are required to consider various relevant factors and explain their decisions to USDOT.

2. Projecting the portion of overall DBE goals to be met through race- and gender-neutral means. USDOT also requires agencies to project the portions of their overall DBE goals they will meet through *race- and gender-neutral* measures and the portions they will meet through any *race-or gender-conscious* measures. Race- and gender-neutral measures are designed to encourage the participation of all businesses—or all small businesses—in agency work, regardless of the

[1] http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm

race/ethnicity or gender of business owners (for examples of race- and gender-neutral measures, see 49 Code of Federal Regulations (CFR) Section 26.51(b)). If agencies cannot meet their goals solely through the use of race- and gender-neutral measures, then they must consider also using *race- and gender-conscious* measures. Race- and gender-conscious measures are specifically designed to encourage the participation of minority- and woman-owned businesses in agency work (e.g., using DBE goals to award individual contracts or procurements). Currently, MDT does not implement any race- or gender-conscious measures. MDT does set aspirational goals on individual projects, but the agency tries to achieve those goals through race- and gender-neutral measures.

3. Determining which groups will be eligible for race- and gender-conscious measures. If agencies determine that race- or gender-conscious measures—such as DBE contract goals—are appropriate for their implementations of the Federal DBE Program, then they must also determine which racial/ethnic or gender groups are eligible to participate in those measures. Eligibility for such measures must be limited to those racial/ethnic or gender groups for which compelling evidence of discrimination exists in the marketplace. USDOT provides a waiver provision if agencies determine only certain racial/ethnic or gender groups are eligible to participate in the race- or gender-conscious measures they use.

B. Study Scope

BBC conducted a disparity study based on transportation-related contracts and procurements MDT and NPIAS airports awarded between October 1, 2015 and September 30, 2020 (i.e., the *study period*). Figure 1-1 presents a list of the 55 NPIAS airports whose contract and procurement data were included in the study. Information from the disparity study will help MDT and NPIAS airports encourage the participation of minority- and woman-owned businesses in their transportation-related contracts and procurements and help MDT and NPIAS airports implement the Federal DBE Program effectively and in a legally defensible manner.

1. Definitions of minority- and woman-owned businesses. To interpret the analyses presented in the disparity study, it is useful to understand how BBC defines minority- and woman-owned businesses, businesses certified as DBEs, and businesses owned by minority women in its analyses.

a. Minority- and woman-owned businesses. BBC focused its analyses on the minority- and woman-owned business groups presumed to be disadvantaged in the Federal DBE Program:

- Asian Pacific American-owned businesses;
- Black American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses;
- Subcontinent Asian American-owned businesses; and
- Woman-owned businesses.

BBC's definition of minority-owned businesses included businesses owned by minority men and minority women. For example, BBC grouped results for businesses owned by Native American men with results for businesses owned by Native American women.

BBC considered businesses as minority- or woman-owned regardless of whether they were, or could be, certified as DBEs. Analyzing the participation and availability of minority- and woman-owned businesses regardless of DBE certification allowed the study team to assess whether there are disparities affecting *all* minority- and woman-owned businesses and not just those that have decided to become DBE certified.

Figure 1-1.
NPIAS airports included in the disparity study

Airports included in the study	
Baker Municipal Airport	Havre City-County Airport
Bert Mooney Airport	Helena Regional Airport
Big Horn County Airport	Jordan Airport
Big Sandy Airport	Laurel Municipal Airport
Big Sky Field Airport	Libby Airport
Big Timber Airport	Liberty County Airport
Billings Logan International Airport	Malta Airport
Bowman Field Airport	Mission Field Airport
Bozeman Yellowstone International Airport	Missoula Montana Airport
Broadus Airport	Plains Airport
Circle Town County Airport	Ravalli County Airport
Colstrip Airport	Roundup Airport
Conrad Airport	Twin Bridges Airport
Cut Bank International Airport	Scobey Airport
Dawson Community Airport	Shelby Airport
Deer Lodge-City-County Airport	Sher-Wood Airport
Dillon Airport	Sidney-Richland Regional Airport
Edgar G Obie Airport	Stanford Airport
Ekalaka Airport	Terry Airport
Ennis Big Sky Airport	Thompson Falls Airport
Eureka Airport	Three Forks Airport
Fort Benton Airport	Tillitt Field Airport
Frank Wiley Field Airport	Townsend Airport
Geraldine Airport	Turner Airport
Glacier Park International Airport	Wokal Field - Glasgow/Valley County Airport
Great Falls International Airport	Woltermann Memorial Airport
Harlem Airport	Yellowstone Airport

b. Woman-owned businesses. Because BBC classified minority woman-owned businesses according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *white woman-owned businesses*. As with minority-owned businesses, BBC considered businesses to be woman-owned based on the known genders of business owners, regardless of whether the businesses were certified as DBEs.

c. DBEs. DBEs are minority- and woman-owned businesses specifically certified as such by MDT.[2] A determination of DBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth. Some minority- and woman-owned businesses do not qualify as DBEs because their gross revenues are too high. Businesses seeking DBE certification in Montana are required to submit an application to MDT. The application is available online and requires businesses to submit

[2] Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the social and economic disadvantage requirements set forth in 49 CFR Part 26.

various information, including business name, contact information, tax information, work specializations, and the race/ethnicity and gender of the owners.[3]

Because the Federal DBE Program requires agencies to track the participation of certified DBEs, BBC reports utilization results for all minority- and woman-owned businesses and separately for minority- and woman-owned businesses certified as DBEs.

d. Potential DBEs. For this disparity study, potential DBEs are minority- and woman-owned businesses that **are** DBE-certified **or appear they could be** DBE-certified based on revenue requirements described in 49 CFR Part 26 (regardless of actual certification). We did not consider businesses that have been decertified or have graduated from the DBE Program as potential DBEs. BBC examined the availability of potential DBEs as part of helping MDT and NPIAS airports calculate the base figures of their next overall DBE goals.

2. Analyses in the disparity study. The crux of the disparity study was to examine whether there are any disparities between the participation and availability of minority- and woman-owned businesses in the transportation-related construction and professional services work MDT and NPIAS airports awarded during the study period. The study also includes various analyses related to outcomes for minorities, women, and minority- and woman-owned businesses throughout Montana. Information in the disparity study is organized in the following manner.

a. 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 and inform MDT's and NPIAS airports' implementations of the Federal DBE Program. The legal framework and analysis for the study is summarized in **Chapter 2** and presented in detail in **Appendix B.**

b. Marketplace conditions. BBC conducted quantitative analyses of the success of minorities and women and minority- and woman-owned businesses in the Montana transportation contracting industry. BBC compared business outcomes for minorities, women, and minority- and woman-owned businesses to outcomes for white men and the businesses they own in key business areas. In addition, the study team collected anecdotal evidence about potential barriers minority- and woman-owned businesses face in Montana from public meetings, in-depth interviews, and other efforts. Information about marketplace conditions is presented in **Chapter 3, Chapter 4, Appendix C,** and **Appendix D.**

c. Data collection and analysis. BBC examined data from multiple sources to complete the utilization and availability analyses, including surveys the study team conducted with hundreds of businesses throughout Montana. The scope of the study team's data collection and analysis is presented in **Chapter 5**.

d. Availability analysis. As part of the availability analysis, BBC estimated the percentage of MDT's and NPIAS airports' relevant prime contract and subcontract dollars minority- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on agency data and surveys the study team conducted with hundreds of Montana businesses that work in industries related to the types of transportation-related work MDT and NPIAS airports award. We analyzed

[3] Businesses owned by white men can be certified as DBEs if those businesses meet the certification requirements in 49 CFR Part 26.

availability separately for businesses owned by specific minority groups and white women and for different types of contracts and procurements. Results from the availability analysis are presented in **Chapter 6** and **Appendix E**.

e. Utilization analysis. BBC analyzed relevant prime contract and subcontract dollars MDT and NPIAS airports awarded to minority- and woman-owned businesses during the study period.[4] We analyzed participation separately for businesses owned by specific minority groups and white women and for different types of contracts and procurements. Results from the utilization analysis are presented in **Chapter 7**.

f. Disparity analysis. BBC examined whether there were any disparities between the participation of minority- and woman-owned businesses in transportation-related work MDT and NPIAS airports awarded during the study period and the availability of those businesses for that work. We analyzed disparity analysis results separately for businesses owned by specific minority groups and white women and for different types of contracts and procurements. We also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 8** and **Appendix F.**

g. Program measures. BBC reviewed measures MDT and NPIAS airports use to encourage the participation of small businesses as well as minority- and woman-owned businesses in its transportation-related work as well as their implementations of the Federal DBE Program. That information is presented in **Chapter 9**.

h. Overall DBE goals. Based on the availability analysis and other research, BBC provided MDT and NPIAS airports with information to help them set their next overall DBE goals for their FHWA- and FAA-funded projects, including establishing base figures and considering step-2 adjustments. Information about MDT's and NPIAS airports' overall DBE goals is presented in **Chapter 10**.

i. Considerations. BBC provided guidance related to additional program options and changes to current contracting practices MDT and NPIAS airports could consider. The study team's review and guidance for program implementation is presented in **Chapter 11**.

C. Study Team Members

The BBC study team was made up of five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with the Federal DBE Program.

1. BBC (prime consultant). BBC is a disparity study and economic research firm based in Denver, Colorado. We had overall responsibility for the study, performed all of the quantitative and qualitative analyses, and authored this report.

2. 7 Bison Cultural Consulting (7 Bison). 7 Bison is a Native American-owned cultural resource management and training firm based out of the Crow Indian Reservation in St. Xavier, Montana. The

[4] Note that prime contractors—not MDT or NPIAS airports—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to MDT and NPIAS airports as *awarding* subcontracts.

firm conducted in-depth interviews as part of the study team's qualitative analyses of marketplace conditions.

3. Applied Communications. Applied Communications is a DBE-certified woman-owned research, planning, and community engagement firm based in Whitefish, Montana. The firm conducted in-depth interviews as part of the study team's qualitative analyses of marketplace conditions.

4. Davis Research. Davis Research is a survey fieldwork firm based in Calabasas, California. The firm conducted telephone surveys with hundreds of Montana businesses in connection with the availability and utilization analyses.

5. Holland & Knight. Holland & Knight is a law firm with offices throughout the country. The firm provided legal consulting services throughout the course of the study.

CHAPTER 2.
Legal Analysis

As a recipient of United States Department of Transportation (USDOT) funds, the Montana Department of Transportation (MDT) implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to encourage the participation of minority- and woman-owned businesses in an agency's USDOT-funded work. MDT and National Plan of Integrated Airport Systems (NPIAS) use only *race- and gender-neutral* measures as part of its implementation of the program. Race- and gender-neutral measures are designed to encourage the participation of all businesses in an agency's work, regardless of the race/ethnicity or gender of business owners. Examples of such measures include networking and outreach efforts, technical assistance programs, and mentor-protégé programs not limited to minority- and woman-owned businesses. In contrast, *race- and gender-conscious* measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an agency's work (e.g., using DBE goals to award individual contracts or procurements).

It is instructive to review information related to the legal standards governing the use of race- and gender-neutral and race- and gender-conscious measures, because if an agency cannot address barriers minority- and woman-owned businesses face as part of its USDOT-funded projects solely through the use of race- and gender-neutral measures, then it must consider also using race- and gender-conscious measures. BBC Research & Consulting (BBC) summarizes legal information related to the use of race- and gender-neutral and race- and gender-conscious measures in three parts:

A. Legal standards for different types of measures;

B. Seminal court decisions; and

C. Addressing requirements.

Appendix B presents additional details about the above topics.

A. Legal Standards for Different Types of Measures

There are different legal standards for determining the constitutionality of minority- and woman-owned business programs, depending on whether they rely only on race- and gender-neutral measures or if they also include race- and gender-conscious measures.

1. Programs that rely only on race- and gender-neutral measures. Government agencies—like MDT and NPIAS airports—that implement minority- and woman-owned business programs that include only race- and gender-neutral measures must show a *rational basis* for their programs. Showing a rational basis requires agencies to demonstrate that their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of programs that could impinge on the rights of others.

2. Programs that include race- and gender-conscious measures. Minority- and woman-owned business programs that include race- and gender-conscious measures must meet the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

a. Strict scrutiny. Agencies' use of race-conscious program measures must meet the strict scrutiny standard, which represents the highest threshold for evaluating the legality of contracting programs that could impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, agencies must show a *compelling governmental interest* in using race-conscious measures and ensure that the use of such measures is *narrowly tailored* to address any discrimination or barriers in their work.

i. Compelling governmental interest. Agencies that use race-conscious measures have the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. They cannot rely on national statistics of discrimination to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.[1] Furthermore, it is not necessary for organizations themselves to have discriminated against minority-owned businesses for them to take remedial action. They could take action if evidence indicates they are *passive participants* in race-based discrimination that exists in their relevant geographic market areas (RGMAs).

ii. Narrow tailoring. In addition to demonstrating a compelling governmental interest, agencies must demonstrate that their use of race-conscious measures is narrowly tailored to address any discrimination or barriers in their work. There are a number of factors courts consider when determining whether the use of such measures is narrowly tailored:

- The necessity of such measures and the efficacy of alternative race-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.

b. Intermediate scrutiny. Agencies' use of gender-conscious program measures must meet the intermediate scrutiny standard. The intermediate scrutiny standard is less rigorous than the strict scrutiny standard but more rigorous than the rational basis standard. In order for a program to meet intermediate scrutiny, it must serve an important government objective and be substantially related to achieving the objective. Although certain courts apply the intermediate scrutiny standard to gender-conscious programs, many courts apply the strict scrutiny standard to both race- and gender-conscious programs.

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

B. Seminal Court Decisions

Two Supreme Court cases established that the use of race-conscious measures in contracting programs must adhere to the requirements of the strict scrutiny standard:

- *City of Richmond v. J.A. Croson Company* (*Croson*);[2] and
- *Adarand Constructors, Inc. v. Peña* (*Adarand*).[3]

Many subsequent decisions in district courts and federal courts have expanded requirements for the use of race-conscious measures as part of minority- and woman-owned business programs, including several cases in the Ninth Circuit, the jurisdiction in which MDT operates. BBC briefly summarizes the United States Supreme Court's decisions in *Croson* and *Adarand* as well as the Ninth Circuit Court of Appeals' decisions in three other cases related to minority- and woman-owned business programs:

- *Western States Paving Co. v. Washington State Department of Transportation (Western States)*;[4]
- *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al. (AGC, San Diego)*;[5] and
- *Mountain West Holding Co., Inc. v. State of Montana, Montana DOT, et al.* (*Mountain West Holding*).[6]

1. *Croson* and *Adarand*. The United States Supreme Court's landmark decisions in *Croson* and *Adarand* are the most important court decisions to date in connection with minority- and woman-owned business programs, the use of race-conscious measures, and disparity study methodology. In *Croson*, the Supreme Court struck down the City of Richmond's race-based subcontracting program as unconstitutional, and in doing so, established various requirements to which government agencies must adhere when using race-conscious contracting measures:

- Agencies' use of race-conscious measures must meet the strict scrutiny standard of constitutional review—that is, in remedying any identified discrimination, they must establish a compelling governmental interest to do so and must ensure the use of such measures is narrowly tailored.
- In assessing availability, agencies must account for various characteristics of the prime contracts and subcontracts they award and the degree to which local businesses are *ready, willing, and able* to perform that work.

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

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

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

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

[6] *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.,* 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

- If agencies show *statistical disparities* between the percentage of dollars they awarded to minority-owned businesses and the percentage of dollars those businesses might be available to perform, then *inferences of discrimination* could exist, justifying the use of narrowly tailored, race-conscious measures.

The Supreme Court's decision in *Adarand* expanded its decision in *Croson* to include federal government programs—such as the Federal DBE Program—that include race-conscious measures, requiring that those programs must also meet the strict scrutiny standard.

2. *Western States*. *Western States* represented the first time the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation's implementation of the Federal DBE Program. In *Western States*, the Court struck down the Washington State Department of Transportation's (WSDOT's) implementation of the Federal DBE Program, because it did not satisfy the narrow tailoring requirement of the strict scrutiny standard. Specifically, the Court held that:

- WSDOT did not present compelling evidence of race-based discrimination in the Washington transportation contracting industry, and agencies must demonstrate evidence of such discrimination for their use of race-conscious measures to be considered narrowly tailored and serving a remedial purpose.
- Even when evidence of discrimination exists within agencies' RGMAs, the use of race-conscious measures is narrowly tailored only when it is limited to those business groups that have been shown to actually suffer from discrimination in their marketplaces.
- Agencies can rely on statistical disparities between the participation and availability of minority- and woman-owned businesses on work they awarded to show discrimination against particular business groups in the marketplace, particularly if that work was awarded using only race- and gender-neutral measures.
- In assessing availability, agencies must account for various characteristics—such as capacity, firm size, and contract size—of the prime contracts and subcontracts they award as well as of the businesses located in their RGMAs.
- Sufficient amounts of both statistical and anecdotal evidence are necessary to demonstrate the need for race- and gender-conscious measures.

3. AGC, San Diego. In *AGC, San Diego,* the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation's—in this case, Caltrans'—implementation of the Federal DBE Program for the first time after *Western States*. In contrast to its decision in *Western States*, the Court upheld Caltrans' use of race- and gender-conscious measures and its implementation of the Federal DBE Program as constitutional, ruling that they met both the compelling governmental interest and narrow tailoring requirements of the strict scrutiny standard. Caltrans' implementation of the Federal DBE Program and its defense of its program was based in large part on a 2007 disparity study BBC conducted.

4. Mountain West Holding. In Mountain West Holding, the Ninth Circuit Court of Appeals gave an unpublished opinion regarding MDT's implementation of the Federal DBE Program and Mountain West Holding Co.'s claim that MDT unconstitutionally gave preference to minority- and woman-owned businesses through its use of DBE contract goals. The Court found Mountain West Holding

Co.'s claims for injunctive and declaratory relief to be moot, because by the time of the case, MDT was no longer using DBE contract goals to award any work. However, the Court found MDT's implementation of the Federal DBE Program may have relied on questionable information, including:

- MDT's interpretating the decrease of DBE participation in its USDOT-funded projects when the agency stopped using DBE contract goals as evidence of barriers against minority- and woman-owned businesses in its work;
- MDT's reliance on anecdotal evidence in the absence of compelling, statistical evidence to demonstrate barriers against minority- and woman-owned businesses in its marketplace; and
- Numerous disputes of fact as to whether MDT's 2009 disparity study provided evidence in support of using race- and gender-conscious measures.

As a result of those findings, the Court reversed and remanded for the district court to conduct further proceedings, including a trial or the resumption of pretrial litigation. However, the case was voluntarily dismissed by stipulation of both parties.

C. Addressing Requirements

Many government agencies have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring their use of race- and gender-conscious measures meets the strict scrutiny and intermediate scrutiny standards, respectively. Various aspects of the 2022 MDT Disparity Study specifically address requirements the United States Supreme Court and other federal courts have established around minority- and woman-owned business programs and race- and gender-conscious measures:

- The study includes extensive econometric analyses and analyses of anecdotal evidence to assess whether any discrimination exists for minorities, women, and minority- and woman-owned businesses in the RGMA and whether MDT or NPIAS airports are actively or passively participating in that discrimination.
- The availability analysis accounts for various characteristics of the prime contracts and subcontracts MDT and NPIAS airports award as well as the specific characteristics of businesses working in the RGMA, including capacity. That approach resulted in accurate estimates of the degree to which minority- and woman-owned businesses are *ready, willing, and able* to perform that work.
- The study includes assessments of whether minority- and woman-owned businesses exhibit substantial statistical disparities between participation and availability for MDT and NPIAS airport work, indicating whether any inferences of discrimination exist for individual business groups.
- The study includes specific recommendations to help ensure MDT's and NPIAS airports' implementations of the Federal DBE Program meet applicable legal standards, and that any potential use of race-conscious measures are narrowly tailored in remedying any identified discrimination, including recommendations related to:
  - Maximizing the use of race-neutral measures to address any barriers;
  - Identifying which race/ethnic groups exhibit substantial barriers;

- Ensuring race-conscious measures are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
- Setting goals related to the availability of minority-owned businesses for MDT and NPIAS airport work and accounting for conditions in the RGMA.

CHAPTER 3.
Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.[1, 2, 3, 4] Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.[5] Historically, minority groups and women in Montana have faced similar barriers. For example, Black Americans, Hispanic Americans, and Native Americans are incarcerated at higher rates than white Americans in Montana, and Hispanic Americans and Native Americans have substantially higher poverty rates than white Americans.[6, 7, 8]

In the middle of the 20th century, many reforms opened new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education, The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.[9] Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women.[10, 11, 12, 13] However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.[14, 15, 16, 17]

Federal Courts and the United States Congress have considered barriers minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.[18, 19, 20] The United States Supreme Court and other Federal Courts have held that analyses of conditions in a local marketplace for minorities, women, and minority- and woman-owned businesses are instructive in determining whether agencies' implementations of minority- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for government contracts and procurements. Passive participation in discrimination means agencies unintentionally perpetuate race- or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.[21, 22, 23]

BBC Research & Consulting (BBC) conducted extensive quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the Montana transportation-related construction and professional services industries. We also examined the potential effects any such barriers have on the formation and success of businesses and on their participation in, and availability for, transportation-related work the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports award. The study team examined marketplace conditions in four primary areas:

- **Human capital**, to assess whether minorities and women face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether minorities and women face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership** to assess whether minorities and women own businesses at rates comparable to that of non-Hispanic white men; and
- **Business success** to assess whether minority- and woman-owned businesses have outcomes similar to those of other businesses.

BBC's analyses are based on MDT's and NPIAS airports' *relevant geographic market area* (*RGMA*), which we identified as the entire state of Montana, because the vast majority of the transportation-related contracting and procurement dollars the agencies awarded during the study period went to businesses with locations in Montana (approximately 91 percent of all relevant contracting and procurement dollars).

The information in Chapter 3 comes from existing research related to discrimination as well as primary research BBC conducted of current marketplace conditions. Additional quantitative and qualitative information about marketplace conditions is presented in Appendices C and D, respectively.

A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Factors such as education, business experience, and managerial experience have been shown to be related to business success.[24, 25, 26, 27] Any barriers in those areas might make it more difficult for minorities and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

1. Education. Barriers associated with educational attainment may preclude the entry or advancement of certain individuals in certain industries, because many occupations require at least a high school diploma, and some occupations—such as many occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.[28, 29] Nationally, minorities lag behind white Americans in terms of both educational attainment and the quality of education they receive.[30, 31] Minorities are far more likely than white Americans to attend schools that do not provide access to core classes in science and math.[32] In addition, Black American students are more than three times more likely than white Americans to be

expelled or suspended from high school.[33] For those and other reasons, minorities are far less likely than white Americans to attend college, enroll at highly- or moderately selective four-year institutions, or earn college degrees.[34]

BBC's analyses of the Montana labor force also indicate that certain groups are far less likely than others to earn college degrees. Figure 3-1 presents the percentage of Montana workers in relevant industries who have earned four-year college degrees by race/ethnicity and gender. As shown in Figure 3-1, Hispanic American and Native American workers are substantially less likely than white American workers to have four-year college degrees.

Figure 3-1.
Percentage of Montana workers 25 and older with at least a four-year college degree

Notes:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites or between women and men is statistically significant at the 95% confidence level.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

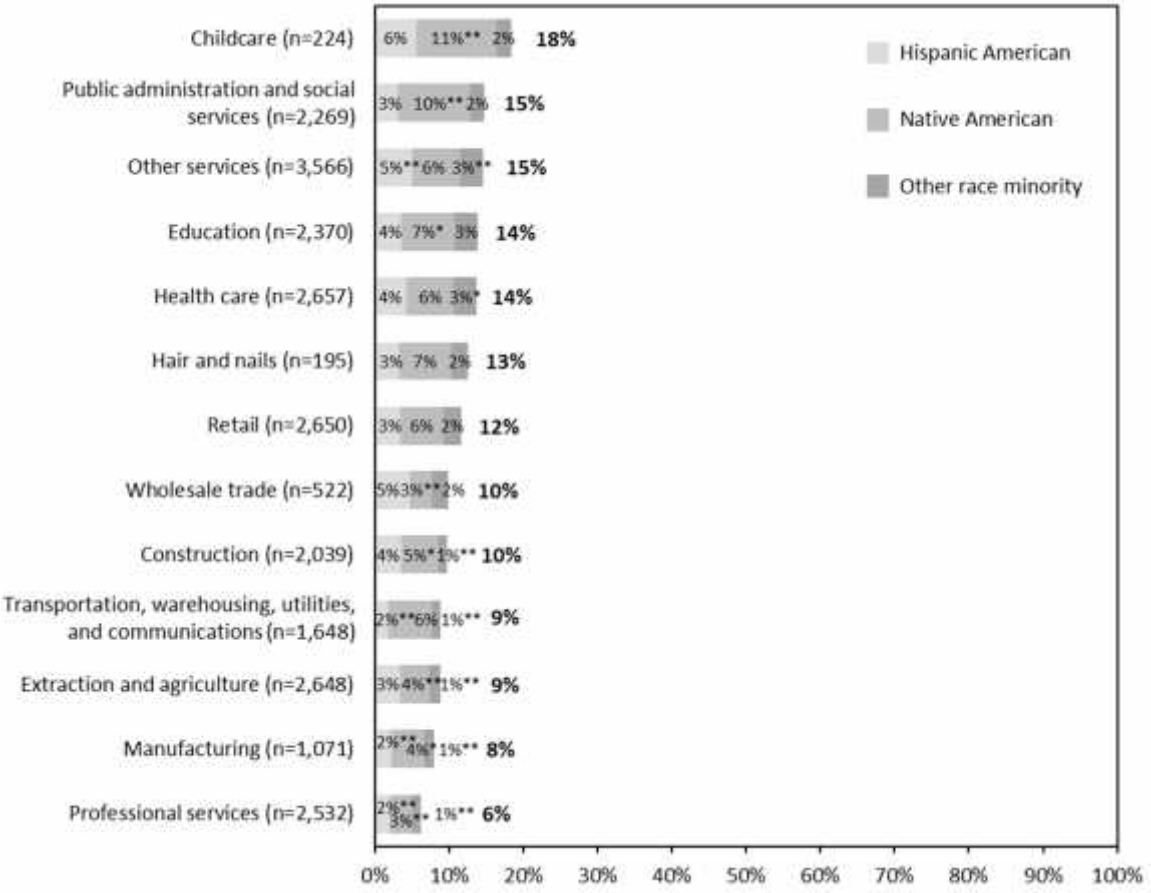
Montana	Percent with college degrees	
Race/ethnicity		
Hispanic American	30.0	**
Native American	17.4	**
Other race minority	46.5	**
Non-Hispanic white	36.4	
Gender		
Women	38.2 %	**
Men	32.8	

2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in the future.

a. Employment. On a national level, prior industry experience has been shown to be an important precursor to business ownership and success. However, minorities and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.[35, 36, 37] When employed, they are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of minorities or women.[38, 39, 40, 41, 42] In addition, minorities are incarcerated at a higher rate than white Americans in Montana and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth. [43, 44, 45, 46]

Figure 3-2 presents the representation of minority workers in various Montana industries. The industries with the highest representations of minority workers are childcare, public administration and social services, and other services. The Montana industries with the lowest representations of minority workers are extraction and agriculture, manufacturing, and professional services.

Figure 3-2.
Percent representation of minorities in various Montana industries



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all Montana workers is 4% for Hispanic Americans, 6% for Native Americans, 2% for Other race minorities, and 12% for all minorities considered together.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

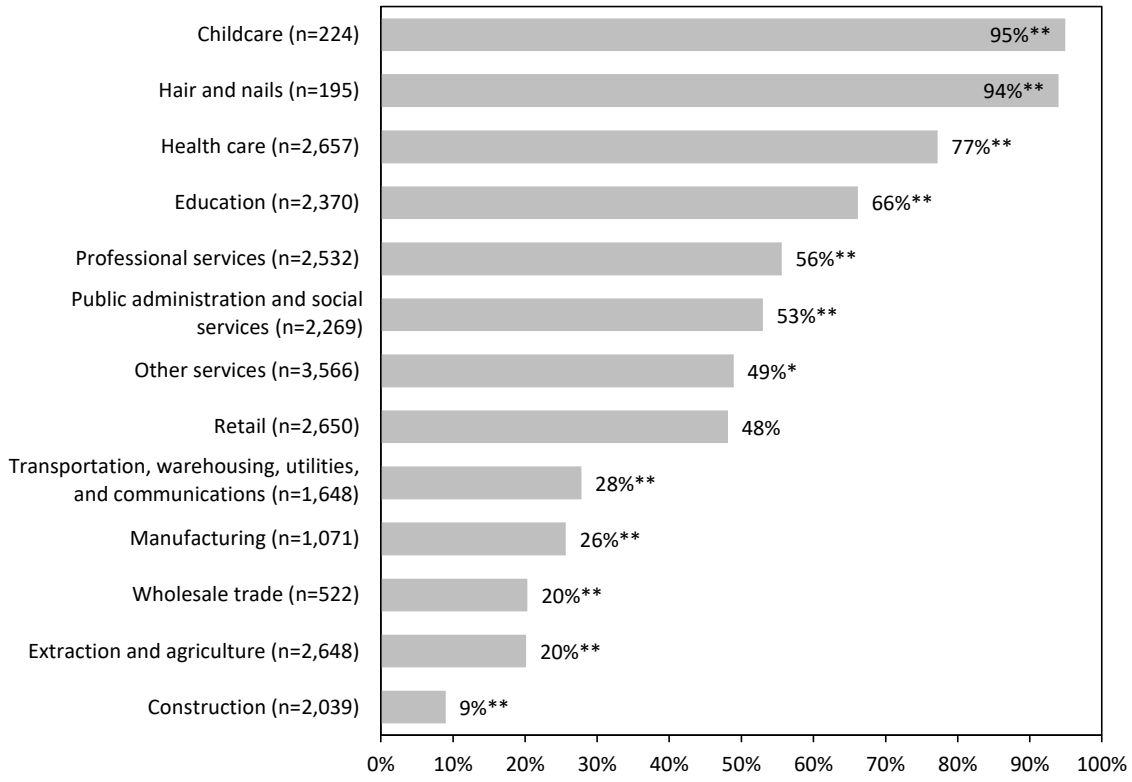
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services.

Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/

Figure 3-3 indicates that the Montana industries with the highest representations of women workers are childcare, hair and nails, and healthcare. The industries with the lowest representations of women workers are wholesale trade, extraction and agriculture, and construction.

Figure 3-3.
Percent representation of women in various Montana industries



Notes: *, ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all Montana workers is 47%

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services.

Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services.

Workers in barber shops, beauty salons, nail salons, and other personal were combined into one category of hair and nails.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/

b. Management experience. Managerial experience is essential to business success, but discrimination remains a persistent obstacle to greater diversity in management positions.[47, 48, 49] Nationally, minorities and women are far less likely than white men to work in management positions.[50, 51] Similar outcomes appear to exist for minorities and women in Montana as well. BBC examined the concentration of individuals of those groups who work in management positions in the Montana construction industry (excluding business owners). As shown in Figure 3-4, compared to white Americans, smaller percentages of Native Americans work as managers in the construction industry. The sample sizes for minority workers in professional services were too small to calculate accurate estimates or test for statistical significance.

3. Intergenerational business experience. Having family members who own and work in businesses is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks, obtain knowledge of best practices and business etiquette, and receive hands-on experience in helping run businesses.

However, nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.[52, 53] That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

Figure 3-4.
Percentage of non-owner workers who worked as managers in the Montana construction and professional services industries

	Construction	Professional Services
Race/ethnicity		
Hispanic American	4.4 %	0.0 % †
Native American	1.9 % **	0.0 % †
Other race minority	0.0 % †	0.0 % †
Non-Hispanic white	7.0 %	2.2 %
Gender		
Women	5.8 %	1.5 %
Men	6.6 %	2.3 %
All individuals	**6.5 %**	**2.1 %**

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites or between women and men is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.[54, 55, 56] Individuals can acquire financial capital through many sources, including wages, personal wealth, homeownership, and financing. If barriers exist in financial capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between minorities and white Americans and between women and men exist throughout the country, even when researchers have statistically controlled for various other personal factors.[57, 58, 59] For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes less than two-thirds those of white Americans.[60, 61] Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.[62] BBC observed wage gaps in Montana consistent with those researchers have observed nationally. Figure 3-5 presents mean annual wages for Montana workers by race/ethnicity and gender. As shown in Figure 3-5:

- Hispanic Americans, Native Americans, and other race minorities earn substantially less than white Americans; and
- Women earn substantially less than men.

BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Native American or other race minority was associated with substantially lower earnings than being white American. In

addition, being a woman was associated with substantially lower earnings than being a man (for details, see Figure C-9 in Appendix C).

Figure 3-5.
Mean annual wages in Montana

Note:

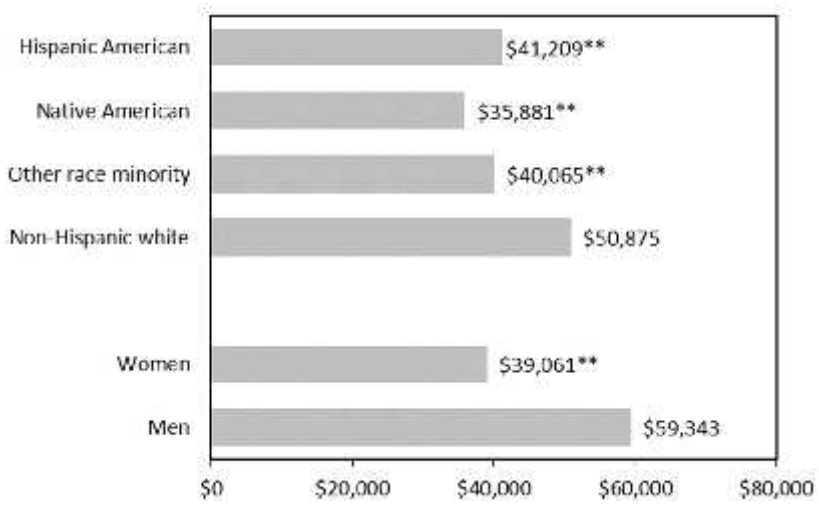
The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015- 2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



2. Personal wealth. Another important source of business capital is often personal wealth. As with wages and income, there are substantial disparities between minorities and white Americans and between women and men in terms of personal wealth.[63, 64] For example, in 2019, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 14 percent and 17 percent that of white Americans, respectively.[65] In addition, approximately one of five Black Americans and one of six Hispanic Americans in the United States are living in poverty, compared to less than one of 10 white Americans.[66] Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.[67]

3. Homeownership. Homeownership and home equity have also been shown to be key sources of business capital.[68, 69] However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of white Americans.[70] Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.[71, 72] Minorities who own homes tend to own homes worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.[73, 74] Differences in home values and equity between minorities and white Americans can be attributed—at least, in part—to depressed property values that tend to exist in racially-segregated neighborhoods.[75, 76] Minorities appear to face homeownership barriers in Montana similar to those observed nationally. As shown in Figure 3-6, all relevant racial/ethnic groups in Montana exhibit homeownership rates substantially lower than that of white Americans.

Figure 3-6.
Home ownership rates in Montana

Note:

The sample universe is all households.

** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

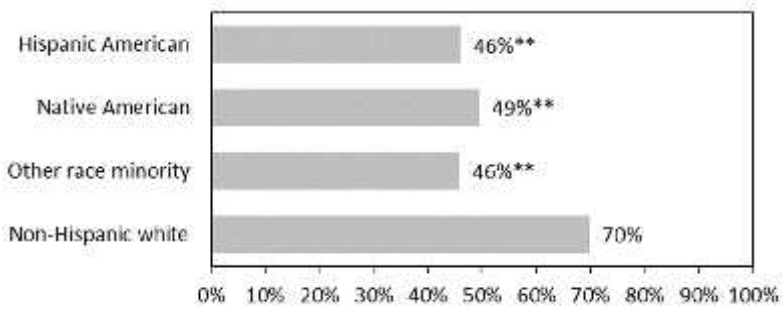


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Montana. Those data indicate that Montana homeowners who identify as Hispanic Americans, Native Americans, and other race minorities appear to own homes that, on average, are worth less than those of homeowners who identify as white Americans.

Figure 3-7.
Median home values in Montana

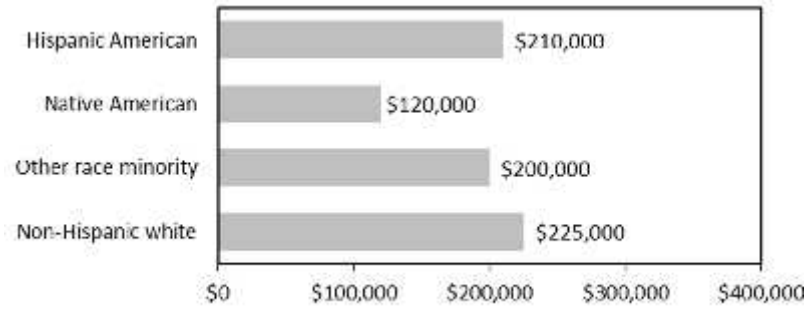
Note:

The sample universe is all owner-occupied housing units.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



4. Access to financing. Minorities and women face many barriers in trying to access credit and financing. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.[77, 78, 79, 80, 81, 82] BBC assessed difficulties minorities and women face in home and business credit markets in Montana.

a. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.[83, 84, 85, 86, 87] Race- and gender-based barriers in home credit have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.[88, 89, 90, 91] To examine how minorities fare in the home credit market relative to white Americans, BBC analyzed home loan denial rates for high-income households by race/ethnicity in Montana. As shown in Figure 3-8, high-income Hispanic American and Native American households appear to have been denied home loans at higher rates than high-income white American households. In addition, our analyses indicate that Hispanic Americans, Native Americans, and other race

minorities in Montana are more likely than white Americans to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

Figure 3-8.
Denial rates of conventional purchase loans for high-income households in Montana

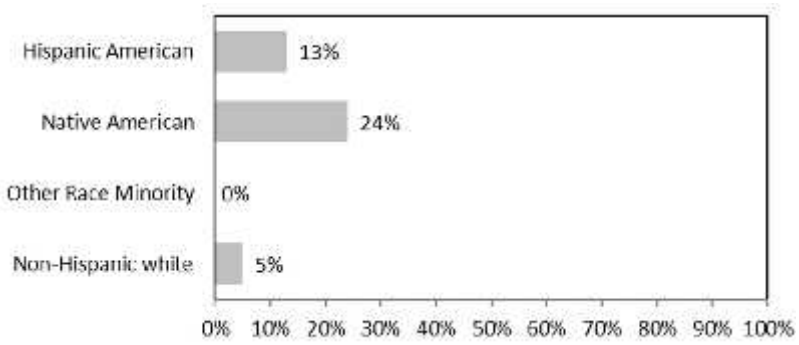
Note:

High-income households are those with 120% or more of the HUD area median family income.

"Other race minority" includes Asian Americans, Black Americans, and Native Hawaiian or Other Pacific Islander.

Source:

FFIEC HMDA data 2019. Raw data were obtained from Consumer Financial Protection Bureau HMDA data tool: http://www.consumerfinance.gov/hmda/explore.



b. Business credit. Minority- and woman-owned businesses also face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, subjected to more credit information requests, and offered less support than their white American counterparts.[92] In addition, researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely than white American-owned businesses to forego submitting business loan applications and to be denied business credit when they do seek loans, even after accounting for various business characteristics factors.[93, 94, 95] In addition, women are less likely to apply for credit than men and receive loans of less value when they do.[96, 97] Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by white men and rely more on personal finances, of which they also tend to have less.[98, 99, 100, 101]

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2012 to 2018, the number of woman-owned businesses increased by 10 percent, Black American-owned businesses increased by 14 percent, and Hispanic American-owned businesses increased by 15 percent.[102, 103] Despite the progress minorities and women have made with regard to business ownership rates, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than white men.[104, 105, 106, 107] In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. They disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.[108, 109, 110] BBC examined rates of business ownership in the Montana construction and professional services industries by race/ethnicity and gender. As shown in Figure 3-9, Native Americans own construction businesses at lower rates than white Americans.

Figure 3-9.
Business ownership rates in study-related industries in Montana

Montana	Construction	Professional Services
Race/ethnicity		
Hispanic American	28.1 %	5.0 % †
Native American	26.8 % *	20.8 % †
Other Race Minority	43.7 % †	15.7 % †
Non-Hispanic white	37.2 %	34.0 %
Gender		
Women	31.5 %	39.7 %
Men	36.9 %	30.6 %
All individuals	**36.5 %**	**33.3 %**

Note:

* Denotes that the difference in proportions between the minority group and non-Hispanic whites or between women and men is statistically significant at the 90% confidence level.

† Denotes significant differences in proportions not assessed due to small sample size.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

BBC also conducted regression analyses to determine whether differences in business ownership rates based on race/ethnicity and gender exist after statistically controlling for various personal factors such as income, education, and familial status. We conducted those analyses separately for each relevant industry. Figure 3-10 presents the racial/ethnic and gender factors that were significantly and independently related to business ownership for each relevant industry. As shown in Figure 3-10, after accounting for various personal factors:

- Being Native American is associated with a lower likelihood of owning a construction business compared to being white American.
- Being Hispanic American is associated with a lower likelihood of owning a professional services business compared to being white American.

Figure 3-10.
Predictors of business ownership in relevant industries in Montana (probit regression)

Industry and Group	Coefficient
Construction	
Hispanic American	-0.20
Native American	-0.32 *
Other race minority	-0.10
Women	-0.25
Professional services	
Hispanic American	-1.40 **
Native American	-0.09
Other race minority	-0.53
Women	0.41

Note:

The regression included 1,810 observations for construction and 438 observations for professional services.

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites or between women and men is statistically significant at the 90% and 95% confidence level, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

D. Business Success

A wealth of research indicates that, nationally, minority- and woman-owned businesses fare worse than businesses owned by white men. For example, Black American-, Native American-, Hispanic American-, and woman-owned businesses exhibit higher rates of closure than businesses owned by white Americans and men. In addition, minority- and woman-owned businesses have been shown to

be less successful than businesses owned by white Americans and men, respectively, using a number of different indicators such as profits and business size.[111, 112] BBC examined data on business closure, business receipts, and business owner earnings to further explore business success in Montana.

1. Business closure. BBC examined rates of closure among Montana businesses by the race/ethnicity and gender of owners. As shown in Figure 3-11, Asian American- and Black American-owned businesses appear to close at higher rates than non-Hispanic white-owned businesses.

Figure 3-11.
Rates of business closure in Montana

Note:

Data include only non-publicly held businesses.

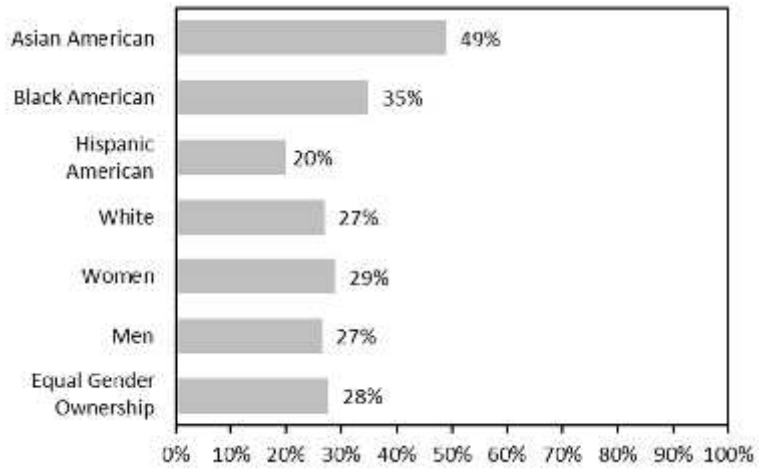
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

Statistical significance of these results cannot be determined because sample sizes were not reported.

Source:

Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.



2. Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in Montana earn as much as businesses owned by white Americans or men, respectively. Figure 3-12 shows mean annual receipts for businesses in Montana by the race/ethnicity and gender of owners. Those results indicate that, in 2018, all relevant minority groups in Montana appeared to show lower mean annual business receipts than businesses owned by white Americans. In addition, woman-owned businesses showed lower mean annual business receipts than businesses owned by men.

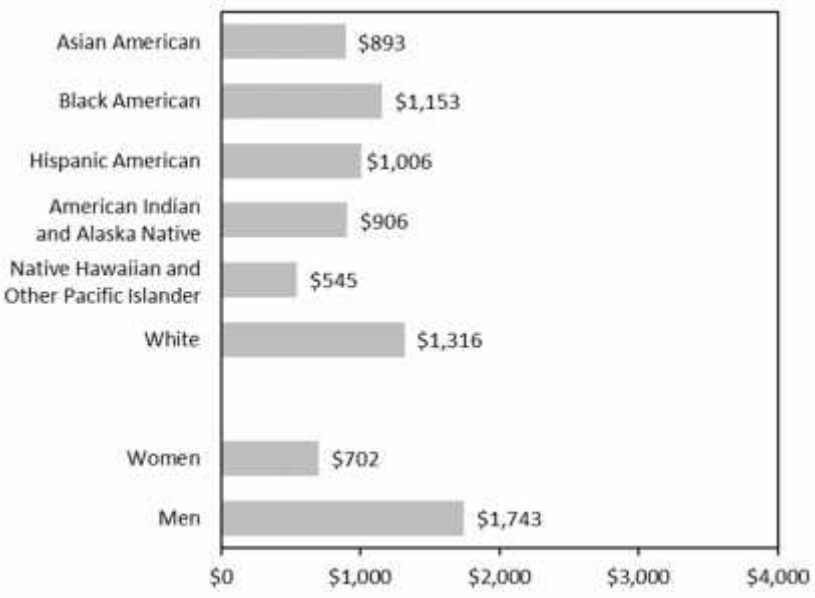
Figure 3-12.
Mean annual business receipts (in thousands) in Montana

Note:

Includes employer firms. Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

Source:

Annual Business Survey data 2018. Raw data were obtained from United States Census Bureau Application Programming Interface: https://www.census.gov/data/developers/data-sets/abs.html.



3. Business owner earnings. BBC also analyzed business owner earnings to assess whether minority and woman business owners in Montana earn as much as white American and men business owners, respectively. As shown in Figure 3-13:

- Hispanic American business owners earn less on average than white American business owners; and
- Women business owners earn less than men business owners.

Figure 3-13.
Mean annual business owner earnings in Montana

Note:

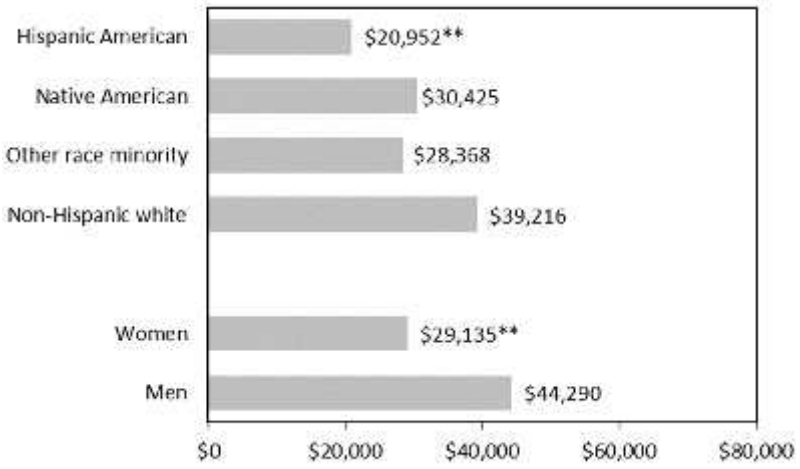
The sample universe is business owners aged 16 and older who reported positive earnings. All amounts in 2019 dollars.

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015 - 2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.



BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being a white American business owner, being a Hispanic American or Native American business owner was associated with substantially lower earnings. Similarly, compared to being a male business owner, being a woman business owner was associated with substantially lower earnings (for details, see Figure C-25 in Appendix C).

E. Summary

BBC's analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face certain barriers in the Montana contracting industry. Existing research and primary research BBC conducted indicate that race- and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various factors such as age, income, education, and familial status. There is also evidence that many disparities are due—at least, in part—to discrimination. Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in construction and professional services and operating those businesses successfully. Any difficulties those individuals face in starting and operating businesses may reduce their availability for government work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the marketplace indicates that MDT and NPIAS airports may be passively participating in discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for their work.

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CHAPTER 4.
Anecdotal Evidence

As part of the disparity study, business owners, trade association representatives, and other stakeholders had the opportunity to share anecdotal evidence about their experiences working in the local marketplace as well as with the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports. BBC Research & Consulting (BBC) documented those insights and identified key themes about conditions in the local marketplace for minority- and woman-owned businesses. The study team used that information to augment many of the quantitative analyses we conducted as part of the disparity study to provide context for study results and provide explanations for various barriers minority- and woman-owned businesses potentially face as part of MDT's and NPIAS airports' transportation-related contracting and procurement. Chapter 4 describes the anecdotal evidence collection process and key themes the study team identified from that information. BBC presents all the anecdotal evidence we collected as part of the disparity study in Appendix D.

A. Data Collection

The study team collected anecdotal information about marketplace conditions, experiences working with MDT and NPIAS airports, and recommendations for program implementation through various efforts between August 2021 and April 2022.

1. Public forums. MDT, NPIAS airports, and the study team solicited various stakeholders for written and verbal insights at two public forums BBC facilitated virtually on October 20 and 26, 2021. Those insights were compiled and analyzed as part of the anecdotal evidence process.

2. In-depth interviews. The study team conducted 36 in-depth interviews with owners and representatives of local construction and professional services businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, working or attempting to work with government agencies in Montana, MDT's and NPIAS airports' implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, and other relevant topics. BBC identified interview participants primarily from a random sample of businesses the study team contacted during the availability survey process, stratified by business type, location, and the race/ethnicity and gender of business owners. The study team conducted most of the interviews with the owner or another high-level representative of each business.

3. Availability surveys. BBC conducted availability surveys for the disparity study with 591 businesses between September 2021 and February 2022. As a part of the surveys, the study team asked business owners and managers to share qualitative information about whether their companies have experienced barriers or difficulties starting or expanding businesses in their

industries, obtaining work in Montana, or working with government organizations in the state. Two hundred eighty-one business owners and representatives shared such information. [1]

4. Focus groups. BBC conducted two focus groups with representatives of businesses that operate as prime contractors or subcontractors on January 20 and 26, 2022, respectively. During each focus group, participants engaged in group discussions and shared their insights about working in Montana with public and private sector organizations.

5. Written comments. Throughout the study, stakeholders and community members had the opportunity to submit written comments regarding their experiences working in the local marketplace directly to the study team. Two stakeholders and community members shared such comments, which were integrated into our analyses of anecdotal evidence.

B. Key Themes

Various themes emerged across all the anecdotal evidence the study team collected as part of the disparity study. BBC summarizes those themes by relevant topic area and presents illustrative quotations. In an effort to protect the anonymity of individuals and businesses, we coded the source of each quotation with a random number and prefix that represents the individual who submitted the comment and the data collection method. We denote availability survey comments by the prefix "AV," focus group comments by the prefix "FG," public forum comments by the prefix "PT," and written comments by the prefix "WT." In-depth interview comments do not have a prefix. We also preface each quotation with a brief description of the race and gender of the business owner and the business type. In addition, we indicate whether each participant represents a certified DBE, minority- or woman-owned business enterprise (MBE/WBE), or small business enterprise (SBE).

1. Marketplace conditions. Some interviewees find Montana's marketplace to be declining, with a few small regions experiencing a boom while most others suffer. Multiple interviewees said that the market is extremely competitive, noting that firms are moving into different markets, more companies are bidding on projects, and fewer skilled employees are available to hire. Others who view the market as growing and healthy noted that additional stimulus funds have led to more government projects.

> *The owner of a majority-owned construction firm stated, "Montana throws a few roadblocks in front of DBEs that don't necessarily have to be there, but it's a hard competitive market to get into for a new business. It's a very tight market. It's a clique-y market." [#1]*
>
> *A representative of a majority-owned professional services firm stated, "I think [the perceived market growth is] probably part of the stimulus funds. I think it might be staffing changes, political. There seems to be a little bit more projects out there than there has been in the past." [#5]*
>
> *The Black American woman owner of a professional services company stated, "It should tell you how exclusive it is … when you have these giant companies that can come into Montana from a state or two states away and do jobs here … the only real competition that those guys get is if somebody from*

[1] The remaining availability survey respondents did not share additional information related to marketplace conditions in Montana.

a different state who's already that size decides to come take work away from them. I mean, it's so stacked against you [as a smaller company in Montana]." [#10]

A representative of a majority-owned professional services firm stated, "I don't know that it's necessarily the last two to three years, but we've seen it in the recent past, is … impacts to the market of larger firms coming in to compete against the smaller firms of Montana. I think it's gotten worse in the last few years, because these larger firms' employees are working at home or can work at home, and so they are able to compete with us here and open up the marketplace to some of the larger firms. We very much struggle to compete with that." [#29]

A representative of a majority-owned professional services firm stated, "I think the economy in general has gotten stronger, which in particular makes it harder to find people to hire. There's a lot more variety of job opportunities for candidates, for employ[ees] to find and to try to find a job. And so, I think the labor market is very competitive …" [#30]

2. DBE certification and benefits. Business representatives noted multiple benefits of DBE certification, including financial benefits for website development, visibility and access to opportunities, and training and business development opportunities and programs. One example an interviewee discussed is the $2,500 reimbursement MDT offers each year for bonding, training, and other approved activities. The DBE certification process is generally regarded as straightforward, getting easier to maintain certification. When discussing disadvantages, interviewees discussed good faith efforts (GFEs), noting that they feel like their presence is often used just to "check a box," and they are not generally as respected as they think other subcontractors are.

The owner of a WBE- and DBE-certified construction company stated, "Being DBE certified is good because once a year [MDT] reimburses you $2,500 ... for bonding or whatever, training. What a nice perk. And then when [events] come up, like if they know that there's going to be this gathering, they'll let you know." [#8]

The Native American owner of a DBE-certified construction company stated, "Opportunity. That [DBE certification] gives you a little bit more opportunity to actually get some work, because they have those requirements of so many percent of every project has to have a DBE. And there's a whole lot of small contractors out there, and not so many of them are DBEs." [#16]

The woman owner of a DBE-certified professional services business stated, "It may be the difference between the first time and recertification, but recertification has even gotten a lot easier. They let us, instead of having to fill out a bunch of forms and re-estimate our personal financial worth and, do all the things proving that we aren't a shell for some evil man, we now are allowed to just say, 'Nothing's changed.' And it's so much easier to do that." [#28]

A respondent at a public meeting stated, "The stigma [of DBE certification] would be, … a prime is more checking the box, potentially, than really interested in [working with] a DBE bit." [#PT2]

The owner of a WBE- and DBE-certified construction company stated, "So [the prime contractors are] looking at me now, this little company, to pave this stretch of [road] so they can fulfill their quota, knowing full well that we're going to slow them down, we're going to break their rhythm. So, here's this little company coming in to do their part, almost feeling foolish, because we know we're under a microscope, because these guys are going, 'Well, geez, here's this crew of four and we have a crew of 12, and we have to wait for them to do this part.'" [8]

3. Doing business with public agencies. Several business owners discussed their experiences working with NPIAS airports and mentioned the frequency of delayed payments, which is a barrier for all businesses but especially for new businesses. Businesses indicated that they are reluctant to work with the airports because of the cumbersome bidding processes.

> *The owner of a majority-owned construction company stated, "Never bid on an airport [project] because … it might be a month and a half before the prime sees the money … So, you could be strung out close to two months … it could almost be three months if you did something at the beginning of the pay period. … It's harder [to bid with airports], because they don't use the same online system. … You're still writing a lot of bids by hand. And you're going to different counties to determine the bids … [because they] don't use an electronic system. … We have to take the bids everywhere. It's a lot." [#1]*

> *A representative of a DBE-certified construction company commented, "It seems like the airports pay significantly slower than some of the other public work we do. … Now, I don't know if that's because of the size of the airports and the staffing or all the red tape and such, I don't know. But it just seems like it takes us a long time to get paid and then a really long time to get the retainage released. We've sometimes waited eight or nine months to get the retainage released on an airport [project], even if it's a significantly sized project … So, that becomes kind of a frustration." [#4]*

Interviewees discussed their experiences working with local tribes and doing work on reservations. The general consensus is that working with tribes is worthwhile, but they lack some of the resources that other, larger government agencies have that makes finding and obtaining work easier.

> *A representative of a majority-owned professional services firm said, "I'd say for us, you know, in the line of work that we do … most difficult … would be tribes. And that's simply just because they generally don't have the resources behind their programs like a local government or a state government would have." [#2]*

> *A representative of a DBE- and SBE-certified professional services firm commented, "Tribes always struggle with [obtaining financing] because of assets, everything being in trust. Then banks … they don't want to come to tribal court, one. Two, there's nothing they can go after in case you fail on a payment. So, I think that's always a challenge for tribal organizations. I think it's a huge problem for tribal small businesses." [#22]*

> *A representative of a majority-owned professional services firm stated, "If we're going in to work on the reservation, we try really hard to use native-owned businesses." [#29]*

4. Doing business as a prime contractor or subcontractor. Several interviewees indicated their preference for working as prime contractors for several reasons. As subcontractors, they do not feel protected from the whims or ire of prime contractors. In addition, subcontractors have less protection from suppliers who provide faulty materials. Finally, subcontractors are often used as scapegoats when project timelines go past contract dates, even if the delays occurred before they performed their work. Businesses that more often perform work as subcontractors noted the financial burden of bidding on projects as prime contractors and the additional opportunities available from working as subcontractors.

> *The owner of a WBE- and DBE-certified construction company stated, "It's kind of like if you're a painter of a house: you're the last one in, but yet if … your sheet rock guy did a bad job, they'll blame*

the painter. It's the exact same thing. So, we used to come back in and pave after the trench work was done … And then if we couldn't get densities, it was always blamed on the asphalt where they never looked at the gravel. And so, it's always like … if you're an asphalt subcontractor, you're kind of a scapegoat." [#8]

The Black American woman owner of a professional services company stated, "[Being a subcontractor]'s way less risk on our part, because we don't have to put up the whole kitchen sink and everything to get to the same kind of thing. So … I'm fine doing it that way." [#10]

The Native American owner of a DBE-certified construction company stated, "We tried a lot of subbing in the past, and with the Montana Department of Transportation generals, we seem to get kicked around pretty easy that way. [Sub opportunities] weren't very profitable for us because of that. [Prime contractors] have a way of manipulating and pretty much put the bad stuff onto the smaller guy. ... So that's why we, myself, just got it in my head that I was going to be a [prime contractor], and I wasn't going to bid anything unless I was a [prime contractor]." [#16]

A respondent at a public meeting stated, "We had to be the sub I should say. And larger companies, knowing that we were new, took advantage of that, and it really bit us in the butt hard. … We decided we're not going to do that anymore. We're going to become a general contractor, and we'll bid the entire site and we'll hire subs for things that we don't do." [#PT2]

5. Potential barriers to business success. The bid process for government work is considered by many to be time consuming, costly, and challenging, particularly for small businesses. The eMACS platform is considered somewhat cumbersome and getting in contact with procurement staff to ask questions can be difficult for many businesses. For construction firms, there are seasons in the year when many projects go out to bid, and bidding on all the potential work for a season leaves bidders with little time to build teams, attend pre-bid meetings, and compile their bids. Bidding projects further in advance may be beneficial, but with the inconsistency in supply prices and the need to have clear access to subcontractor schedules, it may pose more challenges than it resolves. Alternative delivery methods, such as Construction Manager/General Contractor (CMGC) and Construction Manager at Risk projects, are considered less attractive to many bidders, because the upfront work to secure those projects is more time intensive and requires more interviews. To improve the bid process for construction projects in particular, multiple interviewees recommend clearer specifications in the solicitation (especially for design-build contracts) as well as providing walk throughs for projects to help identify any potential pitfalls that will need to be addressed.

The owner of a WBE- and DBE-certified construction company stated, "Right now there's tons of jobs coming across, but I have four jobs that I'm trying to bid right now. By the time I get these done, it sometimes … leaves me a week to get those done, which depends on the size of them and then trying to get sub prices. If you give them a week, they're annoyed, just like I get annoyed … I can't keep up with everything all the time. Especially during the summer still trying to bid plus we're on the job plus have to actually have labor on the job." [#8]

The owner of a majority-owned professional services firm stated, "I find eMACS terribly, terribly, terribly difficult to deal with. And it's so entirely counterintuitive that it's hard to understand what you're doing as compared to some of the other programs, all the other programs that we've worked with. … You should have someplace out there where it just gives me a summary of what the tasks are. … But you can't do that until you go through … 'Do you want the bid?' Well, how do I know?

That's the first question, do you want the bid? Well, how do I know if I want a bid if I can't see what the tasks are?" [#11]

The woman owner of a DBE-certified professional services firm stated, "It's very expensive for a small firm like ours to have put in all of these statements of qualifications. We used to have to run to Helena with multiple copies. I mean, it just was very expensive just to get on [MDT's] list. And then a lot of times you were never selected anyway for projects. So, it got to be where it was just too expensive to even put in your statement of qualifications. … So not only do you have to put a cumbersome qualification in on every single division you want to be on the list for, now instead of just being able to pick from the list and go to somebody and say, 'Hey, we'd like you to do this project,' now [we] have to pick three firms from the list to do a specific proposal for that project. So, it's another costly event to have to submit proposals just to get a job from being on the list." [#15]

A representative of a Native American-owned DBE- and SBE-certified professional services firm stated, "It's a cost analysis. Because somebody's got to sit down and [submit a bid] and... they could be doing something else. … What are you losing to do that?... Like the Boeings of the world, they've got a hundred-person shops. That's all they do all day, every day. We don't have that luxury. Sometimes we're washing dishes and hanging rafters and then trying to do all this other stuff." [#22]

A participant from a focus group of prime contractors stated, "Most of the alternate delivery projects that have been let in the state have gone [to] out of state contractors … And they're extremely time consuming from our standpoint. For a CMGC project, we spend months putting together [a] proposal. … It involves a lot of technical writing, a lot of meetings, interview, just a lot of work. And [a large out-of-state company] comes in with their team of technical writers and amazing interviewees, and they just come and snag it right up from underneath our feet. And obviously everything's based on the writing, your writing and your interview, so cost isn't really taking an account on any of that. … It's hard for the local contracting association to support those delivery methods if they're just going to keep giving it to out-of-state companies. … There's just no way that any of these … Montana companies can get a project, because we don't have the experience because they won't give it to us. … If you really want to get a [Montana] contractor, judge us on our writing, judge us on our interview. Don't judge us on what our previous experience is because we know we can build these bridges and you know we can build these bridges." [#FG2].

Bid shopping is an ongoing problem for many businesses, especially because, as several business representatives indicated, there is an unspoken rule that new businesses tend to get their bids shopped until they are familiar to prime contractors. The "good ol' boy" club facilitates bid shopping and skirting rules that prevent it, but several business representatives indicated that adding more rules to limit such behavior might only make the bid process even more cumbersome. Some interviewees indicated that public agencies also bid shop when they ask businesses for quotes or scopes of work for potential projects and use that information to bid out the work to other businesses or rebid projects if they do not find the original prices advantageous.

The owner of a majority-owned construction company stated, "Any new person who comes on the scene more than likely is going to get shopped for a while. It's kind of like [a] truck salesman comes into our office. I have to see that guy four or five or six times before I'm even going to think about buying something from him. … You got to get a certain level of familiarity before you're going to give them a contract." [#1]

A representative of a DBE-certified construction company stated, "I think [agencies are] putting rules in places you want, but there's enough good ol' boys left that would find a way to skirt the rule. That'd make the process so much more cumbersome, I think, if you tried to [add] restrictive [rules], if you tried to address [bid shopping] too much." [#4]

A representative of a majority-owned professional services firm stated, "I have clients that [bid shop], like cities. [One City in particular] is famous for having me write up the scope and then you tell them what [I] could do it for. They would take that down and share the price with another firm and say, 'Can you do this for less?' Of course, they are going to say yes. I've had firsthand experience." [#5]

A representative of a majority-owned professional services company stated, "One of the rules that I was taught in our industry is nothing good comes from a rebid. So anytime there's a rebid, there's always the thought of the owner [thinking] … 'Hey, wait a minute. This was too high. Let's rebid this in three months.' And coincidentally, some new guy comes in and beats that original price." [#7]

The Black American woman owner of a professional services company stated, "You can't tell me that there isn't some kind of collusion. And I'm not accusing anybody of anything illegal. I'm just saying … You can't compete with that kind of a rigged game. So … we don't." [#10]

A representative of a DBE-certified professional services firm stated, "I do know that, a lot of times, like people that have that inside intel, they'll know exactly how much a client has to award for a certain project, so they create budgets that are within that, so they have that advantage. I think there are things that people do kind of behind the scenes that make them more competitive when a proposal is reviewed." [#21]

Many business representatives indicated that delayed payment is an issue with smaller agencies, grant-funded work, change orders, or certain types of "paid when paid" federal projects. Subcontractors generally experience the most delays in payments, especially when prime contractors do not follow through on the payment period Montana state law requires, seven days for construction companies and 30 days for professional services companies. Some interviewees said that timely payment is a major factor for subcontractors when considering with which prime contractors to team, and they often will not participate in projects on which payment periods are greater than 30 days. Some subcontractors suggest that prime contractors should share their bonding and insurance information, so there is recourse outside of suing prime contractors to receive payment. Prime contractors generally consider MDT to pay on time, and several prime contractors noted that much of the struggle to pay subcontractors on time relates to their own lack of organization in invoicing. Stronger bookkeeping and invoicing practices would help prime contractors pay subcontractors more quickly.

A representative of a majority-owned professional services firm stated, "One of the things… that I have seen as an issue is, for certain projects, if they're to say grant funded or something … [agency] payment is a little [slower]." [#2]

The Native American woman owner of a DBE-certified professional services firm stated, "I haven't had any nonpayment but late [payments]—60, 90 days. Which that was way too long for me. The only thing I can do is look at that prime and say, 'Oh yes, can't work for them.'... And when I work for someone … when I sign the contract I say, 'I cannot wait 60 days. I need to be paid in 30 days, or I can't work for you.'" [#3]

A representative of a DBE-certified construction company stated, "Where we got into a dispute [was] with a prime contractor over a change order that ended up not getting resolved favorably for us. … Well, the project was already finished before the squabble began, and we've just opted not to work with that contractor in the future." [#4]

A representative of a majority-owned professional services firm stated, "DBEs are kind of unorganized with their invoicing, which hurts them, and I'll try and get them paid as soon as I can. I can't pay them if they don't send me the bill." [#5]

The Native American owner of a DBE-certified construction company stated, "The other bad thing about being a subcontractor, especially with the bigger [prime contractors], is they really delay your payments, too. They'll hold you out there 60 to 90 days before you get your money, and for a small [business], that makes it pretty difficult, because then you're leaning on your line of credit or whatever to operate … And therefore, the interest you pay in your bank for that eats your profit for what you can make on a job as a subcontractor, because the subcontractor profit margins are not very good." [#16]

Finding and training personnel was considered a barrier to growth by nearly every respondent, both from in-depth interviews and comments from availability surveys. Many participants said that although many companies train their employees on the job, finding employees with experience in skilled trades is nearly impossible. They remarked that the labor market is extremely tight due both to the pandemic and overall market trends over the last five years. In addition, particularly in Montana, young workers who might otherwise enter the construction industry are pulled to oil industry jobs, because they pay substantially more than most construction companies can offer. In addition, Davis-Bacon wages have remained relatively stagnant over the last decade, not rising to meet inflation. In the construction industry in particular, retaining employees is difficult and workers quit without any warning or notice. In the professional services sector, most employees bounce between firms on a fairly regular basis, making it difficult to retain talent long term.

A representative of a DBE-certified construction company stated, "We're very close to the oil fields. And so, a lot of the skilled laborers go to the oil fields, especially when they are booming, because the oil companies can pay tremendous amounts that small businesses … simply can't afford. … We can't compete with the oil company wages … and that's just a barrier that none of us can really do much about." [#4]

A representative of a majority-owned professional services company stated, "I would say that the biggest burden would be the limitation of qualified or interested individuals in this realm. … The educated kids are a lot easier to find in my opinion, … it's the lower-waged people out there … [that are harder to find]. And then our services are so specialized that we basically have to train everybody from the ground up, so that does take time." [#7]

The owner of a majority-owned professional services firm stated, "As businesses coming to grips with [staffing difficulties], it doesn't matter who I talked to, we are all in the same boat. We're having difficulty hiring staff now. And it seems to be getting a little bit better, but over the last couple three years, it's been quite difficult to hire people." [#14]

A representative of a majority-owned construction firm stated, "I think the economy in general has gotten stronger, which in particular makes it harder to find people to hire. There's a lot more variety of job opportunities for candidates, for employment … to find a job … I think the labor market is very competitive, and that's not just because of COVID." [#30]

A representative of a majority-owned professional services company stated, "I have trouble getting employees. … It's more difficult to find qualified people willing to work than it was prior to COVID." [#AV239]

A participant from a focus group of prime contractors stated, "There's a petition going around state of Montana to do a blanket, across the board, $6 increase to the Davis-Bacon wage scale to try to attract more people to come to work right now. So that's one thing that I've noticed, even since I started working in '99, the wages haven't changed much in 20 years or 22 or 23 years. There's been small changes across the board and realize that we're a federal aid state, so we're beholden to the Davis-Bacon wage scale." [#FG2]

Factors public agencies consider when awarding projects are not generally seen as barriers with the exception of the balance between past performance, past experience with MDT, and price. MDT seems to prioritize past experience with a specific size and type of project rather than familiarity with the agency or with smaller but similar types of projects. In addition, MDT often awards points for contractors' current and past work with the agency, which limits the ability of new firms to break into MDT work. MDT uses a best value evaluation process rather than a low-bid process to award CMGC projects, which business representatives think favors out-of-state contractors with nationwide experience that are generally more expensive than local contractors. Suggestions to overcome this barrier included encouraging small business participation in smaller projects to build experience with the agency, increased transparency in MDT's decision processes, and other related efforts.

A representative of a majority-owned professional services firm stated, "Maybe a little more transparency. [MDT] never really tell us why [they make the award decisions they make], and maybe it's proprietary too. There's probably reasons they can't, but [it] doesn't seem like there's much feedback for how you take second, how could we do better." [#7]

The owner of a DBE-certified professional services company stated, "[MDT's award process] favors large businesses that they're used to doing work with, because when you do a project for them, they have a ranking system so when you get done with the project, you get a ranking of how you did on that project. So, if you do projects over and over, you get rankings that are in their system. If you have never worked with them before, then we have to go solicit letters of recommendation … because they say they've never worked with us before. And so, it definitely favors the [same] people. … I guess I would like to look at more of how they rank the firms, as far as the firms that do business with them get higher rankings, because they're familiar with them, which is... I guess it's not a bad thing. It's just that a new company that comes in has a harder time getting in and getting ranked, because they don't have experiences." [#15]

A representative of a majority-owned professional services firm said, "… If there's anything that could be done to give new companies or smaller companies an opportunity to work with MDT, even though it's just hard to break that barrier of not having worked with MDT before and showing experience.... I think that's the biggest thing for us, is just how do we even start getting to work with MDT because we have that as one of our goals to work with MDT, but it's really hard to compete against all those companies or those several companies that work with MDT all the time." [#27]

A representative of a majority-owned professional services company stated, "We have helped contractors try to compete for [MDT work], and because past experience in it is a scoring criteri[on], the contractors, the Montana contractors we've tried to assist, have been unsuccessful, because they can't compete with the larger out-of-state firms that have that experience." [#29]

6. Barriers related to race and gender. Falsification of GFEs is a substantial issue, according to many businesses that participated in the anecdotal evidence process. They indicated that it most often occurs in the form of prime contractors soliciting subcontract bids far too close to the deadline, leaving too little time for subcontractors to realistically respond. In addition, interviewees reported that they are asked to submit qualifications or bids to prime contractors and then never hear back about the projects, implying that either their participation was falsely reported to the agency or that their response was only intended to meet GFE requirements.

The Native American woman owner of a DBE-certified professional services firm stated, "I had somebody call me to do a [statement of qualifications, or SOQ]. And they wanted to use me and I'm like, 'Okay, so what do I do?' 'Well, just send us your qualifications and all that and we'll put you in the SOQ as our DBE,' or blah, blah, blah. … I never heard back from them." [#3]

The owner of a WBE- and DBE-certified construction company stated, "But see, now the reason they call her three days before she's due, is basically they don't want her to do the job. They just want to fulfill their percentage of reaching out for a DBE company." [#8]

The woman owner of a DBE-certified professional services firm stated, "I have seen us be on a team and propose to do work and then the prime does our work internally themselves." [#28]

Multiple interviewees described their experiences with unfavorable work environments and facing stereotypical attitudes, noting that minority- and woman-owned businesses are commonly questioned about their capability and competency. In addition, several interviewees indicated that sexual harassment and gender discrimination is still prevalent on many work sites.

A representative of a DBE-certified firm stated, "I think that the stereotype for the industry makes it difficult, especially for the females to enter and advance, just because of the stereotype that it's a man's field. … It's a very male dominated field. And so, it's extremely difficult to garner the respect." [#4]

A representative of a majority-owned professional services company stated, "We do have female technicians that go out to a job site. So, the stereotype, you can see the obvious stereotype there, a men-dominated industry where a female comes out and tests stuff and tells them they're not doing well. And you can imagine the firestorm or the level of scrutiny there. … We did have an instance of some sexual harassment that I had to deal with. … It does happen." [#7]

The owner of a WBE- and DBE-certified construction company stated, "I am the paver operator when we're paving, and I have been since '05, and I have been so abused as a paver operator, by men. So, the disadvantage of being a woman is phenomenal." [#8]

The Native American owner of a DBE-certified construction company stated, "There are superintendents that didn't believe in the DBE situation, and they come out and tell you when you start with them that, 'We're going to hold you to the line, and we're going to be tough on you. Tougher than we would on somebody that's not a DBE, et cetera,' because they didn't believe in this affirmative action stuff." [#16]

Many minority- and woman-owned businesses said that they have experienced price discrimination, especially with regard to interest and bonding rates. In particular, Native American-owned businesses were especially vocal about how difficult it is to obtain financing.

The Native American woman owner of a DBE-certified professional services firm stated, "Well, everything was hard in the beginning, because I was a woman. … The first time I went to buy a CAT, they basically told me, 'We can't give you insurance and all this.' And I said, 'Why not?' And they didn't say because you're a woman, but it took me two and a half months in order for me to buy my first CAT and get it insured, because 'I wasn't qualified.' ... I think it was because I was a woman." [#3]

The Native American owner of DBE-certified construction company stated, "[The banks] feel that you, because you are a tribal member, or a minority, that you're a higher risk, so they put you in that little higher risk [category], just like your insurance company does if you've got a bad driving record, et cetera." [#16]

A representative of a Native American-owned DBE- and SBE-certified professional services firm stated, "I think [being a minority-owned businesses is] a huge problem for tribal small businesses that are new. Because one, you got the tribal piece, right? That's the government piece. Two, you got the small business, so you don't have a lot of assets to put up against something. And three, you don't have a lot of past performance to be able to say that 'We can do this, and this is how we do.' So banks are not as willing to take that risk." [#22]

7. Business assistance programs. Some interviewees spoke about the benefits of unbundling large contracts. For example:

The Native American owner of a DBE-certified construction company stated, "The number one [thing agencies could do to help] would be that they maybe slice off some of the big pie, so that the smaller contractor can afford to bid on them. … They're getting so their projects are so darn big, and for a smaller [firm] to get the bonding to do it, even though you think you might be able to do the work, being able to get all the surety to perform the work. There was a time Montana used to bid off some smaller [projects], the secondary roads, et cetera. They seem to quit doing that, and they put them in big packages [now]." [#16]

Several businesses indicated that they consider joint ventures and other alternative teaming arrangements as valuable tools to building the experience and expertise needed to successfully bid on and win work. Some said that in cases where alternative teaming arrangements are not feasible, mentorship is a good alternative. Developing relationships among local businesses is valuable for both large and small firms, as both prime and subcontractors noted that many project teams are built through prior relationships and past performance.

A representative of a Native American-owned DBE- and SBE-certified professional services firm stated, "For me, in what I do, the most effective way for me to grow and to start is through teaming. We're in a joint venture agreement or a teaming agreement with the company right now where we shall share the bidding process. So, they've got a staff of three people that works on it. We come in and help technically where we can, and pricing, and all that stuff. So, for us, that's the only way we can do this effectively, because we don't know everything, right? But they've got more years of experience and can help us with shortcuts, and templates, and how things are done which is beneficial to us.... Unless you find a niche where ... you're the unicorn, it's hard for us small businesses to get going." [#22]

A representative of a majority-owned professional services firm stated, "We developed a partnership with a very large national firm, who can supply just about any type of expertise we need. That

partnership has been very helpful. A lot of these larger engineering firms don't have the local services like our surveyors, our geo-tech firm, because that's equipment and people on the ground. It's not efficient for them to send those people all over the world." [#5]

8. Recommendations. Many interviewees believe that MDT heavily weighs the past experience of contractors working with the agency when it awards projects. Because gaining such experience is considered a barrier for new businesses, common recommendations include breaking up projects to make them more accessible for small businesses, using small business set asides to award certain projects, or weighting past experience less strongly as part of bid evaluations.

The Black American woman owner of a professional services company stated, "If you set aside stuff for actual small companies, like people that do under $10 million a year, … it allows you to get into that and start competing at that type of job." [#10]

A representative of a majority-owned professional services company stated, "If there's anything that could be done to give new companies or smaller companies an opportunity to work with MDT, even though it's just hard to break that barrier of not having worked with MDT before and showing experience.... I think that's the biggest thing for us, is just, how do we even start getting to work with MDT? … If there were certain projects that could be open to newer contractors, just to give them a chance to start working with MDT and … doing MDT projects. So maybe eventually you could get the experience with MDT, so you could compete with the other companies on projects in the future, you know?" [#27]

A representative of a majority-owned professional services company stated, "Once we get our foot in the door, we're great, because then you're working off of your past history. So, I would say that a small business set-aside for maybe term contracts at MDT, because those are smaller. You could handle some of them with a five-person firm or whatever. That would probably be very helpful." [#29]

A representative of a majority-owned construction firm stated, "[MDT] should help small contractors. They have not done that so far. Giving us some of the business would be great. I have tried this before and they never pick me." [#AV368].

To help small businesses gain the experience and capacity to work on larger projects, develop relationships with local companies, and increase awareness of upcoming opportunities, many businesses suggested MDT could consider facilitating additional networking and team building events and more intentionally curate the events to the needs of the business community.

A representative of a majority-owned professional services firm stated, "The only thing I can think of [that MDT could do to help] is [related to] the networking: who to network with and some different opportunities … So, probably helping network and, you know, 'Here's a couple of different firms to talk to.'" [#2]

The owner of a majority-owned construction company stated, "When we started, it was easier, because everybody met in person to [get] quotes out. Now it's all over the internet, so you don't get to meet many people. I think it was easier when you could meet these prime contractors and introduce yourself and try to get to know them, you know what I mean? Not that they always used you, but at least they might give you a chance if they were to meet you and if you could tell them,

you really looked into this, and you knew... It's a little harder to do this day and age when everything's electronic." [#6]

Some interviewees discussed the challenges they face regarding Federal Acquisition Regulations (FAR) and Safe Harbor regulations. Those and other mandated rates can be difficult for small businesses with which to comply because of their impacts on profitability and overhead. MDT could consider expanding its existing supports for small businesses regarding FAR and Safe Harbor compliance, offering discounted software, more training on audits, and supporting small, disadvantaged businesses through the process.

The woman owner of a DBE-certified professional services business stated, "There's one huge thing, but I don't think anything can be done about it, and that is the FAR requirements. … The Federal Acquisition Regulations … have some very onerous audit requirements and bookkeeping requirements that are just, there's no way in the world that a two-person business would want to or need to set all that up. And MDT's worked really well with us in the past, … trying to help us work around that requirement." [#28]

A representative of a majority-owned professional services company stated, "[FAR and Safe Harbor] is a difficulty too, and, again, we don't struggle with it, but we know a ton of our subs struggle with it, [because] the audited overhead rate is prohibitive for a smaller firm. It's very expensive. MDT does have some measures to help with that, but it has consistently been a struggle for our very, very small subconsultants to deal with." [#29]

A representative of a DBE- and MBE-certified professional services company stated, "[FAR and Safe Harbor is] hard for small firms. I don't know what Montana does, but Washington has that Safe Harbor, and I've helped firms. My boss, he's helped other minority businesses, and he's offered me to help them understand how to do their audits, how to get in compliance. But if they can't afford software that's fairly compliant-centric, then they're going to have a hard time. And they're going to be stuck at a low overhead rate. They're going to be stuck at a $120 [rate] and after three years, [the agency] wants you out of that $120 [rate], they want you to have a real overhead rate." [#FG1]

CHAPTER 5.
Data Collection and Analysis

Chapter 5 provides an overview of the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the disparity study and the process we used to collect relevant contract, procurement, and vendor data. Chapter 5 is organized into four parts:

A. Contract and procurement data;

B. Vendor data;

C. Relevant types of work; and

D. Agency review process.

A. Contract and Procurement Data

BBC examined contracts and procurements the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports awarded between October 1, 2015 and September 30, 2020 (the *study period*). We worked closely with MDT and airport staff to collect data on the transportation-related construction and professional services prime contracts and subcontracts they awarded during that time period.

1. MDT. BBC met with MDT to determine what types of data the agency maintained on transportation-related contracts and procurements it awarded during the study period. The agency provided us with data on relevant prime contracts and associated subcontracts from two systems: AASHTOWare and CIS. For each project, BBC included all relevant prime contract and subcontract data—including lower-tier subcontracts—from AASHTOWare. We then reviewed associated CIS data, which included information about any project amendments and renewals, and integrated that information into the AASHTOWare data as appropriate. Based on guidance from MDT, we determined that many amendments associated with professional services projects were actually separate contracting opportunities and treated them as such in our analyses.

2. NPIAS airports. NPIAS airports in Montana hire consultants to conduct engineering work and manage associated construction projects, usually on a multi-year basis. BBC met with the consultants to discuss available data on transportation-related projects they managed on behalf of NPIAS airports during the study period. The consultants provided information on relevant prime contracts, but because they do not maintain comprehensive information on all associated subcontracts, BBC contacted prime contractors directly to request subcontract data. We attempted to collect subcontract data associated with 154 prime contracts for which neither NPIAS airports nor their consultants had comprehensive data. We worked with the consultants to obtain contact information for relevant prime contractors and then emailed data request forms to each one and sent follow-up requests to those that were nonresponsive.

3. Prime contract and subcontract amounts. For each contract element—that is, prime contract or subcontract—included in our analyses, BBC examined the dollars MDT and NPIAS airports awarded to each prime contractor and the dollars prime contractors committed to any

subcontractors. If a contract or procurement did not include any subcontracts, we attributed the entire amount to the prime contractor. If a contract or procurement included subcontracts, we considered the prime contract amount as the total amount less the sum of dollars committed to all subcontractors. In instances where there were lower-tier subcontractors, we considered lower-tier subcontract amounts as the amounts committed to each lower-tier subcontractor. We then calculated first-tier subcontract amounts as the total amount committed to each first-tier subcontractor less the sum of dollars committed to all lower-tier subcontractors associated with that subcontract.

4. Contracts included in study analyses. Figure 5-1 presents the number of contract elements (i.e., prime contracts and subcontracts) BBC included in our analyses by contracting area. In total, we collected information on 5,371 contract elements MDT and NPIAS airports awarded during the study period, which accounted for approximately $2 billion of contract and procurement dollars.

Figure 5-1.
MDT and NPIAS airport work included in the study

Source:
BBC from MDT and NPIAS airport data.

Contracting area	Number	Dollars (in thousands)
Construction	3,982	$1,804,447
Professional services	1,389	$196,640
Total	**5,371**	**$2,001,088**

B. Vendor Data

BBC also compiled the following information on businesses that participated in relevant MDT and NPIAS airport work during the study period:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Ethnicity of ownership (if minority-owned);
- Certification status (i.e., whether each business was certified as a Disadvantaged Business Enterprise);
- Primary lines of work; and
- Business size.

BBC relied on a variety of sources for that information, including:

- MDT and NPIAS airport data;
- Certification lists;
- United States Small Business Administration certification and ownership lists, including 8(a), HUBZone, and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Business surveys we conducted as part of the utilization and availability analyses; and
- Business websites.

C. Relevant Types of Work

For each contract element, BBC determined the *subindustry* that best characterized the vendors' primary lines of work (e.g., heavy construction). We identified subindustries based on agency data, business surveys we conducted, certification lists, D&B business listings, and other sources. Figure 5-2 presents the dollars we analyzed for each relevant subindustry.

Figure 5-2.
MDT and NPIAS airport dollars by subindustry

Note:

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

Source:

BBC from MDT and NPIAS airport data.

Industry	Total (in thousands)
Construction	
Highway and street construction	$841,726
Asphalt paving	$264,187
Bridge construction	$183,988
Excavation, site prep, grading, and drainage	$149,557
Traffic control, signs, and guardrails	$126,351
Electrical work	$44,190
Building construction	$35,633
Concrete work	$30,792
Water, sewer, and utility lines	$18,364
Fencing	$18,277
Landscape services	$13,378
Plumbing and HVAC	$12,144
Trucking, hauling and storage	$11,552
Electrical equipment and supplies	$6,786
Concrete, asphalt, sand, and gravel products	$6,368
Bank stabilization	$500
Other construction materials	$18,925
Other construction services	$21,730
Total Construction	**$1,804,447**
Professional Services	
Engineering	$151,460
Environmental services and transportation planning	$20,567
Advertising, marketing and public relations	$9,525
Testing and inspection	$5,418
Surveying and mapmaking	$4,844
Other professional services	$4,826
Total Professional Services	**$196,640**
GRAND TOTAL	**$2,001,088**

BBC combined related types of work that accounted for relatively small percentages of total contracting dollars into three "other" subindustries: "other construction services," "other construction materials," and "other professional services." For example, the contracting dollars MDT and NPIAS airports awarded to contractors for "roofing" represented less than 1 percent of total dollars we included in the study. So, we combined "roofing" with other types of construction services that also accounted for small percentages of total dollars and that were dissimilar to other subindustries into the "other construction services" subindustry.

There were also contracts and procurements we categorized in various subindustries we did not include as part of our analyses, because they are not typically analyzed as part of disparity studies. BBC did not analyze contracts and procurements that:

- Were part of subindustries not typically included in Federal Highway Administration- or Federal Aviation Administration-related disparity studies and that accounted for relatively small proportions of MDT and NPIAS airport work ($5 million).[1]
- Reflected *national markets*—that is, subindustries dominated by large national or international businesses—or were part of subindustries for which MDT and NPIAS airports awarded most of the contracting dollars to businesses located outside of the relevant geographic market area ($3 million);[2]
- Were part of subindustries which often include property purchases, leases, or other pass-through dollars ($153,000);[3] or
- MDT and NPIAS airports awarded to universities, government agencies, utility providers, hospitals, or other nonprofit organizations ($91,000).

D. Agency Review Process

MDT and NPIAS airports reviewed the contract and vendor data several times during the study process. We met with them to review the data collection process, information we gathered, and data summaries. We incorporated their feedback into the final contract and vendor data we used for our analyses.

[1] Examples of such work include vehicle repair services and equipment maintenance.

[2] Examples of such work include computer manufacturing and proprietary software.

[3] Examples of such work include real estate services.

CHAPTER 6.
Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses *ready, willing, and able* to perform on the transportation-related construction and professional services prime contracts and subcontracts the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports award.[1] Chapter 6 describes the availability analysis in five parts:

A. Purpose of the availability analysis;

B. Potentially available businesses;

C. Availability database;

D. Availability calculations; and

E. Availability results.

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for MDT and NPIAS airport prime contracts and subcontracts to:

- Estimate the degree to which those business are ready, willing, and able to perform relevant MDT and NPIAS airport work (i.e., *availability*); and
- Use as benchmarks against which to compare the actual participation of those businesses in relevant MDT and NPIAS airport work (i.e., *disparities*).

Estimating availability is useful to MDT in setting their overall goals for the participation of Disadvantaged Business Enterprises (DBEs) in the United States Department of Transportation (USDOT)-funded contracts and procurements they award, which is required of them as part of implementing the Federal DBE Program. It is also useful to MDT and NPIAS airports in setting *DBE contract goals* on individual USDOT-funded contracts and procurements if they decide that the use of race- and gender-conscious measures is appropriate as part of their implementations of the Federal DBE Program.

Finally, estimating the availability of minority- and woman-owned businesses for MDT and NPIAS airport work is important so the agencies can compare the actual participation of those businesses in their work against what one might expect the agencies to award to those businesses based on the degree to which they are ready, willing, and able to perform relevant projects. Assessing disparities

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

between the participation and availability of minority- and woman-owned businesses allowed BBC to determine whether certain business groups are *underutilized* relative to their availability for that work, which is crucial to determining whether the use of *race- and gender-conscious* measures is appropriate, and if so, ensuring their use meets the *strict scrutiny* standard of constitutional review (for details, see Chapters 2 and 8).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of transportation-related construction and professional services contracts and procurements MDT and NPIAS airports awarded during the *study period*—that is, October 1, 2015 through September 30, 2020—which served as a proxy for the transportation-related work the agencies might award in the future. We began the availability analysis by identifying the specific subindustries in which MDT and NPIAS airports spend the majority of their transportation-related contracting dollars (for details, see Chapter 5) as well as the geographic area in which most of the businesses to which MDT and NPIAS airports award those contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*).[2]

BBC then conducted extensive surveys with hundreds of businesses to develop a representative and unbiased *availability database* of potentially available businesses located in the RGMA that perform work within relevant subindustries. The objective of the survey process was not to collect information from each and every relevant business operating in the local marketplace. Instead, it was to collect information from an unbiased subset of the relevant business population that appropriately represents the entire relevant business population. That approach allowed us to estimate the availability of minority- and woman-owned businesses for MDT and NPIAS airport work in an accurate, statistically-valid manner.

1. Overview of availability surveys. BBC worked with Davis Research to conduct surveys with business owners and managers to identify Montana businesses potentially available for MDT's and NPIAS airports' transportation-related work. We began the survey process by compiling a *phone book* of all types of businesses—regardless of the race/ethnicity or gender of business owners—that perform work in relevant industries and have at least one location in the RGMA. We developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. We compiled information about all business establishments D&B lists under 8-digit work specialization codes most related to the relevant contracts and procurements MDT and NPIAS airports awarded during the study period. We obtained listings on 4,520 local businesses that perform work related to those work specializations. We did not have working phone numbers for 896 of those businesses, but the study team attempted availability surveys with the remaining 3,624 businesses.

2. Availability survey information. The study team conducted surveys with the owners or managers of the businesses included in our phone book. Survey questions covered many topics about each business, including:

[2] BBC defined the RGMA for MDT's and NPIAS airports' transportation-related construction and professional services work as the state of Montana. We made that determination based on the fact that MDT and NPIAS airports award the vast majority of their contract and procurement dollars (91 percent) to businesses located within Montana.

- Status as a private sector business (as opposed to being a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Interest in performing work for government organizations;
- Interest in performing work as a prime contractor or subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Geographical areas of service; and
- Race/ethnicity and gender of ownership.

C. Availability Database

After conducting availability surveys, BBC developed an *availability database* that included information about businesses potentially available for relevant MDT and NPIAS airport work. We included businesses in the availability database if they reported possessing *all* of the following characteristics:

- Being a private sector business;
- Having a location in the RGMA;
- Having bid on or performed construction or professional services prime contracts or subcontracts in the RGMA in the past five years;
- Their primary lines of work being in subindustries directly relevant to MDT's or NPIAS airports' transportation-related work; and
- Being interested in working for government organizations.

Figure 6-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The database included information on 460 businesses potentially available for specific transportation-related construction and professional services contracts and procurements MDT and NPIAS airports award. Of those businesses, 15.4 percent were minority- or woman-owned, which merely reflects a simple count of businesses with no analysis of their availability for specific MDT or NPIAS airport contracts or procurements. It represents only the first step in analyzing the availability of minority- and woman-owned businesses for that work.

D. Availability Calculations

BBC used a *custom census* approach—which accounts for specific business characteristics such as work type, business capacity, contractor role, interest in government work, and geographical areas of service—to estimate the availability of minority- and woman-owned businesses for MDT and NPIAS airport work. To conduct the analysis, we compared the characteristics of potentially available businesses in the availability database to the characteristics of individual prime contracts and subcontracts MDT and NPIAS airports awarded during the study period to develop dollar-weighted estimates of the degree to which minority- and woman-owned businesses are ready, willing, and able to perform relevant work.

Figure 6-1.
Percentage of businesses in the availability database that were minority- or woman-owned

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Representation
All minority- and woman-owned	15.4 %
White woman-owned	10.2 %
Minority-owned	5.2 %
Asian Pacific American-owned	0.4 %
Black American-owned	0.9 %
Hispanic American-owned	0.9 %
Native American-owned	3.0 %
Subcontinent Asian American-owned	0.0 %

Only a portion of the businesses in the availability database was considered potentially available for any given MDT or NPIAS airport prime contract or subcontract. We first identified the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*), including type of work, contract size, contract role, and location of work and then took the following steps to estimate availability for each contract element:

1. BBC identified businesses in the availability database that reported they:
   - Are interested in performing construction or professional services work in that particular role for government organizations and perform the specific type of work involved in the project;
   - Can perform work or serve customers in the geographical location where the work took place; and
   - Have bid on or performed work of that size or larger.
2. We then counted the number of minority-owned businesses (by the race/ethnicity of the owners), woman-owned businesses, and businesses owned by white men in the availability database that met the criteria specified in Step 1.
3. We then translated the counts of businesses in step 2 into percentages.

Figure 6-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract MDT awarded during the study period.

BBC repeated the above steps for each contract element included in the disparity study and then multiplied the percentages of businesses for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the percentage of relevant contracting and procurement dollars one would expect MDT and NPIAS airports to award to minority- and woman-owned businesses based on their availability for specific types and sizes of that work. We estimated availability for minority- and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group. We also estimated availability separately for various subsets of contracts and procurements MDT and NPIAS airports awarded during the study period.

BBC's availability calculations are based on transportation-related prime contracts and subcontracts MDT and NPIAS airports awarded between October 1, 2015 and September 30, 2020. A key assumption of the availability analysis is that the transportation-related contracts and procurements

the agencies awarded during the study period are representative of the transportation-related work they will award in the future. If the types and sizes of the work they award in the future differs substantially from the work they awarded in the past, then they should consider adjusting availability estimates accordingly.

Figure 6-2.
Example of an availability calculation for an MDT subcontract

On a contract MDT awarded during the study period, the prime contractor awarded a subcontract worth $7,210 for engineering services in District 5. To determine the availability of minority- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that reported they:

a. Perform engineering services;
b. Have bid on work of similar or greater size;
c. Can serve customers in District 5; and
d. Have interest in working as a subcontractor on government work.

BBC identified 67 businesses in the availability database that met those criteria. Of those businesses, eight were minority- or woman-owned. Thus, the availability of minority- and woman-owned businesses for the subcontract was 11.9 percent (i.e., 8/67 X 100 = 11.9).

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for transportation-related construction and professional services work MDT and NPIAS airports award. We present availability estimates for that work overall as well as for different subsets of contracts and procurements MDT awards.

1. Overall. Figure 6-3 presents estimates of the availability of minority- and woman-owned businesses for MDT's and NPIAS airports' transportation-related work. Overall, the availability of minority- and woman-owned businesses is 7.9 percent for MDT work and 10.5 percent for NPIAS airport work. That is, one might expect MDT and NPIAS airports to award 7.9 percent and 10.5 percent, respectively, of transportation-related contracting and procurement dollars to minority- and woman-owned businesses. White woman-owned businesses (MDT = 3.9%; Airports = 5.7%), Native American-owned business (MDT = 1.9%; Airports = 2.3%), and Asian Pacific American-owned businesses (MDT = 1.5%; Airports = 1.6 exhibited the greatest levels of availability for MDT and NPIAS airports work.

Figure 6-3.
Availability estimates for MDT and NPIAS airport work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figures F-2 and F-11 in Appendix F.

Source:

BBC availability analysis.

Organization and business group	Availability
MDT	
All minority- and woman-owned	7.9 %
White woman-owned	3.9 %
Minority-owned	4.1 %
Asian Pacific American-owned	1.5 %
Black American-owned	0.4 %
Hispanic American-owned	0.2 %
Native American-owned	1.9 %
Subcontinent Asian American-owned	0.0 %
NPIAS airports	
All minority- and woman-owned	10.5 %
White woman-owned	5.7 %
Minority-owned	4.8 %
Asian Pacific American-owned	1.6 %
Black American-owned	0.6 %
Hispanic American-owned	0.3 %
Native American-owned	2.3 %
Subcontinent Asian American-owned	0.0 %

2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for MDT prime contracts and subcontracts. As shown in Figure 6-4, the availability of minority- and woman-owned businesses considered together was less for prime contracts (4.9%) than for subcontracts (13.8%). That result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are often more accessible to minority- and woman-owned businesses.

Figure 6-4.
Availability estimates for MDT prime contracts and subcontracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC availability analysis.

Business group	Role	
	Prime contracts	Subcontracts
All minority- and woman-owned	4.9 %	13.8 %
White woman-owned	2.9 %	5.7 %
Minority-owned	2.0 %	8.1 %
Asian Pacific American-owned	1.1 %	2.4 %
Black American-owned	0.4 %	0.3 %
Hispanic American-owned	0.1 %	0.5 %
Native American-owned	0.4 %	4.9 %
Subcontinent Asian American-owned	0.0 %	0.0 %

3. Contract size. BBC also examined whether the size of prime contracts affected the availability of minority- and woman-owned businesses for relevant MDT work. We categorized relevant prime contracts the agency awarded during the study period as *large prime contracts*—construction prime contracts worth $1 million or more and professional services prime contracts worth $100,000 or more or *small prime contracts*—construction and professional services prime contracts worth less than $1 million and $100,000, respectively. As shown in Figure 6-5, the availability of minority- and woman-owned businesses was substantially less for large prime contracts (3.2%) than for small prime contracts (21.1%).

Figure 6-5.
Availability estimates for MDT large and small prime contracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC availability analysis.

Business group	Prime contract size	
	Large	Small
All minority- and woman-owned	3.2 %	21.1 %
White woman-owned	2.0 %	11.3 %
Minority-owned	1.2 %	9.8 %
Asian Pacific American-owned	0.5 %	7.1 %
Black American-owned	0.4 %	0.7 %
Hispanic American-owned	0.1 %	0.3 %
Native American-owned	0.3 %	1.6 %
Subcontinent Asian American-owned	0.0 %	0.0 %

4. Industry. BBC also examined availability analysis results separately for MDT's transportation-related construction and professional services work to assess whether the availability of minority- and woman-owned businesses differed by industry. As shown in Figure 6-6, the availability of minority- and woman-owned businesses considered together was greater for professional services work (10.4%) than for construction work (7.7%).

Figure 6-6.
Availability estimates for MDT construction and professional services work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-5 and F-6 in Appendix F.

Source:

BBC availability analysis.

Business group	Industry	
	Construction	Professional services
All minority- and woman-owned	7.7 %	10.4 %
White woman-owned	3.6 %	6.4 %
Minority-owned	4.1 %	4.0 %
Asian Pacific American-owned	1.7 %	0.1 %
Black American-owned	0.0 %	3.8 %
Hispanic American-owned	0.2 %	0.0 %
Native American-owned	2.1 %	0.1 %
Subcontinent Asian American-owned	0.0 %	0.0 %

CHAPTER 7.
Utilization Analysis

Chapter 7 presents information about the participation of minority- and woman-owned businesses in transportation-related construction and professional services prime contracts and subcontracts the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports awarded between October 1, 2015 through September 30, 2020 (i.e., the *study period*).[1] BBC Research & Consulting (BBC) calculated the participation of minority- and woman-owned businesses in relevant MDT and NPIAS airports contracting and procurement in terms of *utilization*—the percentage of prime contract and subcontract dollars they awarded to those businesses during the study period. BBC measured the participation of minority- and woman-owned businesses in MDT and NPIAS airport work regardless of whether they were certified as disadvantaged business enterprises (DBEs).

A. All Contracts and Procurements

BBC first examined the participation of minority- and woman-owned businesses in all transportation-related construction and professional services prime contracts and subcontracts MDT and NPIAS airports awarded during the study period. As shown in Figure 7-1, MDT and NPIAS airports awarded 11.8 percent and 7.2 percent, respectively, of their transportation-related contract and procurement dollars to minority- and woman-owned businesses during the study period. The business groups that exhibited the greatest levels of participation in MDT work were white woman-owned businesses (11.0%) and Asian Pacific American-owned businesses (0.4%). The groups that exhibited the greatest levels of participation in NPIAS airport work were white woman-owned businesses (4.2%), Native American-owned businesses (2.2%), and Asian Pacific American-owned businesses (0.6%).

B. Contract role

Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine utilization analysis results separately for transportation-related prime contracts and subcontracts MDT awarded during the study period. As shown in Figure 7-2, the participation of minority- and woman-businesses was substantially greater in subcontracts (21.0%) than in prime contract dollars (7.0%). That result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are often more accessible to minority- and woman-owned businesses.

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

Figure 7-1.
Utilization results for MDT and NPIAS airport work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-2 and F-11 in Appendix F.

Source:

BBC utilization analysis.

Organization and business group	Participation
MDT	
All minority- and woman-owned	11.8 %
White woman-owned	11.0 %
Minority-owned	0.8 %
Asian Pacific American-owned	0.4 %
Black American-owned	0.0 %
Hispanic American-owned	0.1 %
Native American-owned	0.2 %
Subcontinent Asian American-owned	0.1 %
NPIAS airports	
All minority- and woman-owned	7.2 %
White woman-owned	4.2 %
Minority-owned	3.0 %
Asian Pacific American-owned	0.6 %
Black American-owned	0.0 %
Hispanic American-owned	0.2 %
Native American-owned	2.2 %
Subcontinent Asian American-owned	0.0 %

Figure 7-2.
Utilization analysis results for MDT prime contracts and subcontracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC utilization analysis.

Business group	Role	
	Prime contracts	Subcontracts
All minority- and woman-owned	7.0 %	21.0 %
White woman-owned	6.6 %	19.4 %
Minority-owned	0.4 %	1.6 %
Asian Pacific American-owned	0.2 %	0.8 %
Black American-owned	0.0 %	0.0 %
Hispanic American-owned	0.0 %	0.2 %
Native American-owned	0.1 %	0.5 %
Subcontinent Asian American-owned	0.2 %	0.0 %

C. Prime Contract Size

BBC also examined whether contract size affected the participation of minority- and woman-owned businesses in relevant MDT prime contracts. We categorized prime contracts the agency awarded during the study period as *large prime contracts*—construction contracts worth more than $1 million and professional services contracts worth more than $100,000—or *small prime contracts*—construction contracts worth $1 million or less and professional services contracts worth $100,000 or less. As shown in Figure 7-3, the participation of minority- and woman-owned businesses was substantially less in large prime contracts (5.8%) than in small prime contracts (18.9%).

Figure 7-3.
Utilization analysis results for MDT large and small prime contracts

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC utilization analysis.

Business group	Prime contract size	
	Large	Small
All minority- and woman-owned	5.8 %	18.9 %
White woman-owned	5.6 %	16.2 %
Minority-owned	0.2 %	2.6 %
Asian Pacific American-owned	0.0 %	1.6 %
Black American-owned	0.0 %	0.0 %
Hispanic American-owned	0.0 %	0.1 %
Native American-owned	0.0 %	0.9 %
Subcontinent Asian American-owned	0.2 %	0.0 %

D. Industry

BBC also examined utilization analysis results separately for MDT's transportation-related construction and professional services work to assess whether the participation of minority- and woman-owned businesses in agency work differed by industry. As shown in Figure 7-4, the participation of minority- and woman-owned businesses was greater in construction work (12.2%) than in professional services work (7.3%).

Figure 7-4.
Utilization analysis results for MDT construction and professional services work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-5 and F-6 in Appendix F.

Source:

BBC utilization analysis.

Business group	Industry	
	Construction	Professional services
All minority- and woman-owned	12.2 %	7.3 %
White woman-owned	11.4 %	6.0 %
Minority-owned	0.8 %	1.3 %
Asian Pacific American-owned	0.4 %	0.1 %
Black American-owned	0.0 %	0.0 %
Hispanic American-owned	0.1 %	0.0 %
Native American-owned	0.3 %	0.0 %
Subcontinent Asian American-owned	0.0 %	1.2 %

CHAPTER 8.
Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the percentage of transportation-related contract and procurement dollars the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports award to minority- and woman-owned businesses (i.e., *utilization* or *participation*) with the percentage of relevant contract and procurement dollars one might expect them to award to those businesses based on their *availability* for that work (for details on the availability and utilization analyses, see Chapters 6 and 7, respectively).[1] The analysis focused on transportation-related construction and professional services work MDT and NPIAS airports awarded between October 1, 2015 and September 30, 2020 (i.e., the *study period*). Chapter 8 presents the disparity analysis in three parts:

A. Overview;

B. Disparity analysis results; and

C. Statistical significance.

A. Overview

BBC expressed both the utilization and availability of minority- and woman-owned businesses for MDT and NPIAS airport work as percentages of the total dollars associated with particular sets of contracts or procurements and then calculated a *disparity index* to help compare actual participation and estimated availability, using the following formula:

$$\frac{\text{\% participation}}{\text{\% availability}} \text{ x } 100$$

A disparity index of 100 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity index of less than 100 indicates a *disparity* between participation and availability. That is, the group is considered to have been *underutilized* relative to its availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been *substantially underutilized* relative to its availability. Many courts have considered substantial disparities as *inferences of discrimination* against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.[2]

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

[2] For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of minority- and woman-owned businesses for transportation-related work MDT and NPIAS airports awarded during the study period overall and separately for various sets of MDT contracts and procurements.

1. Overall. Figure 8-1 presents disparity indices for all transportation-related prime contracts and subcontracts MDT and NPIAS airports awarded during the study period. There is a line at the disparity index level of 100 to indicate parity and a line at the disparity index level of 80 to indicate a substantial disparity. As shown in Figure 8-1, minority- and woman-owned businesses considered together did not exhibit a disparity for relevant work MDT awarded during the study period (disparity index of 149). However, they exhibited a substantial disparity for relevant work NPIAS airports awarded during the study period (disparity index of 69). Disparity indices for individual business groups differed across agency:

- Asian Pacific American- (disparity index of 25), Black American- (disparity index of 0), Hispanic American- (disparity index of 41), and Native American-owned businesses (disparity index of 12) exhibited substantial disparities for MDT work.
- Asian Pacific American- (disparity index of 17), Black American- (disparity index of 6), and Hispanic American-owned businesses (disparity index of 76) exhibited substantial disparities for NPIAS airport work.

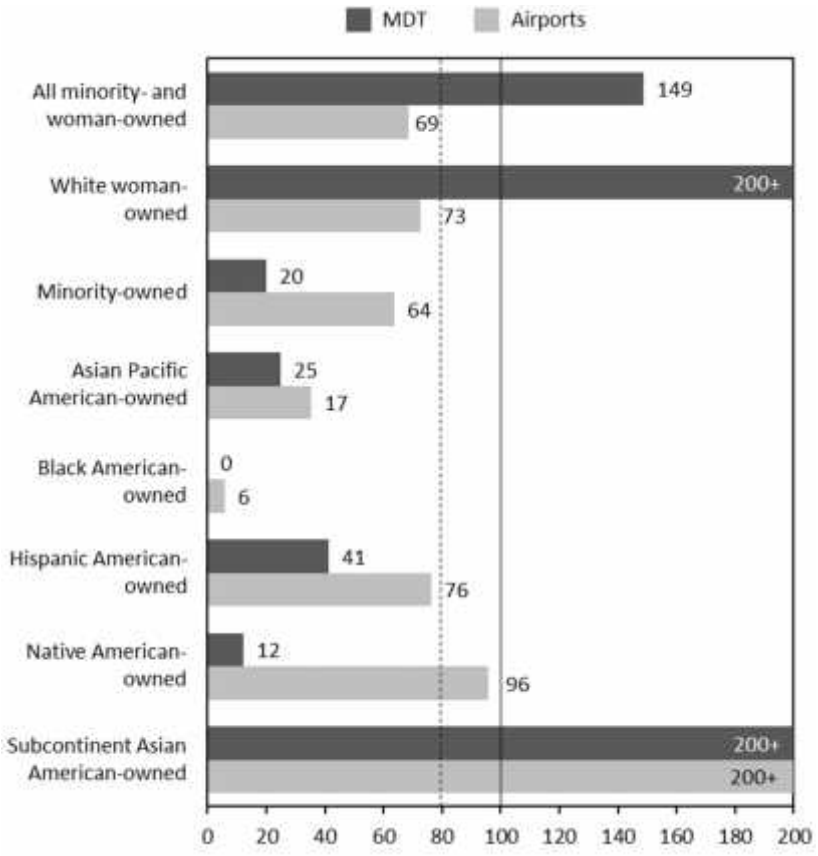
Figure 8-1.
Disparity analysis results for MDT and NPIAS airport work

Note:

For more detail, see Figures F-2 and F-11 in Appendix F.

Source:

BBC disparity analysis.



2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for transportation-related prime contracts and subcontracts MDT awarded during the study period. As shown in Figure 8-2, minority- and woman-owned businesses considered together exhibited disparity indices greater than parity on both prime contracts (disparity index of 144) and subcontracts (disparity index of 152) MDT awarded during the study period. However, most individual business groups showed substantial disparities for both prime contracts and subcontracts:

- Asian Pacific American- (disparity index of 14), Black American- (disparity index of 0), Hispanic American- (disparity index of 15), and Native American-owned businesses (disparity index of 23) exhibited substantial disparities for prime contracts.
- Asian Pacific American- (disparity index of 10), Black American- (disparity index of 0), Hispanic American-owned businesses (disparity index of 32), and Native American-owned businesses (disparity index of 10) also exhibited substantial disparities for subcontracts.

Figure 8-2.
Disparity analysis results for MDT prime contracts and subcontracts

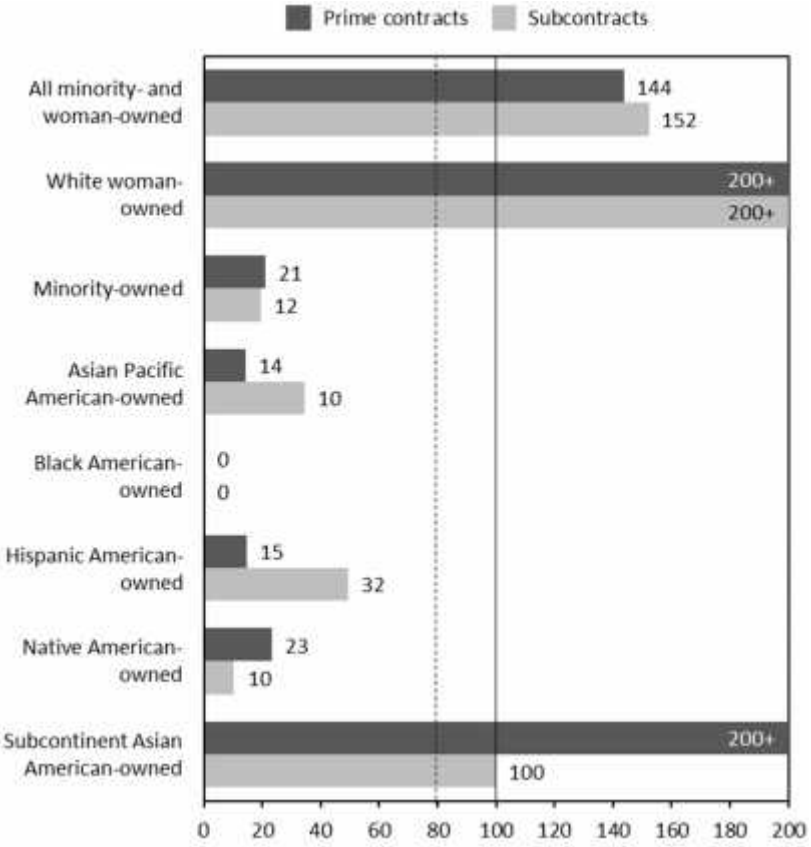
Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC disparity analysis.



3. Contract size. BBC also examined disparity analysis results for prime contracts MDT awarded during the study period separately for *large prime contracts*—which we defined as construction and professional services prime contracts worth $1 million or more and $100,000 or more, respectively—and *small prime contracts*—which we defined as construction and professional services prime contracts worth less than $1 million or $100,000, respectively. As shown in Figure 8-3, minority- and woman-owned businesses considered together did not exhibit a disparity for large prime contracts (disparity index of 181). In contrast, they did exhibit a disparity for small prime contracts, but it did

not reach the threshold to be considered substantial (disparity index of 89). However, several individual business groups showed substantial disparities for both large and small prime contracts:

- Asian Pacific American- (disparity index of 3), Black American- (disparity index of 0), Hispanic American- (disparity index of 0), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities for large prime contracts.
- Asian Pacific American- (disparity index of 22), Black American- (disparity index of 0), Hispanic American- (disparity index of 37), and Native American-owned businesses (disparity index of 59) also exhibited substantial disparities for small prime contracts.

Figure 8-3.
Disparity analysis results for MDT large and small prime contracts

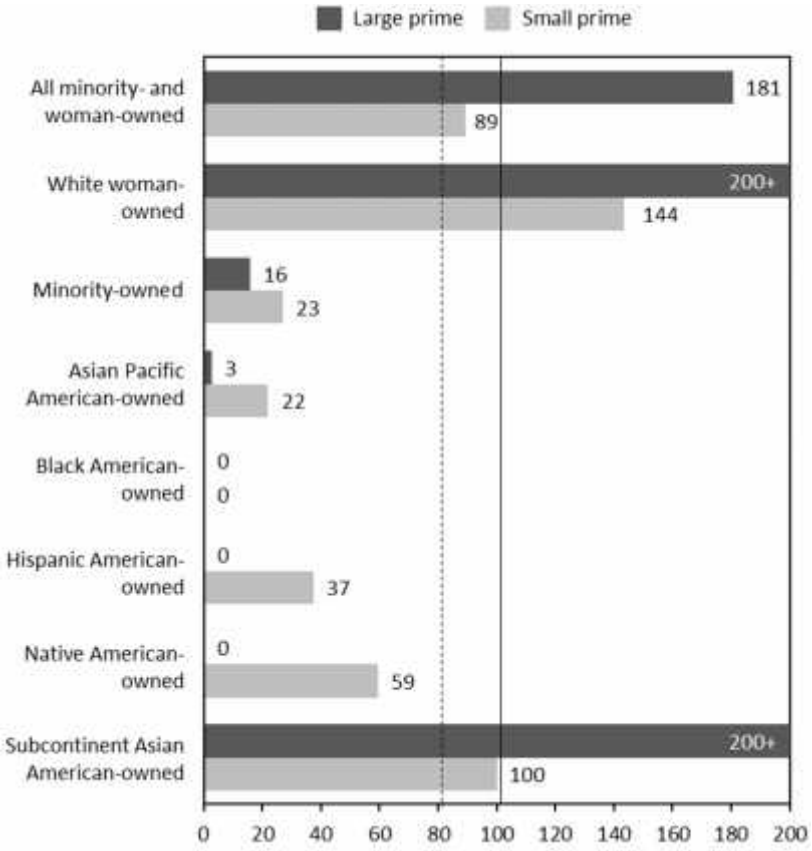
Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail, see Figures F-9 and F-10 in Appendix F.

Source:

BBC disparity analysis.



4. Industry. BBC also examined disparity analysis results separately for MDT's transportation-related construction and professional services contracts and procurements to determine whether disparities between participation and availability differ by industry. As shown in Figure 8-4, minority- and woman-owned businesses considered did not exhibit a disparity for construction work (disparity index of 159) but exhibited a substantial disparity for professional services work (disparity index of 70). Most individual business groups showed substantial disparities for both construction and professional services work:

- Asian Pacific American- (disparity index of 24), Black American- (disparity index of 0), Hispanic American- (disparity index of 42), and Native American-owned businesses (disparity index of 12) exhibited substantial disparities for construction work.

- Black American- (disparity index of 0), Hispanic American- (disparity index of 0), and Native American-owned businesses (disparity index of 7) exhibited substantial disparities for professional services work.

Figure 8-4.
Disparity analysis results for MDT construction and professional services work

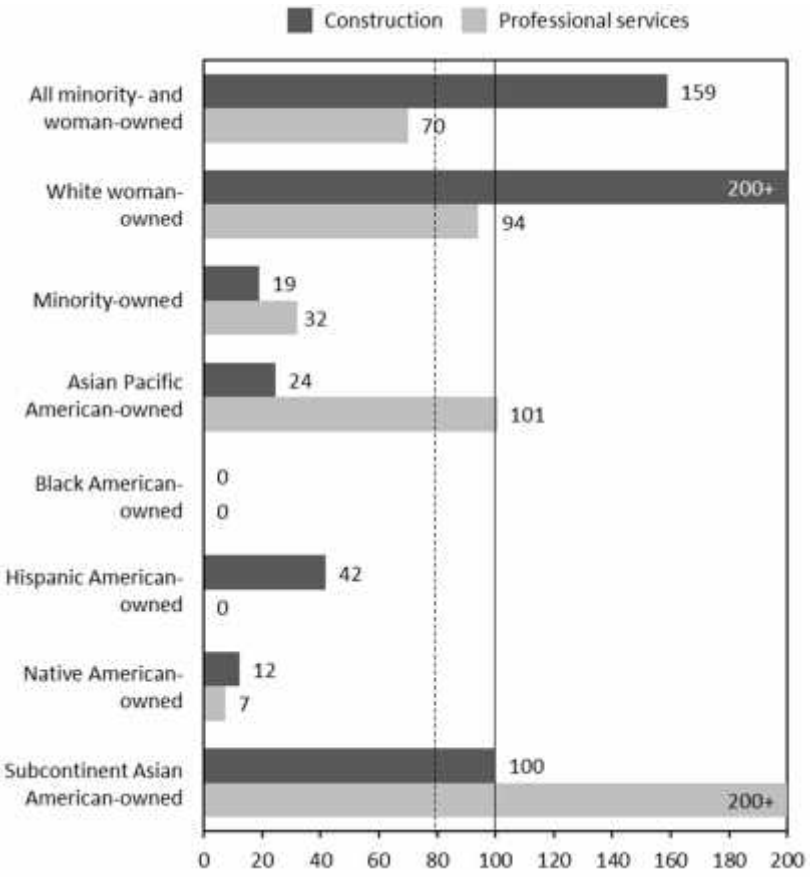
Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

For more detail and results by group, see Figures F-5 and F-6 in Appendix F.

Source:

BBC disparity analysis.



C. Statistical Significance

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is one that can be considered *statistically reliable* or *real*. BBC used a Monte Carlo analysis, which relies on repeated, random simulations of results, to examine the statistical significance of key disparity analysis results.

1. Overview of Monte Carlo. BBC used a Monte Carlo approach to randomly select businesses to *win* each individual contract element included in the disparity study. For each contract element, the availability analysis provided information on individual businesses potentially available to perform that contract element based on type of work, contractor role, contract size, and other factors. Then, the Monte Carlo simulation randomly chose a business from the pool of available businesses to win the contract element, so the odds of a business from a particular business group winning the contract element were equal to the number of businesses from that group available for the contract element divided by the total number of businesses available for it.

BBC conducted a Monte Carlo analysis for all contract elements in a particular contract set. The output of a single simulation for all the contract elements in the set represented the simulated

participation of minority- and woman-owned businesses for the contract set. The entire Monte Carlo simulation was then repeated 1 million times for each contract set. The combined output from all 1 million simulations represented a probability distribution of the overall participation of minority- and woman-owned businesses if contracts and procurements in the set were awarded randomly based only on the availability of relevant businesses working in the marketplace.

The output of Monte Carlo simulations represents the number of simulations out of 1 million that produced participation equal to or below the actual observed participation for each relevant business group for each applicable contract set. If that number was less than or equal to 25,000 (i.e., 2.5% of the total number of simulations), then BBC considered the corresponding disparity index to be statistically significant at the 95 percent confidence level, using two-tailed tests. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of simulations), then we considered the disparity index to be statistically significant at the 90 percent confidence level, using two-tailed tests.

2. Results. BBC ran Monte Carlo simulations on all relevant MDT contracts and procurements considered together to assess whether the substantial disparities we observed for specific business groups—Asian Pacific American-, Black American-, Hispanic American-, and Native American-owned businesses—were statistically significant. As shown in Figure 8-5, results from the Monte Carlo analysis indicated that the substantial disparities BBC observed for Asian Pacific American-, Black American-, and Native American-owned businesses were statistically significant at the 95 percent confidence level, using two tailed tests.

Figure 8-5.
Monte Carlo simulation results

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
Minority-owned and woman-owned	149	N/A	N/A %
Non-Hispanic white woman-owned	200+	N/A	N/A %
Minority-owned	20	0	<0.1 %
Asian Pacific American-owned	25	0	<0.1 %
Black American-owned	0	0	<0.1 %
Hispanic American-owned	41	75,936	7.6 %
Native American-owned	12	0	<0.1 %
Subcontinent Asian American-owned	200+	N/A	N/A %

Source: BBC disparity analysis.

CHAPTER 9.
Program Measures

As part of implementing the Federal Disadvantaged Business Enterprise (DBE) Program, the Montana Department of Transportation (MDT) uses *race- and gender-neutral* measures to encourage the participation of small businesses—including many minority- and woman-owned businesses—in its transportation-related contracting and procurement.[1] Race- and gender-neutral measures are measures designed to encourage the participation of all businesses—or, all small businesses—in an organization's work, regardless of the race/ethnicity or gender of the business owners. In contrast, *race- and gender-conscious* measures are measures designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., using DBE goals on individual contracts). MDT does not use any race- or gender-conscious measures as part of its implementation of the Federal DBE Program.

To meet the *narrow tailoring* requirement of the *strict scrutiny* standard of constitutional review, agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE goals through the use of race- and gender-neutral measures.[2] If they cannot meet their overall DBE goals through the use of race- and gender-neutral measures alone, then they must consider also using race- and gender-conscious measures. When submitting documentation related to their overall DBE goals to the United States Department of Transportation (USDOT), agencies must project the portion of their goals they expect to meet through race- and gender-neutral measures and what portion they expect to meet through race- and gender-conscious measures.

BBC Research & Consulting (BBC) reviewed measures MDT currently uses to encourage the participation of minority- and woman-owned businesses in its contracting and procurement. We reviewed MDT's program measures in two parts:

A. DBE Certification; and

B. Race- and gender-neutral measures.

A. DBE Certification

MDT's Office of Civil Rights (OCR) operates the Federal DBE Program on behalf of the agency, including certifying DBEs. Certain measures MDT uses as part of the Federal DBE Program, including certain supportive services, are only available to DBEs. Businesses interested in becoming DBE certified can apply online for free, apart from notarization fees in some cases. To be eligible, business owners must prove they are "socially and economically disadvantaged," as defined by 49 Code of

[1] "Woman-owned businesses" refers to non-Hispanic white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding racial/ethnic groups.

[2] 49 CFR Section 26.51.

Federal Regulations (CFR) Part 26. According to 49 CFR Part 26, social disadvantage is presumed for businesses that are 51% owned and controlled by individuals who identify with one of the following race or gender groups:

- Asian Pacific Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Subcontinent Asian Americans; or
- Women of any race/ethnicity.

To demonstrate economic disadvantage, business owners must have personal net worths of less than $1.32 million, and the businesses themselves must have average revenues of less than $26.29 million over three years.[3] Finally, business owners must be United States citizens or lawfully admitted permanent residents, and the businesses must be independent of other entities. Once a business submits its application, MDT conducts an on-site visit, and then a DBE Certification Committee reviews the application before making a final decision.[4] Once OCR certifies DBEs, they are added to the Montana Unified Certification Program (UCP) database. The UCP database is searchable and is one of the resources prime contractors use to find certified DBEs with which to work.

B. Race- and Gender-Neutral Measures

MDT uses several race- and gender-neutral measures as part of its implementation of the Federal DBE Program, including:

- Overall DBE goal;
- Contractor resources;
- Upcoming project information;
- On-the-Job Training and Supportive Services (OJT/SS);
- Discrimination training;
- Partnerships with other organizations; and
- DBE and small business resources.

1. Overall DBE goal. MDT has set an overall DBE goal of 6.5 percent for the participation of minority- and woman-owned businesses in its Federal Highway Administration-funded work, which it attempts to achieve exclusively through the use of race- and gender-neutral measures. Although MDT does not use any race- or gender-conscious measures to encourage the participation of

[3] Revenue limits are not considered as part of DBE certification as it applies to Federal Aviation Administration-funded work.

[4] Due to the COVID-19 pandemic, OCR conducted site visits virtually. This practice has continued into 2022, though in-person site visits will be required once circumstances allow.

minority- and woman-owned businesses in that work, the agency does encourage prime contractors to use DBE subcontractors whenever possible.

2. Contractor resources. MDT hosts a webpage that outlines the necessary forms and contracting language prime contractors must use in their subcontracts, including information on how to use DocuSign; its prompt payment policies, which require prime contractors to pay their subcontractors within one week of receiving payment from MDT; and information checklists for both first- and lower-tier subcontracts. MDT also provides an overview of the construction contracting process to help first-time bidders. In addition, for consulting services, MDT has published a "Consultant's Guide to Working with Small Businesses" to help prime consultants.

3. Upcoming project information. MDT publishes a Statewide Transportation Improvement Plan each year, which presents information about anticipated construction projects for the next five years. The plan allows potential bidders to plan ahead and determine which upcoming projects they might pursue. MDT also maintains a Design Consulting webpage to show current and upcoming professional services projects. In addition, potential prime contractors can sign up to receive e-mails when the Engineering Construction Contracting Bureau releases invitations for bids.

4. OJT/SS. MDT operates the OJT/SS Program in partnership with local colleges and community colleges. The program, which is federally-funded, is designed to offer minorities, women, and other individuals presumed to be disadvantaged training opportunities in the highway construction industry. Currently, Fort Peck Community College and Salish Kootenai College partner with MDT in operating the OJT/SS Program.

5. Discrimination training. OCR offers training sessions to businesses to help them as well as MDT employees avoid workplace discrimination. OCR provides training sessions by request on Equal Employment Opportunity, DBE and SBE Programs, contractor compliance, and other topics.

6. Partnerships with other organizations. MDT partners with various organizations including small business development centers, procurement technical assistance centers, government agencies, and women's business centers throughout the state. Through those partnerships, MDT and partner organizations refer contractors to one another based on their needs, facilitate training and business development initiatives, and advertise each other's programs. In addition, MDT encourages potentially eligible businesses to participate in the United States Small Business Administration's 8(a) mentor-protégé program.

7. DBE and small business resources. The OCR website offers a list of resources for DBEs and other small businesses, including both government (e.g. Montana Chamber of Commerce and the Governor's Office of Economic Development) and non-government resources (e.g., Service Corps of Retired Executives and the Montana Procurement Technical Assistance Center).

CHAPTER 10.
Overall DBE Goal

As part of their implementations of the Federal Disadvantaged Business Enterprise (DBE) Program, the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports are required to set overall goals for DBE participation in their Federal Highway Administration- (FHWA-) and Federal Aviation Administration- (FAA-) funded work. Chapter 10 provides information MDT and NPIAS airports might consider in setting their next overall DBE goals. It is organized in two parts based on the two step goal-setting process the United States Department of Transportation (USDOT) outlines in 49 Code of Federal Regulations (CFR) Part 26.45:

A. Establishing base figures; and

B. Considering step 2 adjustments.

A. Establishing Base Figures

Establishing a base figure is the first step in calculating overall goals for DBE participation in MDT's FHWA-funded work and NPIAS airports' FAA-funded work. BBC Research & Consulting (BBC) calculated the base figures using the same approach described in Chapter 6 except that base-figure calculations only included *potential DBEs*—that is, minority- and woman-owned businesses that are DBE-certified or appear they could be DBE-certified based on revenue requirements described in 49 CFR Part 26—and only included FHWA- and FAA-funded prime contracts and subcontracts MDT and NPIAS airports, respectively, awarded during the study period. Our approach to calculating the base figures is consistent with USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" and other guidance.

Figure 10-1 presents the availability of potential DBEs for MDT's FHWA-funded work and NPIAS airports' FAA-funded work by relevant industry and racial/ethnic and gender group. As shown in Figure 10-1, the availability of potential DBEs considered together is 6.9 percent for MDT's FHWA-funded work and 9.6 percent for NPIAS airports' FAA-funded work. MDT and NPIAS airports might consider those values as their base figures for their next overall DBE goals if they anticipate that the types and sizes of the FHWA- and FAA-funded contracts and procurements they award in the future will be similar to the work they awarded during the study period.

B. Considering Step 2 Adjustments

The Federal DBE Program requires agencies to consider potential *step 2 adjustments* to their base figures as part of determining their overall DBE goals to ensure their goals are precise and appropriately reflect current conditions in the relevant geographic market area for minority- and woman-owned businesses. Agencies are not required to make step 2 adjustments to their base figures, but they are required to consider appropriate factors and explain their decision as part of their goal submissions to USDOT offices.

Figure 10-1.
Base figure calculations for MDT and NPIAS airports

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Organization	
	MDT	NPIAS airports
All minority- and woman-owned	6.9 %	9.6 %
White woman-owned	3.9 %	5.7 %
Asian Pacific American-owned	1.5 %	1.6 %
Black American-owned	0.4 %	0.6 %
Hispanic American-owned	0.2 %	0.3 %
Native American-owned	0.9 %	1.3 %
Subcontinent Asian American-owned	0.0 %	0.0 %

USDOT sets forth several factors agencies should consider when assessing whether to make step 2 adjustments to their base figures:

1. Current capacity of DBEs to perform work;
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]

The disparity study provides information related to each of the above factors, which MDT and NPIAS airports should review when deciding whether to make step 2 adjustments to their base figures.

1. Current capacity of DBEs to perform work. USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on DBE participation in their USDOT-funded projects in recent years as an indicator of DBEs' collective capacity to perform future work for them. USDOT further suggests 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]

BBC had access to MDT's Uniform Reports of DBE Awards/Commitments and Payments, which the agency uses to report DBE participation in its FHWA-funded contracts and procurements to FHWA on a semi-annual basis. Figure 10-2 presents past DBE participation in MDT's FHWA-funded work on an annual basis for federal fiscal years (FFYs) 2015 through 2020 according to those reports. Median DBE participation in MDT's FHWA-funded contracts during that time was 5.9 percent. If MDT were to adjust its base figure based on information from the agency's Uniform Reports, it would take the average of the 6.9 percent base figure and the 5.9 percent median past DBE participation, yielding a potential overall DBE goal of 6.4 percent.

[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

Figure 10.2.
DBE participation in MDT's FHWA-funded work in FFYs 2015 through 2020

Source:
MDT's Uniform Reports of DBE Awards/
Commitments and Payments

FFY	DBE participation
2015	4.9%
2016	7.6%
2017	6.2%
2018	5.1%
2019	5.6%
2020	8.1%

2. Information related to employment, self-employment, education, training, and unions. BBC's analyses indicate that there are barriers certain minority groups and women face related to human capital, financial capital, and business ownership in the local marketplace. Chapters 3 and 4 as well as Appendices C and D summarize information about conditions in Montana for minorities, women, and minority- and woman-owned businesses. For example, those analyses indicated that minorities are less likely than white Americans to earn college degrees, some groups of minorities are less likely than white Americans to work as managers in various industries, minorities and women earn substantially less in wages than white Americans and men, and some groups of minorities are less likely to own businesses than similarly situated white American men.

Although it is difficult to quantify the effects of barriers in human capital, financial capital, and business success on the availability of minority- and woman-owned businesses for MDT work, it is possible to do so for barriers in business ownership. BBC used regression analyses to investigate whether race/ethnicity and gender are related to business ownership in relevant industries among workers in Montana independent of various other personal characteristics, including familial status, education, and age. (Chapter 3 and Appendix C provide details about our regression analyses.) We then simulated the availability of potential DBEs for MDT work if minorities and women owned businesses at the same rates as white American men who share similar personal characteristics.

The regression analyses revealed that, even after accounting for various personal characteristics:

- Being Native American is associated with a lower likelihood of owning a construction business compared to being white American.
- Being Hispanic American is associated with a lower likelihood of owning a professional services business compared to being white American.

BBC analyzed the impact barriers in business ownership would have on the base figure if the groups of minorities that exhibited statistically significant barriers in rates of business ownership owned businesses at the same rate as comparable white American men. The results of that analysis—sometimes referred to as a *but for* analysis because it estimates the availability of potential DBEs *but for* the effects of race- and gender-based discrimination—are presented in Figure 10-3. The analysis included the same contracts we analyzed to determine the base figure (i.e., FHWA-funded prime contracts and subcontracts MDT awarded during the study period), and the weights for each industry were based on the proportion of FHWA-funded contract dollars MDT awarded in each industry during the study period (i.e., a weight of 0.91 for construction and 0.09 for professional services). The rows and columns of Figure 10-3 present the following information:

Figure 10-3.
Availability adjusted for disparities in the rates of business ownership

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
Construction					
(1) Asian Pacific American	1.7 %	n/a	1.7 %	1.7 %	
(2) Black American	0.0	n/a	0.0	0.0	
(3) Hispanic American	0.2	n/a	0.2	0.2	
(4) Native American	1.0	70	1.4	1.4	
(5) Subcontinent Asian American	0.0	n/a	0.0	0.0	
(6) White woman	3.6	n/a	3.6	3.6	
(7) Potential DBEs	6.6 %	n/a	7.0 %	7.0 %	6.4 %
(8) All other businesses ***	93.4	n/a	93.4	93.0	
(9) **Total**	**100.0** %	n/a	**100.4** %	**100.0** %	
Professional services					
(10) Asian Pacific American	0.1 %	n/a	0.1 %	0.1 %	
(11) Black American	3.8	n/a	3.8	3.8	
(12) Hispanic American	0.0	18	0.2	0.2	
(13) Native American	0.1	n/a	0.1	0.1	
(14) Subcontinent Asian American	0.0	n/a	0.0	0.0	
(15) White woman	6.4	n/a	6.4	6.4	
(16) Potential DBEs	10.4 %	n/a	10.6 %	10.5 %	0.9 %
(17) All other businesses ***	89.6	n/a	89.6	89.5	
(18) **Total**	**100.0** %	n/a	**100.1** %	**100.0** %	
(37) **TOTAL**	**6.9** %	n/a		n/a	**7.3** %

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals due to rounding.

* Initial adjustment is calculated as current availability divided by the disparity index.

** Components of the base figure were calculated as the value after adjustment and scaling to 100 percent multiplied by the proportion of total FHWA-funded contract dollars MDT awarded in each industry during the study period (construction = 0.91 and professional services = 0.09).

*** All other businesses included businesses owned by white American men and minority- and woman-owned businesses that were not potential DBEs.

a. Current availability. Column (a) presents the current availability of potential DBEs for MDT's FHWA-funded work by racial/ethnic and gender group and by industry. Combined, the current availability of potential DBEs for MDT's FHWA-funded work is 6.9 percent, as shown in row (19) of column (a).

b. Disparity indices for business ownership. For each group significantly less likely than similarly situated white American men to own businesses, BBC simulated business ownership rates if those groups owned businesses at the same rate as white American men who share similar personal characteristics. To simulate business ownership rates for each industry, we took the following steps:

1. We performed a probit regression analysis predicting business ownership including only workers who were white American men in the dataset; and
2. We then used the coefficients from that model and the mean personal characteristics of individual minority groups and white women working in the industry to simulate business ownership for each group.

BBC then calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the simulated business ownership rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for white American men who share similar personal characteristics. Column (b) presents disparity indices related to business ownership for the different groups that are significantly less likely than similarly situated white American men to own businesses: Native Americans in construction and Hispanic Americans in professional services. For example, as shown in row (4) of column (b), Native Americans own construction businesses at 70 percent of the rate they would be expected to own construction businesses if they were white American men with similar personal characteristics.

c. Availability after initial adjustment. Column (c) presents availability estimates by racial/ethnic and gender group and by industry after initially adjusting for statistically significant disparities in business ownership rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100.

d. Availability after scaling to 100 percent. Column (d) shows availability estimates after BBC re-scaled so the sum of the availability estimates equaled 100 percent for each industry. BBC re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total" in column (c)—in row (9) for construction and row (18) for professional services. For example, the re-scaled availability estimate for Native American-owned construction businesses shown in row (4) of column (d) was calculated in the following way: (1.4% ÷ 100.4%) x 100 = 1.4 percent.

e. Components of goal. Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each relevant industry. BBC calculated each component by taking the total availability estimate shown under "Potential DBEs" in column (d)—in row (7) for construction and row (16) for professional services—and multiplying it by the proportion of total FHWA-funded contract dollars MDT awarded in each industry during the study period (i.e., 0.91 for construction and 0.09 for professional services). For example, BBC used the 7.0 percent shown in row (7) of column (d) for construction and multiplied it by 0.91 for a result of 6.4 percent, as shown in row (7) of column (e). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership, as shown in the last row of column (e).

Based on information related to barriers in business ownership, MDT might consider adjusting the base figure upward to 7.3 percent.

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 anecdotal evidence that minorities, women, and minority- and woman-owned businesses in Montana do not have the same access to those business inputs as white American men and businesses owned by white American men (for details, see Chapters 3 and 4 as well as Appendices C and D). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in Montana, placing them at a disadvantage in competing for MDT's and NPIAS airports' USDOT-funded work. Thus, information from the disparity study about

financing, bonding, and insurance supports an upward adjustment to MDT's and NPIAS airports' base figures.

4. Other factors. USDOT suggests that federal fund recipients also examine "other factors" when determining whether to make step 2 adjustments to their base figures. One such factor BBC examined as part of the disparity study is business success. There is quantitative evidence and anecdotal evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by white American men and face greater barriers in Montana, even after accounting for various other business characteristics. Chapters 3 and 4 as well as Appendices C and D summarize that evidence. Disparities in business success could impact the availability of minority- and woman-owned businesses for MDT and NPIAS airport work. Thus, evidence about business success also supports an upward adjustment to MDT's and NPIAS airports' base figures.

CHAPTER 11.
Program Considerations

The disparity study provides substantial information the Montana Department of Transportation (MDT) should examine as it considers potential refinements to its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program and ways to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements. BBC Research & Consulting (BBC) presents several key considerations MDT should make, organized into the following categories:

A. DBE contract goals;

B. Procurement policies;

C. Contract administration policies; and

D. Office of Civil Rights (OCR) programs.

A. DBE Contract Goals

Disparity analysis results indicated that several racial/ethnic and gender groups showed substantial disparities on key sets of contracts and procurements MDT awarded during the study period. Given those results, along with the barriers that exist for minority- and woman-owned businesses throughout the marketplace, many agencies would consider using DBE contract goals to encourage the participation of minority- and woman-owned businesses in their contracts and procurements. Some stakeholders participating in in-depth interviews and public meetings made comments related to the use of race- and gender-conscious measures, including DBE contract goals:

- Several minority- and woman-owned businesses commented that race- and gender-conscious measures help open doors to long-term teaming opportunities. Some indicated that the use of such measures has helped minority- and woman-owned businesses win work they would not have otherwise won.
- Some prime contractors stated that DBE contract goals were their primary reason for finding DBE-certified subcontractors with which to work, though others said they partner with DBEs on as many projects as possible.

The Federal DBE Program requires agencies to use *race- and gender-conscious* measures—such as DBE contract goals—to meet any portion of their overall DBE goals they do not project being able to meet using *race- and gender-neutral* measures alone. United States Department of Transportation (USDOT) guidance on the use of DBE contract goals, which are presented in 49 Code of Federal Regulations (CFR) Part 26.51(e), include the following requirements:

- Agencies may only use DBE contract goals on projects that have subcontracting possibilities.

- Agencies are not required to set DBE contract goals on every USDOT-funded project.
- During the time period their overall DBE goals cover, agencies must set DBE contract goals so they will cumulatively result in meeting the portions of their overall goals they project being unable to meet through race- and gender-neutral measures alone.
- DBE contract goals must provide for participation by all groups eligible to participate in race- and gender-conscious measures and cannot be subdivided into group-specific goals.
- Agencies must maintain and report data on DBE participation separately for projects they awarded with and without the use of DBE contract goals.

Because the use of DBE contract goals is a race- and gender-conscious measure, agencies must ensure their use meets the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review. Meeting the strict scrutiny standard in particular includes showing a *compelling governmental interest* for the use of race-conscious measures and ensuring their use is *narrowly tailored* (for details, see Chapter 2 and Appendix B). In addition, prior to implementing DBE contract goals, MDT should consider whether it has maximized its use of race- and gender-neutral measures, including fully leveraging existing race- and gender-neutral measures and whether additional measures might further encourage the participation of minority- and woman-owned businesses in its contracts and procurements. MDT should also consider the staff and resources required to implement DBE contract goals effectively and in a legally defensible manner.

a. Setting contract goals. If MDT determines that the use of DBE contract goals is appropriate, the agency should consider settings goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project as well as other relevant factors (e.g., other contracting demands in the marketplace, recent business closures or changes, and the size of the contract or procurement opportunity). Prime contractors would have to meet those goals as a condition of award by making subcontracting commitments with eligible, certified DBEs—that is, those DBEs that are substantially underutilized on MDT contracts and procurements—as part of their bids or by demonstrating sufficient good faith efforts (GFEs) to do so. MDT could consider setting DBE contract goals on all relevant contracts and procurements or only on particular types of work (e.g., construction contracts).

b. Group eligibility. Among several factors, one key factor of narrow tailoring is that an agency must limit eligibility for participation in race-conscious measures to those business groups for which inferences of discrimination exist in an agency's contracting and procurement processes. Only the participation of businesses that are part of eligible groups would count toward meeting contract goals MDT establishes on individual contract or procurement opportunities. One of the primary reasons for conducting a disparity study is to assess whether any relevant minority- or woman-owned business groups exhibit substantial disparities between participation and availability for organization work, which many courts have considered inferences of discrimination against particular business groups in the marketplace.[1] As part of the disparity

[1] For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

analysis, BBC observed that most relevant business groups—Asian Pacific American-, Black American-, Native American-, and Hispanic American-owned businesses—exhibited substantial disparities across different sets of MDT contracts and procurements. If MDT decides to use DBE contract goals, it should review those results carefully to ensure its program accounts for them properly.

B. Procurement Policies

Based on our analysis of MDT policies and feedback we collected from stakeholders, BBC identified several areas of MDT's procurement processes the agency should consider refining to help increase the participation of minority- and woman-owned businesses in its contracts and procurements. The refinements we recommend below are all race- and gender-neutral in nature—that is, they might make it easier for all businesses to participate in MDT work, regardless of the race/ethnicity or gender of their owners.

1. Bid opportunities. As part of the anecdotal evidence process, many participants indicated that they experience difficulties learning about bid opportunities. There are several refinements MDT could consider to better address that issue.

a. Bidding platforms. Many businesses reported that the eMACS platform is somewhat cumbersome and contacting procurement staff to ask questions is very difficult. MDT could consider using alternative platforms or working with the Montana Department of Administration to improve eMACS. MDT may also consider hiring more staff to support businesses—especially small businesses—that have questions about MDT's bidding processes.

b. Bidding timeline. For construction firms, there are a few specific times of the year when many projects go out to bid, meaning most companies must decide which projects they want to pursue for the entire next year. Such a constrained timeline causes several problems for both prime contractors and subcontractors. Prime contractors that wish to bid on multiple projects struggle to complete accurate estimates for all those projects at once. Subcontractors are often inundated with requests to join bids, which can make it difficult to forecast their capacities for the year, because they do not know which projects they will win at the time they must commit to other projects. All bidders face the potential problem of exceeding their bonding capacities, which could cause them to lose previously awarded projects. MDT could consider spreading out the number of projects bid throughout the year to alleviate those challenges for prime contractors and subcontractors alike, especially for similar types of work in similar areas of the state.

c. Construction Manager/General Contractor (CMGC) projects. CMGC projects are considered less desirable to many prime contractors, as the upfront work to secure such projects is more time intensive and requires more interviews. In addition, many Montana-based businesses believe that MDT prioritizes national experience over local experience on such projects, making it more difficult for them to compete. To improve the bid process for construction solicitations in particular, MDT could provide clearer specifications in the solicitation for CMGC projects and provide walk throughs for every project to help identify any potential pitfalls that prime contractors should avoid as part of their proposals. MDT might also assess whether reducing the number of interviews for such projects is possible without compromising the effectiveness of its evaluation process.

2. Teaming opportunities. There are several considerations MDT could make to better facilitate meaningful partnerships between prime contractors and subcontractors, which could result in more work opportunities and growth for minority- and woman-owned businesses.

a. DBE directory, plan holders, access plans, and bidders lists. As part of the anecdotal evidence process, prime contractors indicated that they use a variety of resources—including recommendations from other prime contractors, certification lists, business mailers, trade associations, and various MDT resources—to find potential subcontractors. Likewise, subcontractors indicated they use similar resources to find prime contractors with whom they might like to work. MDT should continue to maintain the resources it has available to connect prime contractors and subcontractors, including plan holders' lists, the DBE Quote Request System, and other information on its website. However, some businesses are unaware of how to access MDT's Plan Holders List and project plans, which are accessible for free on MDT's website. Businesses may join a plans exchange, which are located in several towns throughout Montana and have project plans for public projects throughout the state, or they can purchase plans on a project-by-project basis. For DBE and SBE certified businesses this expense is reimbursable.

b. Joint ventures. MDT's implementation of the Federal DBE Program makes it difficult for small businesses to grow their capacities. Small businesses often work as subcontractors, preventing them from gaining the experience or capital to bid on future work as prime contractors. One way MDT could better support business growth is by identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures that include small businesses—including DBEs—to compete for and perform prime contracts. Encouraging joint ventures would allow businesses to gain experience working as prime contractors while mitigating some of the difficulties and costs of doing so, which will allow them to be more competitive on future projects.

c. Working with new subcontractors. The disparity study indicated that a substantial portion of the contract and procurement dollars MDT awarded to minority- and woman-owned businesses during the study period were largely concentrated with a relatively small number of businesses and particularly with white woman-owned businesses. MDT could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, as part of the bid process, MDT might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked, and MDT could award evaluation points or price preferences based on the quality of those efforts. Increasing the number of new subcontractors that participate in MDT's bid process could help many small businesses—including DBEs—become aware of and compete for MDT opportunities and grow the pool of small businesses involved in MDT work.

3. Unbundling contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts MDT awarded during the study period. In addition, as part of in-depth interviews and public meetings, several business owners reported that the size of MDT contracts and procurements is sometimes a barrier to their success. To further encourage the participation of minority- and woman-owned businesses in its work, MDT

should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller pieces. Such initiatives might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontract opportunities into smaller pieces, making them more accessible to small businesses, and accepts such efforts as GFEs as part of its contracting goals program.

4. Small business set asides. Disparity analysis results indicated substantial disparities for most relevant racial/ethnic and gender groups on prime contracts MDT awarded during the study period. The agency might consider reserving, or *setting aside*, certain, small prime contracts exclusively for competition among small businesses, including DBEs. Doing so could encourage the participation of small businesses as prime contractors in MDT work. In addition to using small business set asides, MDT could consider encouraging at least one quote from small businesses for certain, small procurements.

5. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses—including DBEs—to become involved in an organization's contracting and procurement. However, subcontracting accounts for a relatively small percentage of the total contract and procurement dollars MDT awards. For example, during the study period, subcontracting represented only 18 percent of the total transportation-related work MDT awarded. To increase the volume of subcontract opportunities, MDT could consider using subcontracting minimums to award certain types of work. For specific types of contracts and procurements for which subcontracting opportunities might exist, the agency could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If MDT were to implement such a program, it should include GFEs provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals even if they failed to do so.

6. Prequalification requirements and contractor experience. MDT requires prequalification lists for some professional services work. For those projects, only prequalified companies are allowed to submit bids or proposals. Beyond limiting bidders, MDT also ranks prequalified professional services firms based on their prequalification applications. The ranking system prioritizes past work with MDT (especially compared with other state departments of transportation) and with specific sizes and types of projects. MDT uses those rankings—rather than the strength of a company's bid or proposal for a particular project—to create "shortlists." Many in-depth interview participants indicated that MDT's requirements for being shortlisted are too restrictive and make them hesitant to pursue opportunities with the agency. Several businesses said that prequalification requirements and shortlists can reinforce the "good ol' boy" network in the state. MDT could consider eliminating prequalification requirements, eliminating shortlists, or changing how it uses them, so they are less burdensome to small businesses, including DBEs. For example, MDT could still advertise projects directly to prequalified companies but still allow other companies to propose on them or could use preference points for prequalified businesses without limiting the bidding opportunities to only those businesses. In addition, MDT might consider assigning more weight to contractors' work on similar projects for agencies other than MDT. The agency could also consider contracting out a larger number of

small projects to build agency-specific experience among small businesses, for example MDT might consider tiering on larger term contracts. While MDT does provide ample opportunities for firms to debrief about the selection process, the agency should consider further education and outreach about the scoring process to ensure that businesses understand the criteria and the scores provided for each firm.

C. Contract Administration Policies

BBC also recommends MDT consider additional measures to support small businesses and minority- and woman-owned businesses as part of administering contracts and procurements. The refinements we recommend below are also all race- and gender-neutral in nature.

1. Prompt payment. As part of in-depth interviews and surveys, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on government projects, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and a lack of access to capital can be particularly challenging for small businesses. MDT should consider maintaining its current policies related to prompt payment for prime contractors and reviewing and strengthening its policies encouraging prompt payment from prime contractors to subcontractors or suppliers. In-depth interview respondents suggested that MDT continue to share prime contractors' bonding information with subcontractors so they may pursue recourse for slow payments or non-payments from performance bonds.

2. Subcontractor participation. Anecdotal evidence suggested prime contractors often reduce or eliminate subcontract work once they are awarded MDT projects, despite making specific commitments to subcontractors as part of the bid process. MDT should consider tracking subcontractor participation electronically on an invoice-by-invoice basis to ensure prime contractors use subcontractors to the full extent of their subcontract commitments on projects. In addition to tracking subcontractor payments, establishing points of contact between subcontractors and MDT to address any underutilization or subcontractor substitutions may help ensure minority- and woman-owned businesses receive the work they were committed at the time of bid. Other measures MDT could consider include inviting subcontractors to contract negotiation meetings to discuss their expected portions of contracts, notifying the entire project team when projects have been awarded, establishing stricter regulations around subcontract changes and subcontractor substitutions, and considering prime contractors' past use of subcontractors relative to subcontract commitments as a factor during bid evaluations.

3. Data collection. MDT maintains comprehensive data on both the prime contracts and subcontracts it awards, and those data are generally well-organized and accessible. MDT should continue their data collection efforts to ensure they are accurately tracking the participation of minority- and woman-owned businesses in its work. In contrast, National Plan of Integrated Airport Systems (NPIAS) airports do not collect comprehensive subcontract data. Collecting data on all subcontracts will help ensure that NPIAS airports are able to monitor the participation of minority- and woman-owned businesses accurately and could also help them be more aware of subcontracting opportunities on future projects. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor name, address, and phone number;
- Type of associated work;
- Subcontract award amount; and
- Subcontract paid amount.

D. OCR Programs

OCR should consider implementing or strengthening its programs related to encouraging the participation of minority- and woman-owned businesses in MDT work. The refinements we recommend below are also all race- and gender-neutral in nature.

1. Networking events. Anecdotal evidence indicates that MDT's implementation of the Federal DBE program is well-regarded and seen as beneficial to DBEs. However, MDT could consider certain refinements to its implementation of the program. For example, networking events are seen as valuable in theory, but in practice are generally viewed as disorganized, too broad, and not facilitating meaningful connections among businesses. MDT should consider reworking its networking events to focus more on specific industries beyond construction, projects, and regions and focus on fostering relationship between prime contractors and subcontractors.

2. Bonding and insurance assistance. The Montana Annotated Code Title 18 requires bid deposits and bonding for public works projects worth more than $50,000.[2] Projects of that size are relatively accessible to small businesses, but as part of in-depth interviews and public meetings, several businesses owners reported that bid deposits and bonding requirements are a barrier for small businesses, particularly minority- and woman-owned businesses. Currently, prime contractors are responsible for ensuring their subcontractors are appropriately bonded and assisting them with bonding, as necessary. MDT could consider implementing an "owner controlled" bonding program by shifting subcontractor bonding responsibilities away from prime contractors and into the hands of MDT or third parties that can better assist subcontractors as necessary. Similarly, subcontractors should not face additional bonding or insurance requirements if prime contractors' bonds are sufficient to cover the entire project. In addition, MDT could consider breaking up multiyear projects into smaller, annual pieces to help DBEs and other small businesses avoid reaching their bonding limits. For example, MDT might consider breaking a three-year project worth $6 million into three annual pieces each worth $2 million, which would reduce bonding requirements for each individual piece. Finally, MDT could partner with financial institutions to standardize bonding rates at more equitable levels. Currently, small businesses—including DBEs—are subject to higher bonding rates, making it more difficult for them to get bonds relative to larger businesses.

3. Training and outreach. Although most stakeholders who participated in the anecdotal evidence process recognize the value of MDT's training and outreach efforts, many contractors suggested MDT should improve its advertising and communication around those measures to

[2] https://leg.mt.gov/bills/mca/title_0180/chapter_0020/part_0020/section_0010/0180-0020-0020-0010.html

reach more businesses across the state (for details about those measures, see Chapter 9). MDT could consider more partnerships with state and local trade organizations and other public organizations and offering events more frequently. The agency might consider tailoring some events to specific industries or business groups to further maximize their value and provide opportunities to foster more extensive connections among participants. MDT could also consider making continued use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

4. Workforce development. MDT should continue encouraging participation in its programs that help diversify the Montana workforce, including On-the-Job Training and Supportive Services. However, almost no in-depth interviews participants were aware that the program even existed. The agency should consider ways it can increase outreach, engagement, and communication around the program.

5. Mentor/protégé relationships. Mentor/protégé relationships were highly recommended by multiple interviewees who noted the benefits for small businesses of working with larger, more successful companies in similar industries. For example, the 8(a)-mentorship program works to properly match businesses based on size and industry. MDT should consider developing a mentor/protégé program (such as Calmentor) or work with other local business assistance agencies to facilitate such efforts.

APPENDIX A.
Definitions of Terms

Appendix A defines terms useful to understanding the 2022 Montana Department of Transportation Disparity Study report.

49 Code of Federal Regulations (CFR) Part 26

49 CFR Part 26 are the federal regulations that set forth the Federal Disadvantaged Business Enterprise Program. The objectives of CFR Part 26 are to:

- Ensure nondiscrimination in the award and administration of United States Department of Transportation-funded projects;
- Help remove barriers to the participation of Disadvantaged Business Enterprises in United States Department of Transportation-funded projects;
- Promote the use of Disadvantaged Business Enterprises in all types of United States Department of Transportation-funded projects;
- Assist in the development of businesses so they can compete outside the Federal Disadvantaged Business Enterprise Program;
- Create a level playing field on which Disadvantaged Business Enterprises can compete fairly for United States Department of Transportation-funded projects;
- Ensure the Federal Disadvantaged Business Enterprise Program is narrowly tailored in accordance with applicable law;
- Ensure only businesses that fully meet eligibility standards are permitted to participate as Disadvantaged Business Enterprises; and
- Provide appropriate flexibility to agencies implementing the Federal Disadvantaged Business Enterprise Program.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—shared by individual interviewees, public meeting participants, and stakeholders in Montana.

Base Figure

In accordance with United States Department of Transportation requirements, establishing a base figure is the first step agencies must take in calculating their overall Disadvantaged Business Enterprise goals. Agencies must base calculations of their base figures on demonstrable evidence of the availability of potential Disadvantaged Business Enterprises to participate in their United States Department of Transportation-funded projects.

Business

A business is a for-profit enterprise, including sole proprietorships, corporations, professional corporations, limited liability companies, limited partnerships, limited liability partnerships, and any other partnerships. The definition includes the headquarters of the organization as well as all its other locations, as applicable.

Commercially Useful Function

A commercially useful function refers to a business performing real and distinct work for which it has demonstrable skills, experience, and responsibilities. Businesses prime contractors use to meet contract goals are often required to demonstrate that they will serve commercially useful functions on applicable projects.

Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government agency must demonstrate a compelling governmental interest in remedying past identified discrimination in order to implement race- or gender-conscious measures. That is, an agency that uses race- or gender-conscious measures as part of a contracting program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence— within its own relevant geographic market area that supports the use of such measures.

Consultant

A consultant is a business that performs professional services work.

Contract

A contract is a legally-binding relationship between the seller of goods or services and a buyer. The study team sometimes uses the term *contract* synonymously with *project*.

Contract Goals

Contract goals are often a race- and gender-conscious effort whereby organizations set percentage goals for the participation of small businesses or minority- and woman-owned businesses in individual contracts and procurements they award. As a condition of award, prime contractors have to meet contract goals as part of their bids, quotes, or proposals by making participation commitments with eligible, certified businesses or, if they fail to do so, by demonstrating they made genuine and sufficient good faith efforts to do so. The use of contract goals as they apply to minority- and woman-owned businesses must meet the strict and intermediate scrutiny standards of constitutional review, respectively.

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction work.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

A custom census availability analysis is one in which researchers attempt surveys with potentially available businesses working in the local marketplace to collect information about their characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts an agency actually awarded during the study period to assess the percentage of dollars one might expect the agency to award to a specific group of businesses. A custom census approach is accepted in the industry as the preferred method for conducting availability analyses, because it takes several different factors into account, including businesses' primary lines of work and their capacity to perform on an agency's contracts or procurements.

Disadvantaged Business Enterprise (DBE)

A DBE is a business certified to be owned and controlled by one or more individuals who are socially and economically disadvantaged according to the guidelines in 49 CFR Part 26. The following groups are presumed to be socially and economically disadvantaged according to the Federal DBE Program:

- Asian Pacific Americans;
- Black Americans;
- Hispanic Americans;
- Native Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

A determination of economic disadvantage includes assessing businesses' gross revenues (maximum revenue limits ranging from $2 million to $28.48 million depending on work type), businesses' number of employees, and business owners' personal net worth (maximum of $1.32 million excluding equity in his or her primary residence and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the social and economic disadvantage requirements set forth in 49 CFR Part 26.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation of a specific group of businesses in agency contracts and procurements and the estimated availability of the group for that work. A disparity index is computed by dividing the actual participation of a specific group of businesses in agency contracts and procurements by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Federal Aviation Administration (FAA)

The FAA is an agency of the United States Department of Transportation that regulates all aspects of civil aviation across the country and administers federal funding to support the construction and operation of local airports.

Federal 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. It is designed to increase the participation of minority- and woman-owned businesses in United States Department of Transportation-funded contracts. Regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

Federal Highway Administration (FHWA)

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

Federally-funded Project

A federally-funded project is one funded in whole or part with United States Department of Transportation financial assistance, including loans. The study team considered a contract to be federally-funded if it included at least $1 of United States Department of Transportation funding.

Industry

An industry is a broad classification for businesses providing related goods or services (e.g., *construction* or *professional services*).

Inference of Discrimination

An inference of discrimination is the conclusion that businesses whose owners identify with particular race/ethnic or gender groups suffer from barriers or discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations sometimes use race- or gender-conscious measures to address barriers affecting those businesses.

Intermediate Scrutiny

Intermediate scrutiny is the legal standard an agency's use of gender-conscious measures must meet to be considered constitutional. It is more rigorous than the rational basis test, which applies to business measures unrelated to race/ethnicity or gender, but less rigorous than the strict scrutiny test, which applies to business measures related to race/ethnicity. In order for a program to pass intermediate scrutiny, it must serve an important government objective, and it must be substantially related to achieving the objective.

Montana Department of Transportation (MDT)

MDT is responsible for the planning, design, maintenance, operation, and management of Montana's state-owned roadways, walkways, rest areas, airports, and numerous public-use facilities.

Minority

A minority is an individual who identifies with one or more of the following racial/ethnic groups: Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, or other non-white race or ethnic group.

Minority-owned Business

A minority-owned business is one with at least 51 percent ownership and control by individuals who identify with one of the following racial/ethnic groups: Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, or other non-white race or ethnic group. The study team considered businesses owned by minority men and minority women as minority-owned businesses. A business does not have to be certified as a DBE or hold any other type of certification to be considered a minority-owned business.

Narrow Tailoring

As part of the strict scrutiny standard of constitutional review, a government agency must demonstrate its use of race-conscious measures is narrowly tailored. There are several factors to consider when determining whether the use of such measures is narrowly tailored, including:

- The necessity of such measures and the efficacy of alternative, race-neutral measures;
- The degree to which the use of such measures is limited to those groups that suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.

National Plan of Integrated Airport Systems (NPIAS) Airports

NPIAS airports refer to the 55 state-operated airports in Montana whose data the study team included in the 2022 MDT Disparity Study.

Overall DBE Goal

As part of the Federal DBE Program, every three years, agencies are required to set overall aspirational percentage goals for DBE participation in their United States Department of Transportation-funded work, which they must work towards achieving each year through various efforts. If DBE participation in their United States Department of Transportation-funded work is less than their overall DBE goals in a particular year, then they must analyze reasons for their shortfalls and establish specific measures that will enable them to meet their goals in the next year. The United States Department of Transportation sets forth a two step process agencies must use in establishing

their overall DBE goals. First, agencies must develop *base figures* for their overall DBE goals, and second, they must consider whether making *step 2 adjustments* to their base figures is necessary to ensure their overall DBE goals are as accurate as possible.

Participation

See *utilization*.

Potential DBE

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

Prime Consultant

A prime consultant is a professional services business that performs professional services prime work directly for end users, such as MDT or NPIAS airports.

Prime Contract

A prime contract is a contract between a prime contractor, or prime consultant, and an end user, such as such as MDT or NPIAS airports.

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for an end user, such as MDT or NPIAS airports.

Procurement

See *contract*.

Project

A project refers to a construction, professional services, or goods and other services endeavor MDT or NPIAS airports bid out during the study period. A project could include one or more prime contracts and corresponding subcontracts.

Race- and Gender-conscious Measures

Race- and gender-conscious measures are contracting measures designed to increase the participation of minority- and woman-owned businesses specifically in government work. Businesses owned by individuals who identify with particular race/ethnic groups might be eligible for such measures whereas others would not. Similarly, businesses owned by individuals who identify as women might be eligible for such measures whereas businesses owned by individuals who identify as men would not. An example of race- and gender-conscious measures is an organization's use of minority- or woman-owned business contract goals on individual contracts or procurements.

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures designed to remove potential barriers for businesses attempting to do work with an agency, regardless of the race/ethnicity or gender of the owners. Race- and gender-neutral measures might include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, and establishing programs to assist start-ups.

Rational Basis

Government agencies that implement contracting programs that rely only on race- and gender-neutral measures must show a rational basis for their programs. Showing a rational basis requires agencies to demonstrate their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs.

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which MDT and NPIAS airports award most of their contracting dollars are located. Case law related to contracting programs and disparity studies requires disparity study analyses to focus on the relevant geographic market area. The relevant geographic market area for the 2022 MDT Disparity Study is the state of Montana.

State-funded Project

A state-funded project is any contract or project wholly funded by state or local sources. That is, the project does not include any United States Department of Transportation or other federal funds.

Statistically Significant Difference

A statistically significant difference refers to a quantitative difference for which there is a 0.95 or 0.90 probability that chance can be correctly rejected as an explanation for the difference (meaning that there is a 0.05 or 0.10 probability, respectively, that chance in the sampling process could correctly account for the difference).

Strict Scrutiny

Strict scrutiny is the legal standard a government agency's use of race-conscious measures must meet to be considered constitutional. Strict scrutiny is the highest threshold for evaluating the legality of race-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, an agency must:

a) Have a compelling governmental interest in remedying past identified discrimination or its present effects; and

b) Establish the use of any such measures is narrowly tailored to achieve the goal of remedying the identified discrimination.

An agency's use of race-conscious measures must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard for it to be considered constitutional.

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. Only contracts awarded by MDT and NPIAS airports during the study period are included in the study team's analyses. The study period for the disparity study was October 1, 2015 through September 30, 2020.

Subconsultant

A subconsultant is a professional services business that performs services for prime consultants as part of larger professional services contracts.

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 business that performs services for prime contractors as part of larger contracts.

Subindustry

A subindustry is a specific classification for businesses providing related goods or services within a particular industry (e.g., *highway and street construction* is a subindustry of *construction*).

Utilization

Utilization refers to the percentage of total dollars associated with a particular set of contracts MDT or NPIAS airports awarded to a specific group of businesses. The study team uses the term *utilization* synonymously with *participation*.

Vendor

See *contractor.*

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by non-Hispanic white women. A business does not have to be certified as a DBE to be considered a woman-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)

APPENDIX B.
Legal Framework and Analysis

Table of Contents

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Federal Disadvantaged Business Enterprise ("Federal DBE") Program,[1] reviews instructive guidance and authorities regarding the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,[2] and provides an analysis of the implementation of the Federal DBE and ACDBE Programs by local and state governments. The Federal DBE Program was continued and reauthorized by the 2015 Fixing America's Surface Transportation Act (FAST Act).[3] In October 2018, Congress passed the FAA Reauthorization Act.[4] In November 2021, Congress passed the Infrastructure Investment and Jobs Act of 2021, which reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.[5]

The appendix also reviews recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise ("MBE/WBE/DBE") programs, which are instructive to the study and MBE/WBE/DBE programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Montana Department of Transportation ("MDT").

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[6] *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Pena*,[7] ("*Adarand I*"), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court's decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program and their implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. The State of Montana and MDT are in the U.S. Court of Appeals for the Ninth Circuit. In particular, this analysis reviews in Section D below recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of*

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

2 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

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

4 Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

5 Pub. L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

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

7 *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.[8] and *Western States Paving Co. v. Washington State DOT,*[9] *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women's Business Enterprise, U.S. DOT, et al.*[10] and the recent non-published decision in *Mountain West Holding Co. v. Montana, Montana DOT, et al.,*[11] and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*[12]

In addition, the analysis reviews in Section E federal cases from other jurisdictions that have considered the validity of the Federal DBE Program and its implementation by state DOTs and local or state government agencies and the validity of local and state DBE programs, including: *Dunnet Bay Construction Co. v. Illinois DOT,*[13] *Northern Contracting, Inc. v. Illinois DOT,*[14] *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads,*[15] *Geyer Signal, Inc. v. Minnesota DOT,*[16] *Adarand Constructors, Inc. v. Slater*[17] *("Adarand VII")*, *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[18] *Geod Corporation v. New Jersey Transit Corporation,*[19] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[20]

The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section F below, which are instructive to the study and the MDT.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,[21] and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence.[22] In

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

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

10 *Orion Insurance Group, a Washington Corporation, Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Woman's Business Enterprises, United States DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which is pending.

11 *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. 2017). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

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

13 *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); Dunnet Bay Construction Co. v. Illinois DOT, et. al. 2014 WL 552213 (C. D. Ill. 2014), affirmed by Dunnet Bay, 2015 WL 4934560 (7th Cir. August 19, 2015).

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

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

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

17 *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII").

18 *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al*., 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017).

19 *Geod Corp. v. New Jersey Transit Corp*., 766 F. Supp.2d. 642 (D. N.J. 2010).

20 *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

21 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

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

October 2018, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence.[23] Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 1101) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.[24]

The analyses of these and other recent cases summarized below, including the Ninth Circuit decisions in Section D below, *AGC, SDC v. Cal. DOT, Western States Paving, Mountain West Holding, Inc., M.K. Weeden and Orion Insurance Group,* are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to the Federal DBE and ACDBE Programs and their implementation by local and state governments receiving U.S. DOT funds, disparity studies, MBE/WBE/DBE programs, and construing the validity of government programs involving MBE/WBE/DBE/ACDBEs. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of a narrowly tailored DBE Program by a state DOT implementing the Federal DBE Program and local or state government MBE/WBE/DBE programs submitted in compliance with the case law, and applicable federal regulations, including 49 CFR Part 26.

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

Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program 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.[25] 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.[26] The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.[27]

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[23] Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

[24] Pub L. 117-58, H.R. 3684, § 11101(e), November 15, 2021, 135 Stat 443-449.

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

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

[27] *Id*.

The USDOT's Guidance is recognized by the federal regulations as "valid and express the official positions and views of the Department of Transportation"[28] 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."[29] Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.[30]

The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' implementation of the Federal DBE Program is constitutional.[31] The Ninth Circuit found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.[32]

There are other recent cases in the Ninth Circuit instructive for the study, including as follows:

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.,*[33] the Ninth Circuit and the district court applied the decision in *Western States*,[34] and the decision in *AGC, San Diego v. California DOT,*[35] as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.[36] The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation

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28 *Id*., 49 CFR § 26.9; See, 49 CFR § 23.13.

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

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

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

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

33 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

34 407 F.3d 983 (9th Cir. 2005)

35 713 F.3d 1187 (9th Cir. 2013)

36 2014 WL 6686734 at *2 (D. Mont. 2014)

contracting industry."[37] The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination."[38]

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'"[39] Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors."[40]

The Ninth Circuit reversed the District Court's grant of summary judgment to Montana based on issues of fact as to the evidence and remanded the case for trial. The *Mountain West* case was settled and voluntarily dismissed by the parties on remand in 2018.

The District Court decision in the Ninth Circuit in Montana, *M.K. Weeden,*[41] followed the *AGC*, *SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation's implementation of the Federal DBE Program.

Another recent case in the Ninth Circuit is *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al.*[42] Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE. Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black and Native American in the Affidavit of Certification.

Orion's DBE application was denied because there was insufficient evidence that: he was a member of a racial group recognized under the regulations; was regarded by the relevant community as either Black or Native American; or that he held himself out as being a member of either group. OMWBE

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37 *Mountain West*, 2014 WL 6686734 at *2, *quoting Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. 2017) Memorandum, at 5-6, *quoting AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

38 *Mountain West*, 2017 WL 2179120 at *2, Memorandum, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

39 *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99).

40 *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, *quoting, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

41 *M.K. Weeden*, 2013 WL 4774517.

42 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

The District court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause, and the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause. The court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

The District court dismissed claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI because Plaintiffs failed to show the State engaged in intentional racial discrimination. The DBE regulations' requirement that the State make decisions based on race was held constitutional.

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor's claims against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity, Taylor's discrimination claims under 42 U.S.C. §1983 because the federal defendants did not act "under color or state law," Taylor's claims for damages because the United States has not waived its sovereign immunity, and Taylor's claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

The Ninth Circuit held OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well-founded reason" to question Taylor's membership claims, determined that Taylor did not qualify as a "socially and economically disadvantaged individual," and when it affirmed the state's decision was supported by substantial evidence and consistent with federal regulations. The court held the USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Also, in a split in approach with the Ninth Circuit regarding the legal standard, burden and analysis in connection with a state government implementing the Federal DBE Program, the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,[43] and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,[44] upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).[45] The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because

[43] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

[44] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

[45] 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

there was no evidence IDOT exceeded its authority under federal law.[46] The Seventh Circuit most recently in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. These cases are reviewed in detail in Section E below. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.[47]

These decisions regarding a state DOT implementing the Federal DBE Program and MBE/WBE/DBE cases throughout the country will be analyzed in more detail in the Appendix below.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence.[48] And, Congress recently passed legislation in November 2021, which was signed by the President, (H.R. 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021)[49] that again reauthorized the Federal DBE Program and its implementation by local and state governments based on evidence and findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs. It also is instructive that recently there were Congressional findings as to discrimination regarding MBE/WBE/DBEs relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program.[50]

It is noteworthy and instructive to the study that the U.S. Department of Justice in January 2022 very recently issued a report: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence." This report "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs." The "Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs" is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This notice announces the availability on the Department of Justice's website of the "updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs." The report is available on the Department of Justice's website at: https://www.justice.gov/crt/page/file/1463921/download.

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"

[46] *Id*.

[47] 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

[48] Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312 49 CFR Part 26.

[49] Pub. L. 117-58; H.R. 3684 – 117th Congress (2021), § 11101(e), November 15, 2021, 135 Stat 443-449.

[50] 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

governmental programs.[51] 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."[52] 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.[53] 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.[54]

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII.[55] But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[56]

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to

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51 488 U.S. 469 (1989).

52 488 U.S. at 500, 510.

53 488 U.S. at 480, 505.

54 488 U.S. at 507-510.

55 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

56 488 U.S. at 501 *quoting Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

undertake the particular task. The Court noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[57] "Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city."[58]

The Supreme Court stated that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."[59] 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."[60]

The Court said: "If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion."[61] "Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[62]

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[63]

2. Adarand Constructors, Inc. v. Pena ("Adarand I"), 515 U.S. 200 (1995). In *Adarand I*, the U.S. Supreme Court extended the holding in Croson and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases interpreting *Croson* and *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program and ACDBE Program by recipients of federal funds.

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE and ACDBE Programs

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57 488 U.S. at 502.

58 *Id.*

59 488 U.S. at 509.

60 *Id.*

61 488 U.S. at 509.

62 *Id.*

63 488 U.S. at 492.

The following provides an analysis for the legal framework focusing on recent key cases regarding state DOT DBE programs and state and local government DBE programs implementing the Federal DBE and ACDBE Programs and federal regulations, state and local government MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state DOTs and state and local government DBE programs, are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by local and state government recipients of federal financial assistance (U.S. DOT funds) based on 49 CFR Part 26 and 49 CFR Part 23.

The Federal DBE Program (and ACDBE Program) Implemented By State or Local Governments. It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the Program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, considered findings as to disparities, discrimination and barriers to MBE/WBE/DBEs, examined narrow tailoring by local and state governments of their DBE program implementing the federal program, and involved consideration of disparity studies. The cases involving the Program and its implementation by state DOTs and state and local governments are informative, recent and applicable to the legal framework regarding state DOT DBE programs and MBE/WBE/DBE state and local government programs, and disparity studies.

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.[64]

Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five-year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 ("SAFETEA"). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21").[65] In December 2015, Congress passed the Fixing America's Surface Transportation Act ("FAST Act").[66] In October 2018, Congress passed the FAA Reauthorization Act.[67] Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101) that reauthorized the Federal

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64 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.

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

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

67 Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

DBE Program based on evidence and findings of continuing discrimination and related barriers found to cause significant obstacles for MBE/WBE/DBEs.[68]

As noted above, the U.S. Department of Justice in January 2022 issued a report that updated its 1996 report: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence," which "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs." The "Notice of Report on Lawful Uses of Race or Sex in Federal Contracting Programs" is published in the Federal Register, Vol. 87 at page 4955, January 31, 2022. This "updated report regarding the legal and evidentiary frameworks that justify the continued use of race or sex, in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs" is available on the Department of Justice's website at:
https://www.justice.gov/crt/page/file/1463921/download.

The Federal DBE Program provides requirements for federal aid recipients and accordingly changed how recipients of federal funds implement 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.[69]

The Federal DBE and ACDBE Programs established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals 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 and ACDBE Programs outline 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 and ACDBE programs. The implementation of the Federal DBE and ACDBE Programs are substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45, and 49 CFR §§ 23.41-51.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 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.[70] This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient's market.[71] Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.[72] There are many types of evidence considered when determining if an adjustment is appropriate,

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68 Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

69 49 CFR § 26.51; see 49 CFR § 23.25.

70 49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).

71 *Id.*

72 *Id*. at § 26.45(d); *Id*. at § 23.51(d).

according to 49 CFR § 26.45(d) and 49 CFR §23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient's contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.[73] This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.[74]

Further, the Federal DBE and ACDBE Programs require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.[75] A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.[76]

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.[77]

Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101(e)) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers that cause significant obstacles for MBE/WBE/DBEs.[78] Previously, in October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continued to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets," in "federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE Program and the Federal DBE Program.[79] Congress also found in the Infrastructure Investment and Jobs Act of 2021, the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal DBE Program and the Federal ACDBE Program.[80]

Infrastructure Investment and Jobs Act of 2021 (November 15, 2021)

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73 *Id.*

74 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

75 49 CFR § 26.51; 49 CFR § 23.51(a).

76 49 CFR § 26.51(b); 49 CFR § 23.25.

77 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39

78 Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

79 Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

80 *Id*. at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94. H.R. 22, § 1101(b)(1) (2015).

SEC. 11101. Authorization of Appropriations.

(e) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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

Therefore, Congress in the Infrastructure Investment and Jobs Act passed on November 15, 2022 found based on testimony, evidence and documentation updated since the FAST Act adopted in 2015 and MAP-21 adopted in 2012, as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 11101(e), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.[81]

F.A.A. Reauthorization Act of 2018 (October 5, 2018)

- Extended the FAA DBE and ACDBE programs for five years.
- Contains an additional prompt payment provision.

[81] Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021, 135 Stat 443-449.

- Increases in the size cap for highway, street, and bridge construction for construction firms working on airport improvement projects.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

(a) Findings. Congress finds the following:

(1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.

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

(3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 C.F.R. Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.

(4) This testimony and documentation provides a strong basis that there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

Fixing America's Surface Transportation Act or the “FAST Act” (December 4, 2015)

On December 3, 2015, the Fixing America's Surface Transportation Act or the ``FAST Act'' was passed by Congress, and it was signed by the President on December 4, 2015, as a five year surface transportation authorization law, which was extended by the Infrastructure Investment and Jobs Act of 2021. The FAST Act continued the Federal DBE Program and makes the following “Findings” in Section 1101 (b) of the Act:

SEC. 1101. Authorization of Appropriations.

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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

Thus, Congress in the FAST Act found based on testimony and documentation of race and gender discrimination that there was "a compelling need for the continuation of the" Federal DBE Program.[82]

MAP-21 (July 2012). In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided "Findings" that "discrimination and related barriers" "merit the continuation of the" Federal DBE Program.[83] In MAP-21, Congress specifically found 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

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

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

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."[84]

Congress in MAP-21, therefore, determined based on testimony and documentation of race and gender discrimination that there was "a compelling need for the continuation of the" Federal DBE Program.[85]

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011). The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) ("2011 Final Rule") amending the Federal DBE Program at 49 CFR Part 26.

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees "it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE Program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance."[86]

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE Program.[87] The DOT concluded that, as court decisions have noted, the DOT's DBE regulations and the statutes authorizing them, "are supported by a compelling need to address discrimination and its effects."[88] The DOT said that the "basis for the program has been established by Congress and applies on a nationwide basis…", noted that both the House and Senate Federal Aviation Administration ("FAA") Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses."[89] This information, the DOT stated, "confirms the

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

85 *Id*.

86 76 F.R. at 5092.

87 76 F.R. at 5095.

88 76 F.R. at 5095.

89 *Id*.

continuing compelling need for race- and gender-conscious programs such as the DOT DBE Program."[90]

Thus, the implementation of the Federal DBE Program by state and local governments, the application of the strict scrunity standard to the state and local government DBE programs, the analysis applied by the courts in challenges to state and local government DBE programs, and the evidentiary basis and findings relied upon by Congress and the federal government regarding the Program and its implementation are informative and instructive to state DOTs and state and local governments and this study.

1. Strict scrutiny analysis. A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[91] 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.[92]

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.[93] 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.[94] 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.[95]

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state DOTs, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.[96] The federal courts also have held

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90 *Id*.

91 *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP I"), 6 F.3d 990 (3d. Cir. 1993).

92 *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 990 (3d. Cir. 1993).

93 *Id*.

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

95 See, e.g., *Concrete Works I*, 36 F.3d at 1520.

96 *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and affirming, 84 F. Supp. 3d 705, 2015 WL 1396376.

that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).[97]

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[98] 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).[99] 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.[100]
- **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

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[97] *Id*. In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting, Sherbrooke Turf, Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff Rothe's Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf, Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. see, also, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.,* 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government's evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

[98] *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

[99] See, e.g., *Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); see also *Western States Paving*, 407 F.3d at 992 (Congress "explicitly relied upon" the Department of Justice study that "documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts"); *Geyer Signal, Inc.*, 2014 WL 1309092.

[100] *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.[101]

- **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.[102]
- **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.[103]
- **Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21**. In November 2021, October 2018, December 2015 and in July 2012, Congress passed the Infrastructure Investment and Jobs Act or 2021, the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in "federally-assisted surface transportation markets," in airport-related markets, and that the continuing barriers "merit the continuation" of the Federal DBE Program and the Federal ACDBE Program.[104] Congress also found in the Infrastructure Investment and Jobs Act of 2021, the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal ACDBE Program and the Federal DBE Program.[105]

And, as stated above, the U.S. Department of Justice in January 2022 issued a report entitled: "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence," which "summarizes recent evidence required to justify the use of race- and sex-conscious provisions in federal contracting programs."[106] This "updated report" by the U.S. DOJ, is issued "regarding the legal and evidentiary frameworks that justify the continued use of race or sex,

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101 *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

102 *Id*. at 1172-74 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc*., 2014 WL 1309092.

103 *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

104 Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

105 *Id*. at Pub. L. 117-58, H.R. 3684 § 11101(e), November 15, 2021; Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94. H.R. 22, § 1101(b)(1) (2015).

106 Vol. 87 Fed. Reg. 4955, January 31, 2022; located at https://www.justice.gov/crt/page/file/1463921/download.

in appropriate circumstances, by federal agencies to remedy the current and lingering effects of past discrimination in federal contracting programs."[107]

Burden of proof to establish the strict scrutiny standard. 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.[108] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[109] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[110]

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.[111] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[112] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[113]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[114] "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors … and the number of such contractors actually engaged by the

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[107] *Id*; see https://www.justice.gov/crt/page/file/1463921/download.

[108] See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater ("Adarand VII")*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

[109] *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

[110] See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

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

[112] *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[113] *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

[114] *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3rd at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal*, 2014 WL 1309092 (D. Minn, 2014); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

locality or the locality's prime contractors.'"[115] Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[116]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[117] Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[118] Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.[119]

To successfully rebut the government's evidence, the courts hold that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence for the necessity of remedial action.[120] This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.[121] Conjecture and unsupported criticisms of the government's methodology are insufficient.[122] The courts have held that mere speculation the

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[115] See e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); C*ontractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[116] *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"),* 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[117] *Adarand Constructors, Inc. v. Pena, ("Adarand III")*, 515 U.S. 200 at 235 (1995); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d. Cir. 1993).

[118] *Majeske*, 218 F.3d at 820; see, e.g. *Wygant v. Jackson Bd. Of Educ*., 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc*., 2014 WL 1309092; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d. Cir. 1993).

[119] *Id*.; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

[120] See, e.g., *H.B. Rowe v.NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc*., 2014 WL 1309092.

[121] See, e.g., *H.B. Rowe v.NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); C*ontractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598; 603; (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1002-1007 (3d. Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc*., 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

[122] *Id*.; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); Con*tractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.[123]

The courts have stated that "it is insufficient to show that 'data was susceptible to multiple interpretations,' instead, plaintiffs must 'present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.'"[124] The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."[125]

The courts have noted that "there is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'"[126] The courts hold 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.[127] Instead, the Supreme Court stated that a government may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.[128] It has been further held by the courts that the statistical evidence be "corroborated by significant anecdotal evidence of racial discrimination" or bolstered by anecdotal evidence supporting an inference of discrimination.[129]

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact."[130] In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination."[131]

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

124 *Geyer Signal, Inc*., 2014 WL 1309092, *quoting Sherbrooke Turf*, 345 F.3d at 970.

125 *Id*, *quoting Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

126 *H.B. Rowe*, 615 F.3d at 241, *quoting Rothe Dev. Corp. v. Dep't of Def*., 545 F.3d 1023, 1049 (Fed. Cir. 2008) (*quoting W.H. Scott Constr. Co. v. City of Jackson,* 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson*, *Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

127 *H.B. Rowe Co*., 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

128 *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

129 *H.B. Rowe*, 615 F.3d at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

130 See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

131 See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.[132]

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 state or local government recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state or local government recipient level.[133] "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."[134]

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.[135] 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.[136] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[137]

Other considerations regarding statistical evidence include:

- **Availability analysis**. A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.[138] There is authority that measures of availability

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[132] See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 *quoting Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion); see, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

[133] See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

[134] *Croson*, 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

[135] *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver ("Concrete Works II")*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

[136] See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d. Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

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

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

may be approached with different levels of specificity and the practicality of various approaches must be considered,[139] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[140]

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[141]
- **Disparity index.** An important component of statistical evidence is the "disparity index."[142] A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."[143]
- **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.[144]

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence," but rather it may rely on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.[145]

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199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d. Cir. 1996); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

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

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

141 See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *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.

142 *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d. Cir. 1996); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

143 See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *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.

144 See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *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.

145 *H. B. Rowe*, 615 F.3d 233 at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion), and *citing Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970;

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.[146] The court rejected the district court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson.*[147] 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."[148] 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."[149]

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.[150] Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.[151]

Additionally, the court had previously concluded that the local government's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination.[152] Thus, the court held the local government's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.[153]

The court held the district court, *inter alia,* erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.[154] 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.[155]

In *Adarand VII,* the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.[156] ("[W]e may consider public and private discrimination not only in

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W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d. Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

146 *Id*. at 973.

147 *Id*.

148 *Id*., *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added).

149 *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), *quoting Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

150 *Id*. at 973.

151 *Id*.

152 *Id*. at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

153 *Id*.

154 *Id*. at 974.

155 *Id*., *citing Adarand VII*, 228 F.3d at 1166-67.

156 *Concrete Works*, 321 F.3d at 976, *citing Adarand VII*, 228 F.3d at 1166-67.

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.*"[157]. Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to "the Denver MSA evidence of industry-wide discrimination."[158] 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 the local government's burden of producing strong evidence.[159]

Consistent with the court's mandate in *Concrete Works II,* the local government attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business."[160] The Tenth Circuit ruled that the local government can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.[161]

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII,* the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination."[162]

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.[163]

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to

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157 *Id*. (emphasis added).

158 *Id*., *quoting Concrete Works II*, 36 F.3d at 1529.

159 *Id*., *quoting Concrete Works II*, 36 F.3d at 1530 (emphasis added).

160 *Id*.

161 *Concrete Works*, 321 F.3d at 976, *quoting Croson*, 488 U.S. at 492.

162 *Id*. at 977, *quoting Adarand VII*, 228 F.3d at 1167-68.

163 *Id*. at 977.

the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[164]

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.[165]

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.[166] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[167] It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."[168]

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.[169]

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164 *Id*. at 979, *quoting Adarand VII*, 228 F.3d at 1174.

165 *Id*. at 979-80.

166 See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d. Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

167 See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

168 *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

169 See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), affirmed, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

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.[170]

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.[171]

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[172]

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[170] See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp*., 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007).

[171] See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d. Cir. 1993); see also, *Geyer Signal, Inc*., 2014 WL 1309092.

[172] See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc*., 2014 WL 1309092.

The Eleventh Circuit described the "essence of the 'narrowly tailored' inquiry [as] the notion that explicitly racial preferences … must only be a 'last resort' option."[173] 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."[174]

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.'"[175]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[176] 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."[177] The Court found that the District failed to show it seriously considered race-neutral measures.

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by state DOTs and state and local government recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular state or local government recipient's contracting and procurement market.[178] The cases considering challenges to a state government's implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard. The narrow tailoring requirement has several components.

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-

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[173] *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).

[174] See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

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

[176] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

[177] 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

[178] *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

conscious remedial action.[179] Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.[180]

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity - conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.[181]

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."[182] The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.[183] 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.[184] The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).[185] Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.[186]

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.[187] The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its

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

180 *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.

181 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

182 473 F.3d at 722.

183 *Id*. at 722.

184 *Id*. at 723-24.

185 *Id*.

186 *Id*.; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), affirmed, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al*., 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

187 *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al*., 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

authority under the federal regulations.[188] The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.[189] In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.[190]

Race-, ethnicity-, and gender-neutral measures. To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[191] 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.[192]

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."[193]

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;

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188 *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

189 *Id*.

190 840 F.3d 932 (7th Cir. 2016).

191 See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I)*, 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.,* 941 F.2d at 923.

192 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; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II)*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1008-1009 (3d. Cir. 1993).

193 *Croson*, 488 U.S. at 509-510.

- 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.[194]

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.[195]

Additional factors considered under narrow tailoring. In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.[196] For example, to be considered narrowly tailored, courts have held that an MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[197] (2) good faith efforts provisions;[198] (3) waiver provisions;[199] (4) a rational basis for goals;[200] (5) graduation provisions;[201] (6) remedies only for groups for which there

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194 See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng'g Contractors Ass'n*, 122 F.3d at 927-29; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

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

196 See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

197 *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality ("AGC of Ca.")*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County,* 908 F.2d 908, 917 (11th Cir. 1990).

198 *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp*., 908 F.2d at 917.

199 *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp*., 908 F.2d at 917; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

200 *Id*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

201 *Id*.

were findings of discrimination;[202] (7) sunset provisions;[203] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[204]

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.[205]

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.[206] The Ninth Circuit and Montana courts have applied "intermediate scrutiny" to classifications based on gender.[207] Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.[208]

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

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

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[202] See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca*., 950 F.2d at 1417; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1009, 1012 (3d. Cir. 1993); *Kossman Contracting Co., Inc., v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf,* 2001 WL 150284 (unpublished opinion), aff'd 345 F.3d 964.

[203] See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

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

[205] See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al*., 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.,* 713 F.3d 1187, (9th Cir. 2013); W*estern States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.,* 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT* and *Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT,* 228 F.3d 1147 *("Adarand VII")* (10th Cir. 2000); D*unnet Bay Construction Co. v. Illinois DOT, et. al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT,* 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[206] *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al*., 83 F. Supp. 2d 613, 619-620 (2000); See generally, *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) ("exceedingly persuasive justification."); *Geyer Signal*, 2014 WL 1309092.

[207] See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, generally, *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al*., 83 F. Supp. 2d 613, 619-620 (2000); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)); *Rohlfs v. Klemenhagen, LLC*., 354 Mont. 133, 227 P.3d 42 (S. Ct. Mont. 2009); *Arneson v. State By and Through Dept. of Admin. Teachers'*, 262 Mont. 269, 864 P. 2d 1245 (S. Ct. Mont. 1993).

[208] See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al*., 83 F. Supp. 2d 613, 619-620 (2000); see, also *Serv. Emp. Int'l Union, Local 5 v. City of Hous*., 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Rohlfs v. Klemenhagen, LLC*., 354 Mont. 133, 227 P.3d 42 (S. Ct. Mont. 2009); *Arneson v. State By and Through Dept. of Admin. Teachers'*, 262 Mont. 269, 864 P. 2d 1245 (S. Ct. Mont. 1993).

2. Substantially related to the achievement of that underlying objective.[209]

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.[210]

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.[211] The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[212]

The Tenth Circuit in *Concrete Works,* stated with regard evidence as to woman-owned business enterprises as follows:

> "We do not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. See Contractors Ass'n, 6 F.3d at 1009–11 (reviewing case law and noting that "it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary"). Nevertheless, Denver's data indicates significant WBE underutilization such that the Ordinance's gender classification arises from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." Mississippi Univ. of Women, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school)."

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under

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[209] *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al*., 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification."); *Rohlfs v. Klemenhagen, LLC*., 354 Mont. 133, 227 P.3d 42 (S. Ct. Mont. 2009); *Arneson v. State By and Through Dept. of Admin. Teachers'*, 262 Mont. 269, 864 P. 2d 1245 (S. Ct. Mont. 1993).

[210] *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*.

[211] See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co*., 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al*., 83 F.Supp 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.")

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

intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[213]

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit."[214] The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.[215] The Court in *Contractors Ass'n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.[216]

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.[217] Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.[218] But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.[219] The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.[220] This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.[221] When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire

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213 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

214 *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

215 *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

216 *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

217 *Contractors Ass'n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

218 *Id*.

219 *Id*.

220 *Id*.

221 See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers,* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co*., 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.[222]

Courts in applying the rational basis test generally find that a challenged law is upheld "as long as there could be some rational basis for enacting [it]," that is, that "the law in question is rationally related to a legitimate government purpose."[223] So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.[224]

"[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[225] Moreover, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality."[226]

Under a rational basis review standard, a legislative classification will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[227]

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222 See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co*., 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass'n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

223 See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998)see also *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

224 *Id*.; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (*citing FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

225 *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 189 (2012) (*citing Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

226 *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

227 *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[228]

Under the federal standard of review a court will presume the "legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest."[229]

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations ("FAR").[230]

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration ("TSA") issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: "Government anticipates an overall Small Business goal of 40 percent," and that "[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5 percent; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent."[231]

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.[232] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[233]

The court found that "an agency may rationally establish aspirational small business subcontracting goals for prospective offerors…." Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals.[234] The court, in an exercise of judicial restraint, found the "40 percent goal is a rational expression of the Government's policy of affording small business

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228 *Id*.

229 *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster." (internal citations and quotations omitted)) (O'Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) ("Under rational basis review, the classification must only be rationally related to a legitimate government interest."); *Hensley v. Montana State Fund*, 402 Mont. 277, 477 P.3d 1065, (S. Ct. Mont. 2020); *State v. Jenson*, 402 Mont. 231, 477 P.3d. 335 (S. Ct. Mont. 2020); *Montana Cannabis Industry Ass'n v. State*, 382 Mont. 256, 368 P. 3d. 1131 (S. Ct. Mont. 2016); *Goble v. Montana State Fund*, 374 Mont. 453, 325 P. 3d 1211 (S. Ct. Mont. 2014).

230 2012 WL 5939228 (Fed. Cl. 2012).

231 *Id*.

232 *Id*.

233 *Id*.

234 *Id*.

concerns…the maximum practicable opportunity to participate as subcontractors…."[235]

4. Pending cases (at the time of this report) and Informative Recent Orders. There are recent pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and federal programs with minority and woman-owned business preferences that may potentially impact and are informative and instructive to the study, including the following:

i. **Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration,** 993 F.3d 353, 2021 WL 2172181 (6th Cir. May 27, 2021).

ii. **Greer's Ranch Café v. Guzman,** 2021 WL 2092995 (N.D. Tex. 5/18/21), U.S. District Court for the Northern District of Texas.

iii. **Faust v. Vilsack,** 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).

iv. **Wynn v. Vilsack,** 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Florida.

v. **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.,** U.S. District Court for the Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

vi. **Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.,** Case No. 502018CA010511; in the 15th Judicial Circuit in and for Palm Beach County, Florida.

vii. **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.,** U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099.

viii. **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.,** U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.

ix. **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams,** In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appealed to the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

x. **Circle City Broadcasting I, LLC ("Circle City") and National Association of Black Owned Broadcasters ("NABOB") (Plaintiffs) v. DISH Network, LLC ("DISH" or "Defendant"),** U.S. District Court for the Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.

[235] *Id.*

xi. **Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al.,** U.S. District Court for the District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.

xii. **Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al.,** Case No.: Gjh-20-981, In The United States District Court for the District Of Maryland, Southern Division. Complaint filed in April 2020.

The following summarizes the above listed pending cases and informative recent decisions:

i. **Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration,** 993 F.3D 353, 2021 WL 2172181 (6th Cir. May 27, 2021), on appeal to Sixth Circuit Court of Appeals from decision by United States District Court, E.D. Tennessee, Northern Division, 2021 WL 2003552, which District Court issued an Order denying plaintiffs' motion for temporary restraining order on May 19, 2021, and Order denying plaintiffs' motion for preliminary injunction on May 25, 2021. The appeal was filed in Sixth Circuit Court of Appeals on May 20, 2021. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

   Background and District Court Memorandum Opinion and Order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created the Paycheck Protection Program ("PPP"), a $349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act appropriated an additional $310 billion to the fund.

   The district court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and women-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and women-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and women-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

   Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (the "ARPA"). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated $28,600,000,000 to a "Restaurant Revitalization Fund" and tasked the Administrator of the Small Business Administration with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. See *Id.* § 5003. Under the ARPA, the Administrator "shall award grants to eligible entities in the order in which

applications are received by the Administrator," except that during the initial 21-day period in which the grants are awarded, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the Small Business Administration announced that it would open the application period for the Restaurant Revitalization Fund on May 3, 2021. The Small Business Administration announcement also stated, consistent with the ARPA, that "[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals."

Antonio Vitolo is a white male who owns and operates Jake's Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the Restaurant Revitalization Fund through the Small Business Administration on May 3, 2021, the first day of the application period. The Small Business Administration emailed Vitolo and notified him that "[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days."

On May 12, 2021, Vitolo and Jake's Bar and Grill, LLC initiated the present action against Defendant Isabella Casillas Guzman, the Administrator of the Small Business Administration. In their complaint, Vitolo and Jake's Bar and Grill assert that the ARPA's twenty-one-day priority period violates the United States Constitution's equal protection clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo's sworn declaration dated May 11, 2021, Vitolo and Jake's Bar and Grill request that the Court enter: (1) a temporary restraining order prohibiting the Small Business Administration from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the Small Business Administration from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict Scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the district court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the Government asserts that it has a compelling interest in "remedying the effect of past or present racial discrimination" as related to the formation and stability of minority-owned businesses.

Compelling Interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government's early attempts at general economic stimulus—i.e., the Paycheck Protection Program ("PPP")—disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 ("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."); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000) ("The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied."); *DynaLantic Corp v. U.S. Dep't of Def.,* 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012) (rejecting facial challenge to the Small Business Administration's 8(a) program in part because "the government [had] presented significant evidence on race-based denial of access to capital and credit").

The court said that the PPP—a government-sponsored COVID-19 relief program—was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow Tailoring found by District Court. The court then addressed the "narrow tailoring" requirement under the strict scrutiny analysis, concluding that: "Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to

accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.' "

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be "socially and economically disadvantaged" for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the TRO hearing that the SBA is using race as an absolute basis for identifying "socially and economically disadvantaged" individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA's processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant's implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs' motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address "any alleged inequities or past discrimination." However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had "a weaker income statement" or "a weaker balance sheet." But, the court noted, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the Government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the Government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be "socially disadvantaged." However, the court stated the race-based presumption is just that: a presumption. Counsel for the Government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003's broader definition of "socially and economically disadvantaged" was free to check that box on the application. ("[E]ssentially all that needs to be done is that you need to self-certify that you fit within that

standard on the application, ... you check that box").) For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such. Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the Restaurant Revitalization Fund is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out for example, of Alaskan and Hawaiian natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii. This is not like the racial classification in *Croson*, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to "an Aleut citizen who moves to Richmond tomorrow." Here, the court found any narrowly tailored racial classification must necessarily account for the national scale of prior and present COVID-19 programs.

The district court noted that the Supreme Court has historically declined to review sex-or gender-based classifications under strict scrutiny. The district court pointed out the Supreme Court held, "[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those "[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate Scrutiny applied to women-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting women-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The district court therefore stated it cannot conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of women-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between women-owned and men-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the record before it, the district court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: [W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." However, the district court did not conclude that Plaintiffs' constitutional rights are likely being violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The district court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants—which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits. The district court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs' Motion for Preliminary Injunction. Subsequently, the court addressed the Plaintiffs' motion for a preliminary injunction. The court found its denial of Plaintiffs' motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant's additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the Paycheck Protection Program (the "PPP"): "As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding

underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses."

There was a written statement noting that "[m]inority and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program"; testimony observing that historical lack of access to capital among minority- and women-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties' briefing on Plaintiff's motion for preliminary injunction have not impacted the court's analysis with respect to the remaining preliminary injunction factors. Accordingly, for the reasons stated in the court's memorandum opinion denying Plaintiff's motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court's decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants' race or sex. Vitolo asked the district court to enjoin the race and sex preferences until his appeal was decided. The district court denied that motion too. Finally, the district court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency Motion for Injunction Pending Appeal and to Expedite Appeal Granted by Sixth Circuit. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using "these unconstitutional criteria when processing" Vitolo's application.

Standing and Mootness. The Sixth Circuit agreed with the district court that Plaintiffs had standing. The Court rejected the Defendant Government's argument that the Plaintiffs' claims were moot because the 21-day priority phase of the grant program ended.

Preliminary Injunction. Application of Strict Scrutiny by Sixth Circuit. Vitolo challenges the Small Business Administration's use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under the factors in determining whether a preliminary injunction should

issue on the first factor that is typically dispositive: the factor of Plaintiffs' likelihood of success on the merits.

Compelling Interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government's asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And, the Court said, since "an effort to alleviate the effects of societal discrimination is not a compelling interest," the government's policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the district court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority-and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a

compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow Tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. But, the Court stated an "obvious" race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses." But, the Court found a simple race-neutral alternative exists again: The government could simply grant priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is "plagued" with other forms of underinclusivity. The Court considered the requirement that a business must be at least 51 percent owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51 percent. But does that mean those owners did not suffer economic harms from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar, is 50 percent owned by a Hispanic female. It is far from obvious, the Court stated, why that 1 percent difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the Small Business Administration's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this "scattershot approach" does not conform to the narrow tailoring strict scrutiny requires.

Women-Owned Businesses. Intermediate Scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-owned restaurants. Like racial classifications, sex-based discrimination is presumptively invalid. Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing women-owned restaurants serves an important governmental interest. The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately affected' by the COVID-19 pandemic." But, the Court stated, while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government's prioritization system is not "substantially related to" its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the pandemic. Yet under the Act, the Court said, all women-owned restaurants are prioritized—even if they are not "economically disadvantaged." For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51 percent women-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is "substantially related" to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The Court held that plaintiffs are entitled to an injunction pending appeal, thus reversing the district court decision. Since the government failed to justify its discriminatory policy, the Court found that plaintiffs likely will win on the merits of their

constitutional claim. And, the Court stated, similar to most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted.

Dissenting Opinion. One of the three Judges filed a dissenting opinion.

Amended Complaint and Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Plaintiffs on June 1, 2021, filed an Amended Complaint in the district court adding Additional Plaintiffs. Additional Plaintiffs' who were not involved in the initial Motion for Temporary Restraining Order, on June 2, 2021, filed a Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The court in its Order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongful behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs' claims are moot.

The court thus denied the Additional Plaintiffs' motion for temporary retraining order and preliminary injunction. The court also ordered the Defendant Government to file a notice with the court if and/or when Additional Plaintiffs' applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plainitffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

ii. **Greer's Ranch Café v. Guzman,** 2021 WL 2092995 (N.D. Tex. 5/18/21). Plaintiff Philip Greer ("Greer") owns and operates Plaintiff Greer's Ranch Café—a restaurant which lost nearly$100,000 in gross revenue during the COVID-19 pandemic (collectively, "Plaintiffs"). Greer sought monetary relief under the$28.6-billion Restaurant Revitalization Fund ("RRF") created by the American Rescue Plan Act of 2021 ("ARPA") and administered by the Small Business Administration ("SBA"). See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003. Greer prepared an application on behalf of his restaurant, is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program's first twenty-one days from May 3 to May 24, 2021.

During that window, ARPA directed SBA to "take such steps as necessary" to prioritize eligible restaurants "owned and controlled" by "women," by "veterans," and by those "socially and economically disadvantaged." ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program's first twenty-one days, it "will accept applications from all eligible applicants, but only process and fund priority group applications"—namely, applications from those priority-group applicants listed in ARPA. Priority-group "[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements" as "an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.

Substantial Likelihood of Success on the Merits. Standing. Equal Protection Claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA's implementation of the "socially disadvantaged group" and "socially disadvantaged individual" race-based presumption and definition from SBA's Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is "narrowly tailored" and "furthers compelling governmental interests."

Defendants propose as the government's compelling interest "remedying the effects of past and present discrimination" by "supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic." To proceed based on this interest, the court said, Defendants must provide a "strong basis in evidence for its conclusion that remedial action was necessary."

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the "well-established principle about the industry-specific inquiry required to effectuate Section 8(a)'s standards." Thus, the court looked to Defendants' industry specific evidence to determine whether the government has a "strong basis in evidence to support its conclusion that remedial action was necessary."

According to Defendants, "Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA." The Defendants evidence was summarized by the court as follows:

- A House Report specifically recognized that "underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic," that "[w]omen –especially mothers and women of color – are exiting the workforce at alarming rates," and that "eight out of ten minority-owned businesses are on the brink of closure."
- Expert testimony describing how "[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses" because of "structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies," and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.
- Expert testimony explaining that "businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently," and that minorities are less likely to have such relationships with lenders due to "pre-existing disparities in access to capital."
- House Committee on Small Business Chairwoman Velázquez's evidence offered into the record showing that "[t]he COVID-19 public health and economic crisis has disproportionally affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses" and that "minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit."
- Witness testimony that emphasized the "[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital" and noted that "[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th."
- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, "due to the heavy reliance on large banks, with whom they have had historically poor relationships."
- Evidence presented at other hearings showing that minority and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing "long-standing structural racial disparities in small business ownership and performance."
- A statement of the Center for Responsible Lending describing present-day "overtly discriminatory practices by lenders" and "facially neutral practices with disparate effects" that deprive minority-owned businesses of access to capital.

This evidence, the court found, "largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification." The court, quoting the *Croson* decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities,

"[d]efining these sorts of injuries as 'identified discrimination' would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in "remedying the effects of past and present discrimination" in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an "important governmental objective" or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the Court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants' use of race-based and sex-based preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs' motion for temporary restraining order, and enjoins Defendants to process Plaintiffs' application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

iii. **Faust v. Vilsack,** 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021)**.** This is a federal district court decision that on June 10, 2021 granted Plaintiffs' motion for a temporary restraining order holding the federal government's use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The district court granted the motion for a temporary retraining order.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, "Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA." It advises that, in June 2021, the FSA will begin to process signed letters for payments, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20 percent of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt."

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. "The government has a compelling interest in remedying past discrimination only when three criteria are met." (*Citing Vitolo*, F.3d at, 2021 WL 2172181, at *4; *see also City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989) (plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

"First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." *J.A. Croson Co*., 488 U.S. at 498, 109."

"Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co*., 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination.... "

"Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government "shows that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of a local industry," then the government can act to undo the discrimination. *J.A. Croson Co*., 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles."

The court found that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry…. But Defendants cannot rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest." *Citing J.A. Croson Co*., 488 U.S. at 498; see also *Parents Involved*, 551 U.S. at 731, (plurality opinion) ("remedying past societal discrimination does not justify race-conscious government action"). The court pointed out "Defendants' evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities."

The court concluded that: "Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts." "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way." *Citing Vitolo,* 2021 WL 2172181, at *5. The court held "Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications."

In addition, the court found "Defendants have not established that the remedy is narrowly tailored. To do so, the government must show "serious, good faith consideration of workable

race-neutral alternatives." *Citing Grutter v. Bollinger*, 539 U.S. 306, 339, (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, "they have not shown that Congress engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here. *Citing Vitolo*, 2021 WL 2172181, at *6.

The court stated: "The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin."

The court found "Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race." On this record, the court held, "Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests."

Conclusion. The court found a nationwide injunction is appropriate in this case. "To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper."

This case remains pending at the time of this report. The court on July 6, 2021, issued an Order that stayed the Plaintiffs' motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (*see* below), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the *Wynn* case. For the same reason, the court dissolved the temporary restraining order.

iv. **Wynn v. Vilsack** (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. In *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla., which is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (June 10, (2021) case in district court in Wisconsin, the court granted the Plaintiffs' Motion for Preliminary Injunction holding: "Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency … are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court."

The court in *Faust* granted the Plaintiffs' Motion for Temporary Restraining Order for similar reasons and as discussed below in an Order issued on July 6, 2021, stayed a Motion for Preliminary Injunction and dissolved the Temporary Restraining Order as not necessary based on the *Wynn* holding imposing a nationwide injunction.

Background. In *Wynn,* Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), 2 which provides debt relief 3 to "socially disadvantaged farmers and ranchers" (SDFRs). (Doc 1; Complaint). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120 percent of the indebtedness, as of January 1, 2021, of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 U.S.C. § 2279's definition of an SDFR as "a farmer of rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." see also U.S. Dep't of Agric., American Rescue Plan Debt Payments, https://www.farmers.gov/americanrescueplan (last visited June 22, 2021). White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005's provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys' fees and costs.

Strict Scrutiny. The court, similar to the court in *Faust,* applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action. The statistical and anecdotal evidence presented, the court stated, appears insufficient.

Compelling Governmental Interest. The Government stated that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination. In cases applying strict scrutiny, the court said the Eleventh Circuit has instructed:

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.

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted). Thus, the court found that to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. *Id.* at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.,* the court noted the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained:

A 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. However, 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.

Here, to establish the requisite evidence of discrimination, the court stated the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress' request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. Based on the historical evidence of discrimination, Congress took remedial measures to correct USDA's past discrimination against SDFRs.

Due to the significant remedial measures previously taken by Congress, for purposes of this case, the court pointed out that historical evidence does little to address the need for continued remediation through Section 1005. Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA's past discrimination or that the Government remains a "passive participant" in discrimination in USDA loans and programs. See *Eng'g Contractors*, 122 F.3d at 911. The court found that this is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The Government contends its prior measures were insufficient to remedy the effects of past discrimination, but the court found the actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory. Where a race-neutral basis for a statistical disparity can be shown, the court concluded it can give that statistical evidence less weight. *Eng'g Contractors*, 122 F.3d at 923. Here, the statistical discrepancies presented by the Government, the court found, can be explained by non-race related factors—farm size and crops grown—and the Court finds it unlikely that this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

On the record presented here, the court expressed "serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action. The statistical and anecdotal evidence presented appears less substantial than that deemed insufficient in Eng'g Contractors, which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for

government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts. *Id*. at 912."

The court said to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to white farmers.

The court held that nevertheless, at this stage of the proceedings, it need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the Government's evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, the court found Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest.

Narrowly Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court stated Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must be only a 'last resort' option." *Eng'g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the court noted the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

The court found that the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident. More importantly, the court stated Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120 percent debt relief—and no one else receives any debt relief.

Regardless of farm size, an SDFR receives up to 120 percent debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120 percent debt relief. Yet, the court said, a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or

ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005.

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough Cnty*., 908 F.2d 908, 910 (11th Cir. 1990). The court in *Cone Corp* pointed to several critical factors that distinguished the county's MBE program in that case from that rejected in *Croson*:

> "(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in *Croson*, the county's program did not benefit "groups against whom there may have been no discrimination," instead its MBE program "target[ed] its benefits to those MBEs most likely to have been discriminated against . . . ." *Id*. at 916-17.

The court found that "Section 1005's inflexible, automatic award of up to 120 percent debt relief only to SDFRs stands in stark contrast to the flexible, project by project Cone Corp. MBE program."

The court noted that in *Cone Corp*., although the MBE program included a minority participation goal, the county "would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses." In this way the Court in *Cone Corp*. observed the county's MBE program "had been carefully crafted to minimize the burden on innocent third parties." *(Citing Cone Corp*., 908 F.2d at 911).

The court concluded the "120 percent debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the *Cone Corp*. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in *Croson* and other similar cases."

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. "It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship." The court found "Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination."

Finally, the Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. "The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy

USDA's discrimination against SDFRs…. However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers." However, the court stated, "the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race."

Thus, on the current record, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, the court held Plaintiff is likely to show that Congress "failed to give serious good faith consideration to the use of race and ethnicity-neutral measures" to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a "last resort," but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest. The court holds "it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradicate the evils of discrimination that remain following Congress' prior efforts to remedy the same." Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court. The court also ordered that the parties confer and submit a proposed expedited schedule to resolve the merits of the action.

v. Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al., U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

This is a challenge to the Shelby County, Tennessee "MWBE" Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C.

Sections 1981, l983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The case at the time of this report is in the middle of discovery. The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

In addition, Plaintiffs on February 17, 2020, filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County's ability to present proof at trial due to the non-party MTA's failure to meet its discovery obligations, that nothing in the record attributes MTA's failure to meet its discovery obligations to the County, and that MTA's efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA's appeal to the Ninth Circuit.. The district court in Tennessee stated in a footnote: "Now that the Ninth Circuit has dismissed MTA's appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose."

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.

The parties filed on September 25, 2020, with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission, which was provided in October 2020.

The parties filed a Stipulation of Dismissal with Prejudice with the court on January 4, 2021. The federal court in Tennessee on January 4, 2021, issued an order and Judgment approving the settlement and dismissing the case.

vi. Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc., Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida.

In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also denied a motion by AGC to be elevated to party status and to conduct discovery. The court held a Case Management Conference on August 17, 2020, and ordered that MTA's Motion to Dismiss be scheduled for a hearing at a date mutually agreeable to the parties.

The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in- camera inspection are exempted from the Public Records Act.

On February 1, 2021, the court issued a final order finding that the records of MTA sought by the County fell within the trade secret exemption of the state of Florida Public Records Act. The court thus held the County's Complaint for breach of contract and specific performance were dismissed as moot.

vii. CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege that this cause of action arises from Defendant's Minority and Women's Business Enterprise Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based

on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis.

Plaintiffs allege they are Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs claim the Northern Cherokee Nation is an American Indian Tribe with contacts in what is now known as the State of Missouri since 1721.

Plaintiff alleges the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiff alleges the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs.

The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors to the Equal Protection of Laws in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification and Compliance Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

As a result of the City's deliberate indifference to their rights under the Fourteenth Amendment, Plaintiffs claim they have suffered loss of business, loss of standing in their community, and damage to their reputation by the City's decision to decertify the MBE status of these companies, and incurred attorney's fees and costs.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation.

Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition a Minority Group Member under its policy and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiffs, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

The court issued a Memorandum and Order, dated July 27, 2020, which provided the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August. The court on September 14, 2020, issued an order over the opposition of the parties referring the case to mediation "immediately," with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City also agreed for this case only to a rebuttable presumption that the plaintiffs in the case are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.

In addition, the City agreed that it will pay plaintiffs $15000 in attorney's fees, and related orders. The City agreed that it will use best efforts to process Plaintiffs' certification applications and will provide a decision on each application by August 2, 2021. If the Plaintiffs are not certified as an MBE under the revised October 2020 rules, Plaintiffs reserve their right to pursue all claims relating to the decision.

viii. **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.,** U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants filed a Motion to Dismiss asserting inter alia that the court does not have jurisdiction. Plaintiff has filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021, issued an Memorandum Opinion and Order granting in part and denying in part the Motion to Dismiss. The court held that plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part defendants' Motion to Dismss holding that plaintiff's 42 U.S.C. Section 1981 claims are dismissed as that section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8 (a) Program.

The court on April 9, 2021, entered a Scheduling Order providing that defendants shall file an Answer by April 28, 2021 and set a Bench Trial for October 11, 2022, with Dispostive Motions due by June 6, 2022. Defendants filed their Answer to the Complaint on April 28, 2021. Plaintiffs on May 20, 2021 filed a Motion to Amend/Revise Complaint, Defendants filed their Response to Motion to Amend on June 4, 2021 and Plaintiffs filed on June 8, 2021 their Reply to the Response. The Motion is pending at this time.

ix. **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams,** In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was

instructed to award 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the 12 provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature prior to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related

to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to government procurement contracts only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts before enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to

the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires 15 percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), 15 percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots 12 licenses to be issued to the most qualified applicants. By allowing a 15 percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the 15 percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

The court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court found R.C. §3796.09(C) is unconstitutional on its face.

The case was appealed in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954. The appeal was voluntarily dismissed in March, 2021.

In the Court of Common Pleas, on March 11, 2021 the parties filed a Joint Motion to Dismiss Remaining Claims and Counterclaims Without Prejudice, and the Court of Common Pleas Ordered the dismissal of the remaining Counts of the Complaint and Counterclaim without prejudice.

x. Circle City Broadcasting I, LLC ("Circle City") and National Association of Black Owned Broadcasters ("NABOB") (Plaintiffs) v. DISH Network, LLC ("DISH" or "Defendant"), U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.

This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City. Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981. Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations located in and serving Indianapolis, Indiana and the surrounding areas.

NABOB is a nonprofit corporation. The Amended Complaint alleges that NABOB represents 167 radio stations owned by 59 different radio broadcasting companies and 21 television stations owned by 10 different television broadcasting companies. The Amended Complaint alleges NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country. Plaintiffs allege that as the voice of the African American broadcast industry for the past 42 years, NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success in broadcasting for African Americans and other minorities.

Plaintiffs claim that DISH insists on maintaining the industry's policies and practices of discriminating against minority-owned broadcasters and disadvantaged business by paying the non-minority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.

Plaintiffs assert that DISH's policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.

Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.

Circle City sues for retransmission fees at a fair market rate, actual and punitive damages, interest, attorneys' fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous "negotiations" with Circle City. NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.

The court issued an Order on May 18, 2021, regarding discovery and noted that it does not appear that settlement would be productive at this time; thus, the case will proceed with discovery. The court set a pretrial conference in February 2022, and the case is pending at the time of this report.

xi. **Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al.,** U.S. District Court for District, District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.

This Complaint concerns Senate Bill 20B-001 ("SB1") signed into law by the Governor of Colorado on December 7, 2020. The Complaint claims unconstitutional race-based classifications in SB1, including those in Section 8 providing economic relief and stimulus only to minority-owned businesses; provisions will be codified at Colo. Rev. Stat. §24-49.5-106. SB1appropriates $4 million for COVID-19 relief payments for "minority-owned businesses."

Plaintiffs allege Caucasian businesses are excluded from participating in these relief payments based on the racial identities of the business owners. The appropriation of $4 million for use by the Colorado Minority Business Office is to provide "relief payments, grants and loans to minority-owned businesses."

SB1 directs the Colorado Minority Business Office to use a portion of the funds "to provide technical assistance and consulting support to minority-owned businesses across the state." SB1 provides three primary forms of economic relief exclusively to minority-owned businesses: direct relief payments, grants and loans for startup capital, and funds to provide minority-owned business leaders with professional development and networking opportunities.

SBE directs Director of CMBO to establish a process for minority-owned businesses to apply for economic stimulus benefits, with a threshold requirement to applying is that the business be "minority owned" as defined by SB1.

Plaintiffs allege SB1's provision limiting certain economic stimulus payments to minority-owned businesses violates the Equal Protection Clause of the Fourteenth Amendment by unconstitutionally making facial racial classifications.

The Plaintiffs filed a Motion for Preliminary Injunction and Defendants filed a Motion to Dismiss. The court held a hearing on the preliminary injunction on April 6, 2021. Based on the status of the case, the court found the record is undeveloped or the future uncertain, the case is unripe, and the Plaintiffs brought the case before any implementing regulations had been adopted and without information regarding their own eligibility for economic assistance.

Given that the issue is not ripe for review, and it is unclear whether Plaintiffs have standing as a result, the court found that it is inappropriate to address the preliminary injunction factors. Although a preliminary injunction is, by definition, preliminary relief, a litigant still must have standing and the claim must be ripe. Without these two prerequisites, the court stated, it is inappropriate to exercise jurisdiction, whether preliminary or final. Accordingly, the motion for preliminary injunction will be denied. And, the court based on this status of the case, took the further step and dismissed the case in its entirety.

The court thus held on April 19, 2021, that the Plaintiffs' claims were dismissed without prejudice and granted the Defendants' Motion to Dismiss, and held that the Plaintiffs' Motion for Preliminary Injunction is denied.

xii. Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al., Case No.: Gjh-20-981, In the United States District Court for the District of Maryland, Southern Division. Complaint filed in April 2020.

This case involved a complaint filed in response to the distribution of PPP funds that "resulted in a disproportionate number of minority-owned and female-owned business owners unfairly left without relief."

Plaintiffs, two owners of Maryland small businesses, sued Defendants U.S. Department of the Treasury, the U.S. Small Business Administration ("SBA") regarding the guidelines governing the first round of funding for the Paycheck Protection Program ("PPP") in April 2020.

Plaintiffs alleged Defendants knowingly and intentionally discriminated against MBE/WBEs by prohibiting businesses without employees from applying for funding until a week after businesses with employees could apply, leaving only a short period before the funds were depleted. In anticipation of legislation authorizing a second round of funding for the PPP, Plaintiffs moved for a temporary restraining order and preliminary injunction halting the entire PPP from proceeding until Defendants took steps to guarantee more equitable distribution of PPP funds before they were exhausted a second time.

Plaintiffs' asserted claims under the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. §706(2). Court on April 26, 2020 held Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction was denied.

Court found Plaintiffs did not demonstrate a likelihood of success on their claims or that their remedy would be in the overall interest of the greater public. Court held Plaintiffs did not show Defendants' knowingly and intentionally discriminated against MBE/WBEs with no employees, and thus did not prove violation of the equal protection component of the Fifth Amendment's Due Process Clause. Plaintiffs did not show that an "invidious discriminatory purpose was a motivating factor" behind the Defendants' decision making in administering the PPP.

Court pointed out that while "a showing of disparate impact on a protected group and the foreseeability of this impact is relevant to prove that the decision maker acted with a forbidden purpose, 'impact alone is not determinative, and the Court must look to other evidence."

After the denial of the Temporary Restraining Order and Preliminary Injunction, Motions to Dismiss were filed by Defendants mainly asserting lack of jurisdiction and failure to state a claim. Plaintiffs and Defendants subsequently entered into a Stipulation of Dismissal with prejudice on October 27, 2020.

This list of recent pending and informative cases is not exhaustive, but in addition to the cases cited previously, may potentially have an impact on the study and implementation by state DOTs and state and local governments regarding the implentation of the Federal DBE/ACDBE Programs and MBE/WBE/DBE programs, and related legislation.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, the Federal DBE and ACDBE Programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

SUMMARIES OF RECENT DECISIONS

D. Recent Decisions Involving State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program in the Ninth Circuit Court of Appeals

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019).

Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a

DBE under federal law. The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of "Black American" and "Native American" are void for vagueness. The district court dismissed' the claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations' requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor's claims againt Acting Director of the USDOT's Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor's

discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color or state law" as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor's claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well founded reason" to question Taylor's membership claims, and that Taylor did not qualify as a "socially and economically disadvantaged individual." Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor's equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office

of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id*. Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African, and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id*. Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a "member of a designated disadvantaged group," the court stated Mr. Taylor "must demonstrate social and economic disadvantage on an individual basis." *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and "articulated a rational connection between the facts found and the choices made." *Id*. at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE "program requires states to extend benefits only to those who are actually disadvantaged." *Id., citing Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was "actually disadvantaged" or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, *citing Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of*

Transportation, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations "weigh adversely and disproportionately upon" mixed-race individuals, like Mr. Taylor. *Id*. This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at *14, *citing Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* at *14, *quoting Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of "Native Americans" now "includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." *Id., citing,* 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Id.* at *17, *quoting Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

3. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

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

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

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

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.,* MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in

evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

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

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

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

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

West, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

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

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

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

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

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

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

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

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

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memornadum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further

compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see,* 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West's expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. W. States Paving, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results Mountain West, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that "some of the population samples were very small and the result may not be significant statistically." 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than 10 percent of total contract volume in the State's transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 ("If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination."); *Id.* at 1001 ("The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs."). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting* U.S. Dep't of Transp., *Western States Paving Co. Case* Q&A (Dec. 16, 2014) ("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and *quoting Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual

discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of parties (March 14, 2018).

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

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

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

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id*. at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id*. Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the

federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id*., *citing Western States Paving Co*., 407 F.3d at 990-995, 999-1002.

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

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

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

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

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id*. at 1192.

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

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id*. at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id*. However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id*. The Court

noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id*.

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

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

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

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id*. at 1193.

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

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

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

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

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

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

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

Application of strict scrutiny standard articulated in Western States Paving. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving.* The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (*quoting Western States Paving,* 407 F.3d at 997–99).

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

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

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

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

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id*. at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination … may vary." *Id.* at 1197 (*quoting Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (*citing Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

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

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

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

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

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id*. at 1198, *citing Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id*. The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

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

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id*. at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

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

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, *citing Grutter v. Bollinger,* 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California. Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient

Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

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

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

5. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9th Cir. 2013). This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

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

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

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

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the

government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

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

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

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

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

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

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

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

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

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

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

6. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al*., 2013 WL 4774517 (D. Mont.) (2013). This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id*.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE

subcontractors (although the court points out that Weeden's bid actually identified only 0.81% DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id*. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id*. at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id*. at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id*.

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

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

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id*. The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id*. The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id*. The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id*.

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id*. at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Program as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id*. at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id*.

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

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

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

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the

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

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

7. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012). Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

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

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

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

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The

court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

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

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

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

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

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

8. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own

boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

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

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

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

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

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

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in

favor of a higher bidding minority-owned subcontracting firm. *Id*. at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id*. The prime contractor expressly stated that he rejected plaintiff's bid due to the minority utilization requirement. *Id*.

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

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

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

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

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

discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

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

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

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

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id*. WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled

11.17%). *Id*. WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id*. Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id*. at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id*. WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id*.

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

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

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

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

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

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

9. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion). This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

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

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

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

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

reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

10. *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 defendants also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id*. at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not

meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id*. The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas … [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Id*. at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id*. at 711.

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

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id*. at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id*. at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (*e.g.*, inclusion of Aleuts). *Id*. at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Id*. at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

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

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

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id*. at 1405. The

district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id*. at 1412.

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

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id*. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id*. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id*. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id*. at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id*. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id*. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id*. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id*. The Ninth Circuit stated than in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id*. at 1414, *citing Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id*. at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when

evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id*. The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id*. at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id*. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id*.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id*. at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id*. at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id*. According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id*. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id*. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*. at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id*. at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id*. at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id*. at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id*. at

1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id*. at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id*. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id*. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id*. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id*. 1418.

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

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

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

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

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

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

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

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

businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id*.

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

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

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

A second indicator of a program's narrowly tailoring is program flexibility. *Id*. at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id*. at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id*. at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id*.

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

levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id*.

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

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

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

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

13. Coral Construction, Inc. v. City and County of San Francisco, et. al., 50 Cal. 4th 315, 235 P.3d 947, 113 Cal.Rptr.3d 279 (S. Ct. Cal. 2010). In Coral Construction, Inc. v. the City and County of San Francisco ("Coral Construction"), the Supreme Court of the State of California considered an action brought against the City and County of San Francisco for declaratory and injunctive relief from an ordinance establishing an MBE/WBE program, which established race- and gender-based remedies on construction contracts. 235 P.3d at 952-956. The parties filed cross-motions for summary judgment in the Superior Court of the City and

County of San Francisco. 235 P.3d at 955-56. The Superior Court struck down the MBE/WBE ordinance as violative of California's constitutional amendment (Proposition 209) prohibiting race- and gender-based preferences in public contracting. 235 P.3d at 956.

The City and County of San Francisco (the "City") appealed to the California Court of Appeals, which affirmed in part, reversed in part, and remanded the case back to the Superior Court of the City and County of San Francisco. 235 P.3d at 956. The Court of Appeals remanded the case for adjudication of the City's claim that the federal equal protection clause required the ordinance. *Id*. The Supreme Court of the State of California granted review, superseding the opinion of the California Court of Appeals. *Id.*

Political structure doctrine. Article I, section 31 of the California Constitution ("section 31") prohibits a city awarding public contracts to discriminate or grant preferential treatment based on race or gender. 235 P.3d at 952. The Court stated that the City of San Francisco, "whose public contracting laws expressly violate section 31 challenges its validity under the so-called political structure doctrine, a judicial interpretation of the federal equal protection clause." 235 P.3d at 952. The Court held that section 31 does not violate the political structure doctrine. *Id.* The Court also held that section 31 prohibits race- and gender-conscious programs the federal equal clause permits but does not require. 235 P.3d at 957. The Court stated that section 31 prohibits discrimination and preferential treatment but poses no obstacle to race- or gender-conscious measures required by federal law or the federal Constitution. *Id*.

The Court, joining with the United States Court of Appeals for the Sixth and Ninth Circuits, concluded that the political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender and other similar classifications. *Id*. at 958-9. The Court found that a generally applicable rule forbidding preferences and discrimination not required by equal protection, such as section 31, does not require the same justification as a remedy in which racial preferences are required by equal protection as a remedy for discrimination. *Id.* at 960.

Federal funding exception. The Court also rejected the City's argument that the MBE/WBE ordinance is unaffected by section 31 because the ordinance falls within the exception set out in subdivision (e) of section 31, which provides the section shall not be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state. 235 P.3d at 961. The Court rejected the City's argument that its MBE/WBE ordinance invokes the federal funding exception to section 31 in subdivision (e). *Id.* The Court concluded that the relevant federal regulations do not require racial preferences by the City. *Id.* The Court only addressed the question whether the relevant federal regulations, independently of the federal equal protection clause, required the City's MBE/WBE ordinance. *Id.* at n. 14.

The Court found that the federal regulations did not compel the City to adopt the MBE/WBE ordinance to avoid a loss of federal funding. *Id.* at 962. The Court made a distinction between regulations that mention race-based remedies which are permissive from regulations that require race-based remedies. *Id.* The Court held that the federal funding exception under subdivision (e) of section 31 does not exempt the MBE/WBE ordinance from section 31's general prohibition of racial preferences. *Id.* at 962.

Federal compulsion argument. Finally, the Court considered the City's argument that the federal equal protection clause requires the MBE/WBE ordinance as a remedy for the City's own discrimination. 235 P.3d at 962. The Court held the California Court of Appeals ruled correctly and affirmed its judgment remanding the case for the limited purpose of adjudicating the issue of whether the federal equal protection clause requires the MBE/WBE ordinance as a remedy for the City's own discrimination under the federal compulsion doctrine. *Id*.

The Court stated that unlike the political structure and federal funding issues, which it may resolve as questions of law, the federal compulsion claim is largely factual and depends on the evidence supporting the City's decision to adopt race-conscious legislation. *Id*. at 963.

The Court offered certain "comments" to assist the superior court in resolving the federal compulsion issue on remand. 235 P.3d at 963-965. The Court stated that the relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting. *Id*. at 963. The Court said that the "only possibly compelling governmental interest implicated by the facts of this case is the interest in providing a remedy for purposeful discrimination." *Id*. at 964.

The Court held that for the City to defeat plaintiff's motion for summary judgment, the City must show that triable issues of fact exist on each of the factual predicates for its federal compulsion claim, namely: (1) that the City has purposely or intentionally discriminated against MBE's and WBE's; (2) that the purpose of the City's MBE/WBE ordinance is to provide a remedy for such discrimination; (3) that the ordinance is narrowly tailored to achieve that purpose; and (4) that a race- and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury. 235 P.3d at 964. The City, the Court stated, must establish all of these points to establish the federal compulsion doctrine. *Id*.

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

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010). The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of

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

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

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

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

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. *Id*. at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified by [the study] … that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." *Id*. at 239 *quoting* section 136-28.4(c)(2)(2010).

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

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

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

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

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

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

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the necessity for remedial action. *Id*. at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id*. at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *Id*. at 242, *citing Concrete Works*, 321 F.3d at 991.

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

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

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

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

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

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

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

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

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

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

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id*. The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id*. For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id*. The Court found there was at least a 95

percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id*.

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id*.

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id*.

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id*. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id*.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id*. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id*. at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id*. at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American

ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id*. The Court concluded plaintiff did not offer any contrary evidence. *Id*.

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id*. at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id*. at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id*. at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id*. at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id*. at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id*. at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id*.

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American

respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id*. at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id*.

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id*. at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id*. at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id*. at 249. It was noted that the samples of the minority groups were randomly selected. *Id*. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id*. at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id*. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and

demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id*.

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id*. The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id*. at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id*. The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id*. at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] … every conceivable race-neutral alternative." 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id*. at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id*. at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id*.

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these "persistent disparities indicate the necessity of a race-conscious remedy." 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program's inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id*. at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program's goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program's participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id*. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id*. The Court found there was a lenient standard and flexibility of the "good faith" requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id*.

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id*. at 254.

Women-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id*.

The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id*. at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id*. at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id*. In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id*.

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id*. at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id*.

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id*. Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id*.

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination again African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it

upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id*. The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id*.

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006). This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (i.e., those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id*. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id*.

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id*. Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id*. at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id*. at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id*. at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id*. at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id*. at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." *Id*. Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id*. at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id*. at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006). In *Rapid Test Products, Inc. v. Durham School Services Inc.,* the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh

Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

4. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion). Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id*.

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id*. On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id*.

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id*. The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id*. Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community." *Id*. The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id*.

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id*. The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id*.

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id*. The Board also

implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id*. at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id*. Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id*. Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id*. In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id*. In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the "District was only looking for 'black-owned firms.'" *Id*. Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id*.

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id*. at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id*. Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id*.

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id*. at 267. The court first questioned whether the identified government interest was compelling. *Id*. at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id*.

The court held the MVP was not narrowly tailored for two reasons. *Id*. First, because no evidence existed that the District considered race-neutral alternatives to "avoid unwitting discrimination." The court found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake." *Id*., *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id*. at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id*. at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id*. "[R]ace conscious … policies must be limited in time." *Id*., *citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id*. at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to

lose a contract that he would have otherwise received. *Id*. Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id*. at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id*.

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id*. at 270.

5. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari). This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id*. at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id*. In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id*. at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id*. at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id*. The district court conducted a bench trial on the constitutionality of the three ordinances. *Id*. The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id*. The City then appealed to the Tenth Circuit Court of Appeals. *Id*. The Court of Appeals reversed and remanded. *Id*. at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id*. at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U.S. 469, 492 (1989) (plurality opinion). Because "an effort to alleviate the effects of *societal* discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence" supports its conclusion that remedial action is necessary. *Id*. at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id*. Rather, Denver could rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors.'" *Id*., *quoting Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id*.

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id*. The Court of Appeals held that once Denver met its burden, CWC had to introduce "credible, particularized evidence to rebut [Denver's] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities." *Id*. (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver's statistical evidence "by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id*. (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id*. at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on "reasoned analysis rather than through the mechanical application of

traditional, often inaccurate, assumptions." *Id*., *quoting Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id*. at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id*. at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id*. Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id*. After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id*.

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the "1995 Study"). *Id*. at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id*. The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id*. at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id*.

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id*. at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate

than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id*.

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia,* whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the "1997 Study"). *Id*. at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as "the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City's contracts." *Id*.

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id*. The statewide market was used because necessary information was unavailable for the Denver MSA. *Id*. at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id*.

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id*. Using data from the Public Use Microdata Samples ("PUMS") of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

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

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

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id*. at 968-69.

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

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

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

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

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat

upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id*. at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id*. at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id*. at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id*. at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id*., *quoting Adarand VII*, 228 F.3d at 1176.

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

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

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

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id*. at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to

the holdings in *Concrete Works II* and the plurality opinion in *Croson. Id*. The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area." *Id*., *quoting Concrete Works II,* 36 F.3d at 1529 (emphasis added). In *Concrete Works II,* the court stated that "we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." *Id*., *quoting Concrete Works II,* 36 F.3d at 1529.

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

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

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

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

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

In *Adarand VII,* the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of

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

Consistent with the court's mandate in *Concrete Works II,* the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id*. The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id*., *quoting Croson,* 488 U.S. at 492.

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

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

construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

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

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra,* the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id*. at 978.

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

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

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

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

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

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

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

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

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

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

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

Consistent with the court's mandate in *Concrete Works II,* at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id*. at 984, *quoting Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id*. at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id*. at 985.

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

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

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

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

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

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

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

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

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

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

6. In re City of Memphis, 293 F.3d 345 (6th Cir. 2002). This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id*. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage.

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

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplment pre-enactment evidence. *Id*. This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id*. The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

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

7. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001). This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

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

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

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

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

no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons." *Id*. The court, therefore, held that the ordinance was not "narrowly tailored" to the wrong that it seeks to correct. *Id*.

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

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

8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998). This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts.

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

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

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

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

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

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

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

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

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

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id*. at 736. The Court found the problem with Ohio's statistical comparison was that the

percentage of minority-owned businesses in Ohio "did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts." *Id*.

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

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

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

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

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

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id*. at 737.

The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id*.

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute 20 years ago, it would not suffice to continue to justify it forever. *Id*. at 737-738. The MBEA, the Court noted, has remained in effect for 20 years and has no set expiration. *Id*. at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id*. at 737.

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

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

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

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

9. *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999). A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

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

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

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

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

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

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

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

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

because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

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

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

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

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

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

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

discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

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

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

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

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

10. Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997). Engineering Contractors Association of South Florida v. Metropolitan Dade County is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

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

programs). *Id*. The plaintiffs challenged the application of the program to County construction contracts. *Id*.

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

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

On appeal, the Eleventh Circuit considered four major issues:

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

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

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

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

Id. at 903.

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

government interest' and must be 'narrowly tailored' to achieve that interest." *Id*. The Eleventh Circuit further noted:

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

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." *Id*., *citing Croson*, 488 U.S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id*. at 907, *citing Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*)). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." *Id*. (internal citations omitted).

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

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

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

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

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

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

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

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

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

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

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

The Eleventh Circuit then explained the burden of proof:

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

Id. (internal citations omitted).

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

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

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

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

The Eleventh Circuit then summarized:

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

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id*. A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id*.

(internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id*.

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

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id*. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id*. The Eleventh Circuit held that this decision was not clearly erroneous. *Id*.

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

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

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

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

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

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

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

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

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

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

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id*. Although this factor did

not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id*. at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id*., *quoting Croson*, 488 U.S. at 501, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

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

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

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

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

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

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

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

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

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

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

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

order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

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

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id*. However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id*. In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." *Id*., *quoting Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*. at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id*. at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id*.

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

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

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third

parties." *Id*. at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical structure." *Id*. at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id*.

The Eleventh Circuit

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

Id. at 927.

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

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

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

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

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

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

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

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

11. *Contractor's Association of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996). The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court's judgment declaring that the City's DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), affirming, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City's Ordinance sought to increase the participation of "disadvantaged business enterprises" (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51 percent owned by "socially and economically disadvantaged" persons. "Socially and economically disadvantaged" persons are, in turn, defined as "individuals who have ... been subjected to racial,

sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition "includes only individuals who are both victims of prejudice based on status and economically deprived." Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than $5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation "goals" for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance's participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the "lowest responsible, responsive contractor" received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed "the highest goals" of DBE participation at a "reasonable price" did not exert good faith efforts, and the contract was awarded to the "lowest, responsible, responsive contractor" who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court's ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 *citing Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id., citing Contractors II,* 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did "not provide a sufficient evidentiary basis" for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id. citing*, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the 2 percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the "strict scrutiny" standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance's preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its 15 percent goal was appropriate. The City maintained that the goal of 15 percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the 15 percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no "strong basis in evidence" for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was "not 'narrowly tailored' to even the perceived objective declared by City Council as the reason for the Ordinance." *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to "strict scrutiny" review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant;" race-based preferences cannot be justified by reference to past "societal" discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not "fit" the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court

found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. The court found Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin's testimony:

Macklin] went to the contract files and looked for contracts in excess of $30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin

examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility." 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." Like the Supreme Court in *Croson*, the Court stated the district court found significant the City's inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the

work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id., citing,* 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study "mixed data," the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He "mixed" this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of $667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court's suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City's Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at

605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a "sheltered market" basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15 percent set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated "[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms." *Id.* at 606, *citing*, 488 U.S. at 502 . Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City's Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought

to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set–aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15 percent participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7 percent of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7 percent figure. That figure did not provide a strong basis in evidence for concluding that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race–neutral or less burdensome to non–minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives

were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15 percent set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

12. *Contractor's Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 996 (3d Cir. 1993). An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City's motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d. Cir. 1991), affirmed in part and vacated in part the district court's decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id*. at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia,* 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia,* 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17–500. *Id.* The Ordinance established "goals" for the participation of "disadvantaged business enterprises." § 17–503. "Disadvantaged business enterprises" (DBEs) were defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id*. at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17–

501(11)(a), but that a business which has received more than $5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id*. at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing,* 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id*. Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson,* the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id.* at 995, *quoting* 735 F.Supp. at 1295–98. The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; 735 F.Supp. at 1298–99. The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id*. at 995 *citing,* 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id*. at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id*. at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id*. at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance's classification scheme is spelled out in its definition of "socially and economically disadvantaged. *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition's economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982). *Id.* at 999.

a. Strict scrutiny. Under strict scrutiny, a law may only stand if it is "narrowly tailored" to a "compelling government interest." *Id.* at 999. Under intermediate scrutiny, a law must be "substantially related" to the achievement of "important government objectives." *Id.*

The Court agreed with the district court that the definition of "socially and economically disadvantaged individuals" included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged." *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

b. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited

intermediate scrutiny. *Id*. at 1000, *citing Hogan* 458 U.S. at 728. The Ordinance, the Court stated, is such a program*. Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing Coral Constr. Co. v. King County,* 941 F.2d 910, 930 (9th Cir.1991), *cert. denied,* 502 U.S. 1033 (1992); *Michigan Road Builders Ass'n, Inc. v. Milliken,* 834 F.2d 583, 595 (6th Cir.1987), *aff'd mem.,* 489 U.S. 1061(1989); *Associated General Contractors of Cal. v. City and County of San Francisco,* 813 F.2d 922, 942 (9th Cir.1987); *Main Line Paving Co. v. Board of Educ.,* 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson,* which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County,* 908 F.2d 908 (11th Cir.), *cert. denied,* 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing,* 735 F.Supp. at 1307. That standard validates the classification if it is "rationally related to a legitimate governmental purpose."*Id.* at 1001, *citing Cleburne,* 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id*.

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Id*. at 1001-2. The Court noted that in *Croson,* the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id*. at 1002, *quoting,* 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1002, *quoting*, 488 U.S. at 492.

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing,* 488 U.S. at 502.

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id*. at 1002, *quoting,* 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting,* 1295–98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a "*passive participant* " in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." *Id*. at 1002, n. 10, *quoting*, 488 U.S. at 492.

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id*. at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson,* where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Id*., *quoting,* 488 U.S. at 480.

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson,* it discounted this evidence because "other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers." *Id*. at 1002, *quoting,* 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id*. at 1003, *quoting, Coral Constr.,* 941 F.2d at 919 ("anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson,* it is insufficient here. *Id*. But because the combination of "anecdotal and statistical evidence is potent," *Coral Constr.,* 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the "pre-enactment" evidence), and evidence developed by the City on remand (the "post-enactment" evidence). *Id*. at 1003.

Pre–Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson,* available minority-

owned businesses comprise the "relevant statistical pool." *Id*. at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post–Enactment statistical evidence. The "post-enactment" evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the "relevant statistical pool" needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id*. at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id*. at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson.. Id.* at 1004*.* Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the "disparity index." The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the "population" of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id*. at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*'s evidentiary burden is satisfied. *Id*. Disparity indices are highly probative evidence of discrimination because they ensure that the "relevant statistical pool" of minority contractors is being considered. *Id.*

a. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, *citing Cone Corp.,* 908 F.2d at 916 (10.78 disparity index); *AGC of California,* 950 F.2d at 1414 (22.4 disparity index); *Concrete Works,* 823 F.Supp. at 834 (disparity index "significantly less than" 100); *see also Stuart,* 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare O'Donnell,* 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id*.

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their

interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that "[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program." *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. *Id*. Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id*. at 1006. *Croson*'s reference to an "inference of discriminatory exclusion" based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City's statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a "neutral explanation" for the disparity, "showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data." *Id.* at 1007. A *fortiori,* this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors' objections to the study were properly presented to the trier of fact. *Id*. Accordingly, the Court found the City's statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian–Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, six firms owned by Asian–American persons, three firms owned by persons of Pacific Islands descent, and one other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15 percent of the available firms and Asian–American, Pacific–Islander, and "other" minorities represented 0.12 percent of the available firms, and that these firms received no City contracts during the years 1979

through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that 0.27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the "significant statistical disparity." *Id.* at 1008.

b. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent. *Id.* at 1008. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," *Id*. at 1008, *quoting,* 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian–American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id*. In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance's racial preference was "narrowly tailored" to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective "race-neutral measures," such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition's programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City's prior consideration of race-neutral programs to withstand summary judgment. *Id*. at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the 15 percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses "to ensure adequate competition and an expectation of reasonable prices on bids or proposals," and allowed a prime contractor to request a waiver of the 15 percent requirement where the contractor shows he has been unable after "a good faith effort to comply with the goals for DBE participation." *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won $5 million in city contracts. *Id.* Also unlike the Richmond program, the City's program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs "within the Philadelphia Standard Metropolitan Statistical Area." *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance's 15 percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id. Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." *Id., quoting,* 488 U.S. at 507.

The Court pointed out that imposing a 15 percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id*. Given the strength of the Ordinance's showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was "narrowly tailored." *Id*.

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." *Id*, at 1009.

The City contended the gender preference was aimed at the "important government objective" of remedying economic discrimination against women, and that the 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the 10 percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled

on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id*. at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id*. at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the 2 percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id., citing,* 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is "rationally related to a legitimate government purpose," *Id., citing Cleburne,* 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe,* 509 U.S. 312–43 (1993), indicating that "a [statutory] classification" subject to rational basis review "is accorded a strong presumption of validity," and that "a state ... has no obligation to produce evidence to sustain the rationality of [the] classification." *Id.* at 1011. Moreover, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the 2-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id*. at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negativing every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian–American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

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

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference

given MBEs and WBEs. *Id*. The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed $14 million. *Id*.

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

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

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id*. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id*. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id*. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id*. at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id*. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id*. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id*. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id*. The Ninth Circuit stated than in its decision in *Coral*

Construction, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id*. at 1414, *citing Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id*. at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id*. The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id*. at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id*. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id*.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id*. at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id*. at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id*. According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id*. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id*. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*. at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id*. at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral

ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id*. at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id*. at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id*. at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id*. at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id*. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id*. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id*. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id*. 1418.

14. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994). The court considered whether the City and County of Denver's race- and gender-conscious public contract award program complied with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. ("Concrete Works") appealed the district court's summary judgment order upholding the constitutionality of Denver's public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In 1990, the Denver City Council enacted Ordinance ("Ordinance") to enable certified racial minority business enterprises ("MBEs") and women-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." *Id*. at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id*. at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id*. Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE

participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id*.

In 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id*. With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id*.

Standing. At the outset, the Tenth Circuit on appeal considered Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *Id*. at 1518. The court concluded that Concrete Works demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id*.

Specifically, the unequal nature of the bidding process lied in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id*. In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id*. Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id*. at 1519.

In addition to demonstrating "injury in fact," Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver's race- and gender-conscious contract program. *Id*.

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance's race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id*. Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id*.

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing Croson*, 488 U.S. at 492, 509, The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id*. *citing Croson* at 492.

a. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id*. at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id*. at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id*.

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id*. The record revealed that over 80 percent of Denver Department of Public Works ("DPW") construction and design contracts were awarded to firms located within the Denver MSA. *Id*. at 1520. To confine the permissible data to a governmental body's strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id*.

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver's contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id*. at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id*.

b. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id*.

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id*. at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id*. The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id*. Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id*.

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id*. at 1520, *quoting International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id*. at 1521. The court thus deemed anecdotal evidence of

public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id*.

c. Post–Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id*. In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id*. at 1521, *quoting Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id*.

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id*. at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id*. This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id*.

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id*. at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. *Id*. Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id*.

d. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id*. at 1521, *citing Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments "must identify that discrimination ... with some specificity before they may use race-conscious relief." *Id., citing Croson*, at 504. The court said that the Supreme Court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation was whether there exists a "*strong basis in evidence* for [the government's] conclusion that remedial action was necessary." *Id*., *quoting Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id*. at 1521, *citing Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id*. at 1522, *citing Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors

... and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Id*. at 1522, *quoting Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id*. That, the court stated, must be evaluated on a case-by-case basis. *Id*.

The court said that the adequacy of a municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id*. at 1522, *citing Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id*. Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program. *Id*.

Notwithstanding the burden of initial production that rests with the municipality, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id*. at 1522, *quoting Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver's evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id*. at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver's Ordinance would be appropriate. *Id*.

e. Evidentiary Predicate Underlying Denver's Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid–1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id*. at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id*. at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id*. at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id*. at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id*.

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id*. at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id*. In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id*. Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id*.

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id*. at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id*.

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, 0.7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was 0.05 percent for 1980. *Id*. at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id*. Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id*. at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id*. In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id*.

(b) Denver's Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id*. at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report's description of the approximately $85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id*. The

Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id*.

To undermine this data, Concrete Works alleged that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. *Id*. at 1525. However, the court concluded the Report's description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id*. Thus, the court said this line of attack by Concrete Works was unavailing. *Id*.

Concrete Works also advanced expert testimony that Denver's data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id*. Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid–1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." *Id*.

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id*. Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id*. at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id*. at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id*. For MBEs, the DGS data showed a 14 disparity index in 1989 and a 19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id*. For WBEs, the disparity index was 47 in 1989 and 136 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id*.

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id*. at 1526, n.19, *quoting Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no

goals program was imposed. *Id*. at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id*. But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id*. Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id*. The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id*. Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id*.

Empirical data. The third evidentiary item supporting Denver's contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id*. at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id*.

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id*. From 1985 to 1988 (prior to the 1989 modification of Denver's program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id*. However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id*. at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id*.

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id*. at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id*. This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id*.

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id*. at 1528. Although Denver's data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id*. The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id*.

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id*. at 1527 *citing Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp*., 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id*. at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id*.

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id*. The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id*.

Denver presented several responses. *Id*. at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id*. DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id*. at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id*. Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id*.

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id*. at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id*. at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id*.

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was 44 in 1977, 26 in 1982, and 43 in 1990. *Id*. The corresponding WBE disparity indices were 46 in 1977, 30 in 1982, and 42 in 1989. *Id*. This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs— the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id*.

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id*. at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id*. But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Id., quoting Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id*. at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id*.

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id*. The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id*. at 1529, *quoting Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d) Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id*. at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id*.

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id*. at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry

more weight due to the systemic impact that such institutional practices have on market conditions. *Id*.

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id*. at1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id*. at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id*.

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id*. at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id*. The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id*. Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id*. Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id*.

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id*. at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id*. The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id*. at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id*. at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id*. at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

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

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

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

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

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

classification to justify the denial of a Motion for Summary Judgment. *Id*. at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

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

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

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

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

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id*. at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id*. at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id*. Thus, the court required only that a state exhausts

race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id*. The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id*. The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id*.

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

A second indicator of a program's narrowly tailoring is program flexibility. *Id*. at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id*. at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id*. at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id*.

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

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

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

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

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

Recent District Court Decisions

16. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn. 2017). In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's

principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. Id at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately $2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of $1.89 million." *Id.* at 746 . These subcontracts were between WMCC and a general contractor and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBEs and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBEs from obtaining such contracts. *Id.*

Motion to Dismiss—challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id at 754.* Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755*, citing,* 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id*. at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a "commercially useful function." *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that "[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation." *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was "ambiguous" and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, *quoting United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a "commercially useful function."

Id. at 756, *quoting United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was "fronted" as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant's final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government's exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.,*

citing, 49 U.S.C. § 322(a) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); 23 U.S.C. § 304 (The Secretary of Transportation "should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system."); 23 U.S.C. § 315 ("[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.").

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny review," with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757*, citing Midwest Fence Corp.*, 840 F.3d at 942 (*citing Western States Paving Co. v. Washington State Dep't of Transportation,* 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant's motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of $85,221.21; and a $30,000 fine. The case also was terminated on March 13, 2018.

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

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

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id*. at *1 The Magistrate Judge also found that the MWBE program was

constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id*. The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id*.

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

District court order adopting Memorandum & Recommendation of Magistrate Judge.

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

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id*. at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id*. As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id*. Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

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

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

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

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

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

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

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

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

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

sharing of opportunities is, at the core, the point of a remedial program. *Id*. The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

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

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

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

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

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

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

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

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

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

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

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

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id*. at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id*. at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and

MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id*. at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

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

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

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

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

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

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id*. at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the

period as a whole. *Id*. at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id*. at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id*.

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

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

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

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

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

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that

while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

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

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

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

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

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

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

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith

efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id*. An individual target for MBE participation was set for each project. *Id*.

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id*. The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by

women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq*. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id*. NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id*.

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least

every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id*. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

19. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009). In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

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

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id*. Plaintiff Conover also complained

that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id*. The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id*. at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id*. The court found, however, that he provided no specifics about why he did not receive the work. *Id*.

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

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

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id*. at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id*. at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id*.

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

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

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

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

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

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

20. *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 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 13-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.

21. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004). The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the Engineering Contractors Association decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus Hershell Gill is instructive as to the analysis relating to architect and engineering services. The decision in Hershell Gill also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 .3d 950 (10th Cir. 2003). *See discussion, infra.*

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Miami-Dade County (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id*. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id*. The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id*. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id*. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id*. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id*.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id*. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both

times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id*. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id*. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id*.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id*. at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id*. at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id*. at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." *Id*. at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. *Id*. (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." *Id*.

The County presented both statistical and anecdotal evidence. *Id*. at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id*. Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id*. The study used four data sets: three were designed to establish the marketplace availability of

firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id*. Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id*. For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id*.

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id*. Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id*. Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. *Id*. at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id*. Dr. Carvajal's results remained substantially unchanged. *Id*.

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id*.

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id*. The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id*. The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id*.

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id*. at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id*. at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id*. at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id*. The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id*. at 1326. However, the district court found that the anecdotal evidence contradicted Dr.

Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id*.

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id*. (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id*.

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id*. at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id*. at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished … it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id*.

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id*. Instead, the Commissioners voted to continue the HBE program. *Id*. The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id*. at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id*. However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id*. Under either scenario, the HBE program could not be narrowly tailored. *Id*.

The court found the waiver provisions in the HBE program inflexible in practice. *Id*. Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id*. The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id*. at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id*. at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination."

Id. at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id*.

The court held that the County was liable for any compensatory damages. *Id*. at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known … Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional." *Id*. at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs … were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*]." *Id*. at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id*. Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id*. Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id*.

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id*. at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id*. For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

22. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004). This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of

the Fourteenth Amendment by instituting race- and gender-conscious "preferences" in order to increase the numeric representation of "MBEs" in certain industries.

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

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

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

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

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

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

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

23. *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).

24. *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.

25. *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 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.

26. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000). Plaintiff Associated Utility Contractors of Maryland, Inc. ("AUC") filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance ("the Ordinance"). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. ("MMCA") opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment ("the December injunction"). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for Minority-and Women–Owned Business Enterprises ("MWBEs"), which had been established at 20 percent and 3 percent, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed "a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action." *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20 percent of the value of subcontracts be awarded to Minority–Owned Business Enterprises ("MBEs") and 3 percent to Women–Owned Business Enterprises ("WBEs"). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of "[p]ast discrimination in the City's contracting process by prime contractors against minority and women's business enterprises...." *Id.* The City Council also found that "[m]inority and women's business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;" that "[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination." *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and "contract authorities" and to annually specify goals for each separate category of contracting "such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate." *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20 percent MBE and 3 percent WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20 percent MBE and 3 percent WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20 percent and 3 percent goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were "ready and able" to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC's members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the "'injury in fact' is the inability to compete on an equal footing in the bidding process ..." *Id.* at 617, *quoting Northeastern Florida Chapter*, 508 U.S. at 666, and *citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates "that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 616, *quoting Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is "ready and able" to bid in this context, the party will have sufficiently shown that the set-aside goals are "the 'cause' of its injury and that a judicial decree directing the city to discontinue its program would 'redress' the injury," thus satisfying the remaining requirements for individual standing. *Id. quoting Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were "ready and able" to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City's set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City's set-aside goals required AUC members to "select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors" in order to bid successfully on City public works contracts for work exceeding $25,000 ("City public works contracts"). *Id.* at 618. AUC claimed, therefore, that the City's set-aside goals violated the Fourteenth Amendment's guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon

gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618 , *citing United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 619, *quoting Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id. citing Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

> The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, *quoting Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, *citing Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 619, *quoting Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a "two step analysis for evaluating a race-conscious remedy." *Id.* at 619 *citing Maryland Troopers Ass'n*, 993 F.2d at 1076. "First, the [government] must have a 'strong basis in evidence for its conclusion that remedial action [is] necessary....' 'Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Id.* at 619, *quoting Maryland Troopers Ass'n*, 993 F.2d at 1076 (*citing Croson*).

The second step in the *Croson* analysis, according to the court, is to determine whether the government has adopted programs that " 'narrowly tailor' any preferences based on race to meet their remedial goal." *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on "narrow tailoring" as follows:

> The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant

> qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, *quoting Maryland Troopers Ass'n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* at 620, *quoting Virginia*, 518 U.S. at 531, 116. This burden is a "demanding [one] and it rests entirely on the State." *Id.* at 620 *quoting Virginia*, 518 U.S. at 533.

Although gender is not "a proscribed classification," in the way race or ethnicity is, the courts nevertheless "carefully inspect[ ] official action that closes a door or denies opportunity" on the basis of gender. *Id.* at 620, *quoting Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 620, *quoting Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, "[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying *Croson's* evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny." *Id.* at 620, *quoting Contractors Ass'n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 620, *quoting Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that "this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors." *Id.* at 620, *quoting Contractors Ass'n*, 6 F.3d at 1010.

Preenactment versus postenactment evidence. In evaluating the first step of the *Croson* test, whether the City had a "strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary," the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the "strong basis in evidence" that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O'Connor, held that a state entity "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.* at 621*, quoting Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20 percent MBE participation in City construction subcontracts, and for analogous reasons, the 3 percent WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* "strong basis in evidence." *Id*. at 621, n.6, *citing Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African–American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* "strong basis in evidence" requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that "post enactment evidence is admissible to determine whether an affirmative action program" satisfies *Croson*. *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the "strong basis in evidence" inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20 percent for MBEs and 3 percent for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20 percent preference is not supported by a "strong basis in evidence" showing a need for a race-conscious remedial plan in 1999; nor is the 3 percent preference shown to be "substantially related to achievement" of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City's assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary

studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20 percent MBE and 3 percent WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City's motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

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.

27. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000). This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

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

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

28. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999). The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). Id. at 741.

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

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id*. at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given

by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id*. at 745.

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

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

(1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id*.

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id*. at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 %) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id*.

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id*.

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

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past

discrimination was stale and 20 years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id*. at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority buisnesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id*. at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id*.

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

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

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

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

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

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

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

29. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998). This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two-year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to

use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments

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

Recent Decisions in Federal Circuit Courts of Appeal

1. Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017). Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. Id. Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). Id. Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. Id.

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.,* 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race– and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.

2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.

3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *Id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no "affirmative evidence" that IDOT's implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *Id.* at *4.

The district court noted that Midwest Fence's challenge to the Tollway's program paralleled the challenge to IDOT's program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *Id.* at *4. In addition, the court concluded that, like IDOT's program, the Tollway's program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *Id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id*. at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id*. at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT "target market program." *Id*. at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id*. at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id*. Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id*.

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a "compelling interest" to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id*. at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id*.

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 *citing Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id*. at *7. The court found that narrow tailoring requires "a close match between the evil against which the remedy is directed and the terms of the remedy." *Id*. The court stated it looks to four factors in determining narrow tailoring: (a) "the necessity for the relief and the efficacy of alternative [race-neutral] remedies," (b) "the flexibility and duration of the relief, including the availability of waiver provisions," (c) "the relationship of the numerical goals to the relevant labor [or here, contracting] market," and (d) "the impact of the relief on the rights of third parties." *Id*. at *7 *quoting United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id*. at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, *citing* 49 C.F.R. § 26.51(a). Next, on its face, the federal

program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of "any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts," § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state's progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing,* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence "mismatch" argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id*. at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id*. A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id*. at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state's compliance with part of the federal program "impractical," and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id*. at *8, *citing,* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a "mismatch" in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states' overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals "*only* on those [USDOT]-assisted contracts that have subcontracting possibilities." *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the "mismatch." *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with

subcontractor dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found "[t]his prospect is troubling." *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing,* § 26.39(b). The court also noted that the federal program contemplates DBEs' ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence's criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id*. at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id*. The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id*. at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id*. at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id*. But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id*.

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing

firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id*. at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study found that DBEs made up 25.55 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below $500,000 and 8.25 percent of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under $500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5 percent of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84 percent.

Tollway program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id*. at *13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id*.

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01 percent across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence's criticisms. Midwest Fence's expert consultant argued that the study consultant failed to account for DBEs' readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id*. at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs' relative capacity, "meaning a firm's ability to take on more than one contract at a time." The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id*. at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under $500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id*.

The court pointed out that one major problem with Midwest Fence's report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, "speculative at best." *Id.* at *15. The court said the consultant's relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to $500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence's expert similarly argued that the existence of the DBE program "may" cause an upward bias in availability, that any observations of the public sector in general "may" be affected by the DBE program's existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence's speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in

evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence's strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id*. at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id*. The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id*.

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though

they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination", according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al*., 2016 WL 193809 (Oct. 3, 2016). Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (See 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (See summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over $52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification requests or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id*. at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id*. Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77 percent contract DBE goal on the rebid project, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a

showing that the state exceeded its federal authority. *Id.* at 688. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id*. Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id*.

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over $52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, *quoting Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id*. The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bidders List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

IDOT typically adopted a new DBE plan each year. *Id*. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id*. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id*. The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id*. This initial list was corrected for errors in the data by surveying the D&B list. *Id*. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id*. The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id*. IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id*. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id*.

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

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id*. The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id*. at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id*. at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id*. The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id*. at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id*. at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id*. at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id*. at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id*. First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id*. NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id*. The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id*. at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id*. (*citing* 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. *Id*. The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id*. The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id*.

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id*. The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id*. According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id*.

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id*. at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id*. at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id*. According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id*.

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id*.

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

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

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

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

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

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

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

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

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

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal

for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

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

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

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

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

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

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would

be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

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

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

5. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001). This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

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

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

Following the Supreme Court's vacation of the Tenth Circuit's dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). The court's evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id*. at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

"Compelling Interest" in race–conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O'Connor explicitly states: "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." *Adarand III,* 515 U.S. at 237; *see also Shaw v. Hunt,* 517 U.S. 899, 909, (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (*citing Croson,* 488 U.S. at 498–506)). Interpreting *Croson,* the court recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ' "passive participant" in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.' " *Concrete Works of Colo., Inc. v. City & County of Denver,* 36 F.3d 1513, 1519 (10th Cir.1994) (*quoting Croson,* 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Id.*

Evidence required to show compelling interest. While the government's articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id*. at 1166.

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.' " *Concrete Works,* 36 F.3d at 1521 (*quoting Croson,* 488 U.S. at 500, (*quoting* (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, *citing Concrete Works,* 36 F.3d at 1520–21.

After the government's initial showing, the burden shifted to Adarand to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (*quoting Wygant,* 476 U.S. at 277–78, (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* at 1166, *quoting Concrete Works,* at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, *citing Concrete Works,* 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it 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. *Id* at 1166-67 *citing Concrete Works,* at 1523, 1529, and *Croson,* 488 U.S. at 492 (Op. of O'Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, *citing, Appendix—The Compelling Interest for Affirmative Action in Federal Procurement,* 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) ("*The Compelling Interest* ") (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works,* the court noted that:

> Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson,* 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Id. at 1167, *quoting Concrete Works,* 36 F.3d at 1529. Unlike *Concrete Works,* the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government's evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest,* 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors' unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government's evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id*. at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id*. at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing

minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id*. at 1171.

The government's evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 1172.

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government's evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court's decision in *Croson,* numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government's review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest,* 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated 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 [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." *Id. quoting*, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

The court said that it was mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 1172, *quoting Croson* at 501–02. But the court found that here, it was unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works,* the court stated that "[w]e agree with

the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion," and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, *citing Concrete Works*, 36 F.3d at 1528. Although the government's aggregate figure of a 13 percent disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting Croson,* 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample 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. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id*. at 1174, *quoting Croson,* 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing Croson,* 488 U.S. at 500 (*quoting Wygant,* 476 U.S. at 277).

Adarand's rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their "ultimate 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. *Id.* at 1175. The court rejected Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that "racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets." *Id.*

The government's evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id*. at 1176.

The court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id*. at 1176. If Congress had valid evidence, for example that Asian–American individuals are subject to discrimination because of their status as Asian–Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* "Race" the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* at 1176, note 18, *citing,* 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was unrebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id*. The court reiterated that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (*quoting Wygant,* 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (*quoting Wygant,* 476 U.S. at 293, 106 S.Ct. 1842 (O'Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government's initial showing stands. *Id.*

In sum, guided by *Concrete Works,* the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest,* 61 Fed.Reg. 26,050, more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id*. The court therefore affirmed the district court's finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id*. at 1177. In

applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

> [i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, *quoting Paradise,* 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, "the availability of waiver" is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id., quoting Croson*, 488 U.S. at 507 (*quoting Sheet Metal Workers',* 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a "rigid numerical quota," the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, *citing Croson*, 508, As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 476 U.S. at 280–81 (Op. of Powell, J.) (*quoting Fullilove,* 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O'Connor's majority opinion in *Croson* added a further factor to the court's analysis: under– or over-inclusiveness of the DBE classification. *Id*. at 1177. In *Croson,* the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Id., quoting Croson,* 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III,* where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) "[c]onsideration of the use of race-neutral means;" and (2) "whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate." *Id.* at 1177, *quoting Adarand III,* 515 U.S. at 237–38 (internal quotations and citations

omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*'s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over– or under-inclusiveness*. Id.* at 1178.

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

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

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id*. at 1185-1186.

The court stated 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*.

Holding. Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III* 's strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id*. at 1178.

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. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

Recent District Court Decisions

6. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).[236]

In Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al*., 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages

[236] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market

Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id*. The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id*.

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id*. The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id*. The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.,* 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727*, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity

evidence. *Id*. Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become

"overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id*. at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id*. Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT,* the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730*, citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation

of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730.The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731.For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under $500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account

its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal–Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non–DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race–neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. *Id*. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id*.

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as–applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an

"economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small

businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is discussed above in the Seventh Circuit decision in 2016.

7. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014). In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.,* Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id*. at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id*. The party

challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id*.

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id*. at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id*. *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id*. *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id*. at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id*. at *6.

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

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

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

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

private discrimination. *Id*. Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id*.

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

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id*. at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id*. at *14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the

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

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id*. at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

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

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

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

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

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

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id*. at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

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

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

8. *Dunnet Bay Construction Company v. Gary Hannig*, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig*, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project , was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id*. at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id*. at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id*. at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *26, *quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, *quoting Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, *quoting Northern Contracting, Inc.,* 473. F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

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

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

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

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

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

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

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

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

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

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

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

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id*. at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

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

9. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al*., 2013 WL 4774517 (D. Mont.) (September 4, 2013). This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id*.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only 0.81% DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id*. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id*. at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id*. at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id*.

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

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

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE

subcontractor participation are confusing, non-specific and contradictory. *Id*. The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id*. The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id*. The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id*.

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id*. at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Program as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id*. at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id*.

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

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

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court

concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id*. at *4.

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

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

10. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010). Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id*. at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id*.

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

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id*. at 649. The court found that DBEs are

more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id*.

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

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

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

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

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id*. at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. *Id*. The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id*. The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id*.

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

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

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

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

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

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id*. at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id*. at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id*. at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

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

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

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

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

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

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id*. at 654-655.

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

the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id*. at 655.

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

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

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

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

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

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

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

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

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

11. *Geod Corporation v. New Jersey Transit Corporation*, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009). Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

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

preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

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

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

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

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

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id*. at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id*.

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

the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id*.

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

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

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

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

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id*. Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id*. at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id*. at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id*.

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

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

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

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

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

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

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

entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

12. *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.

13. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007). This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

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

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

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

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program

and the level of participation that would be expected but for the effects of past and present discrimination. *Id*. at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id*.

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id*. at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id*. at *7. The study thus calculated a weighted average base figure of 22.77 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 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.

14. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004). This is the earlier decision in *Northern Contracting, Inc.,* 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), see above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (i.e., the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

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

discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

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

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

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

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

efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

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

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

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed $750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

15. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002). This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

16. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003). *Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. Sherbrooke challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

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

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

> by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

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

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

17. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003). The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR")

DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

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

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

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015).

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. Id. The court held, however, that Congress considered and rejected statutory language that included a racial presumption. Id. Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. Id.

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The

statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, *quoting* 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* at *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id.* at *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id.* at *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id.* at *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id.* at *3. On its face, the court stated the term envisions an individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id.* at *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id.* at *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines

socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id.* at *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id.* at *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id.* at *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* at *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* at *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id.* at *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id.* at *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id.* at *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id.* at *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id.* at *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* at *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.* at *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id.* at *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id.* at *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id.* at *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id.* at *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id.* at *22.

2. *Rothe Development Corp. v. U.S. Dept. of Defense, et al*., 545 F.3d 1023 (Fed. Cir. 2008). Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In Rothe, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged business (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantages individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe,* 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the

contract. *Id*. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id*. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id*. at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id*. at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id*. at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity

studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id*. at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id*. at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id*. at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id*. The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id*. The court declined to adopt a "bright-line rule for determining staleness." *Id*.

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id*. at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id*. at 839, *quoting* 61 Fed.Reg. 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id*. at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id*. at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id*. at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id*. at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id*. at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id*. at

875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id*. at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id*. at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id*.

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id*. The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id*., *quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id*. The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id*. The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id*. at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id*.

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id*. at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id*. at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id*. The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id*.

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing 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 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 Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id*. at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id*. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id*. The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id*. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id*.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the

1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 545 F.3d at 1049, *quoting W.H. Scott Constr. Co*., 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016). Plaintiff Rothe Development, Inc. is a small

business that filed this action against the U.S. Department of Defense ("DOD") and the U.S. Small Business Administration ("SBA") (collectively, "Defendants") challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id*. at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id*. Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, *citing DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that

Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id*. at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id*. The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to

accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in

evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id*. at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

4. *DynaLantic Corp. v. United States Dept. of Defense, et al*., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014). Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id*. at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id*. at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id*.

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.,* 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id*. at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id*. Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id*. DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." DynaLantic, at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id*. *quoting Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its

conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 *quoting Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, *citing Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id*. The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*,

and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id*.

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id*.

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence

permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie*

case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id*. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id*. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id*.

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and

training industry." *DynaLantic,* at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id*. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id*.

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id*.

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id*. The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the burden

on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id*. The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. *DynaLantic Corp. v. United States Dept. of Defense, et al*., 503 F. Supp.2d 262 (D.D.C. 2007). *DynaLantic Corp*. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically

disadvantaged individuals. *Id*. Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id*. at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id*. at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id*. at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id*. at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id*. The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id*. at 267.

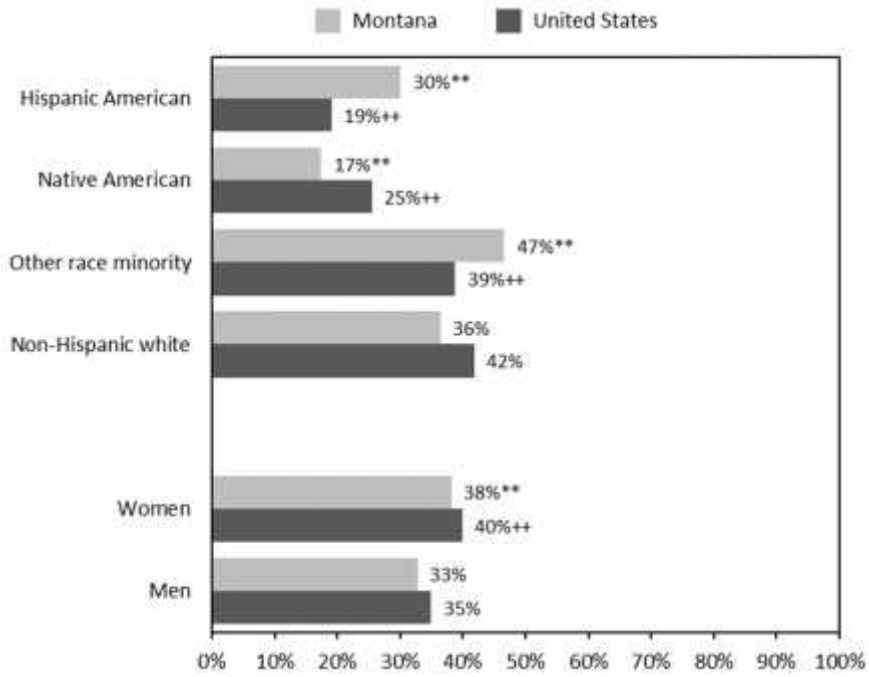
APPENDIX C.
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in Montana to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the state's transportation-related construction and professional services industries. We examined marketplace conditions in four primary areas:

- **Human capital**, to assess whether minorities and women face barriers related to education, employment, and gaining experience;
- **Financial capital**, to assess whether minorities and women face barriers related to wages, homeownership, personal wealth, and financing;
- **Business ownership** to assess whether minorities and women own businesses at rates comparable to white Americans and men, respectively; and
- **Business success** to assess whether minority- and woman-owned businesses have outcomes similar to those of other businesses.

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a four-year degree, Montana and the United States, 2015-2019



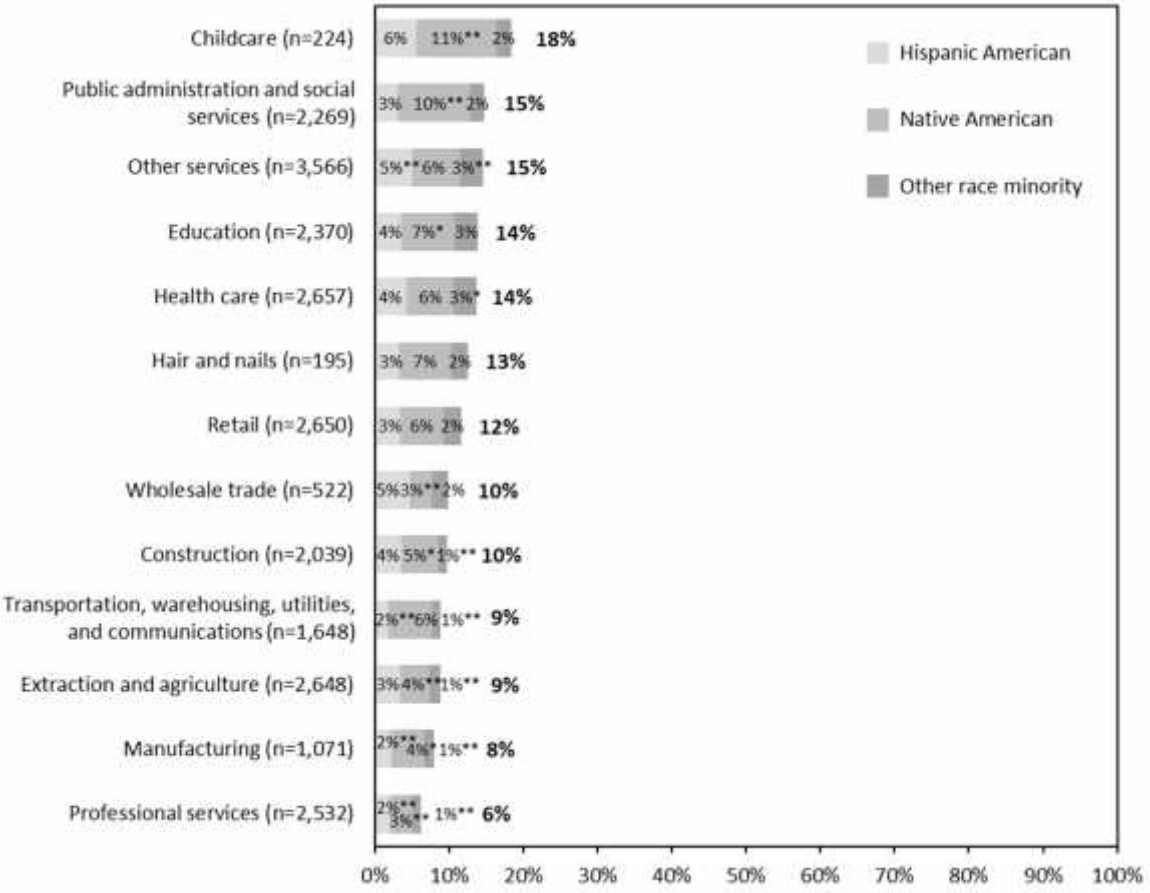
Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level for Montana and the United States, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

Figure C-1 indicates that smaller percentages of Hispanic American and Native American workers have four-year college degrees than white Americans in Montana.

Figure C-2.
Percent representation of minorities in various industries in Montana, 2015-2019



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all Montana workers is 4% for Hispanic Americans, 6% for Native Americans, 2% for Other race minorities and 12% for all minorities considered together.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services.

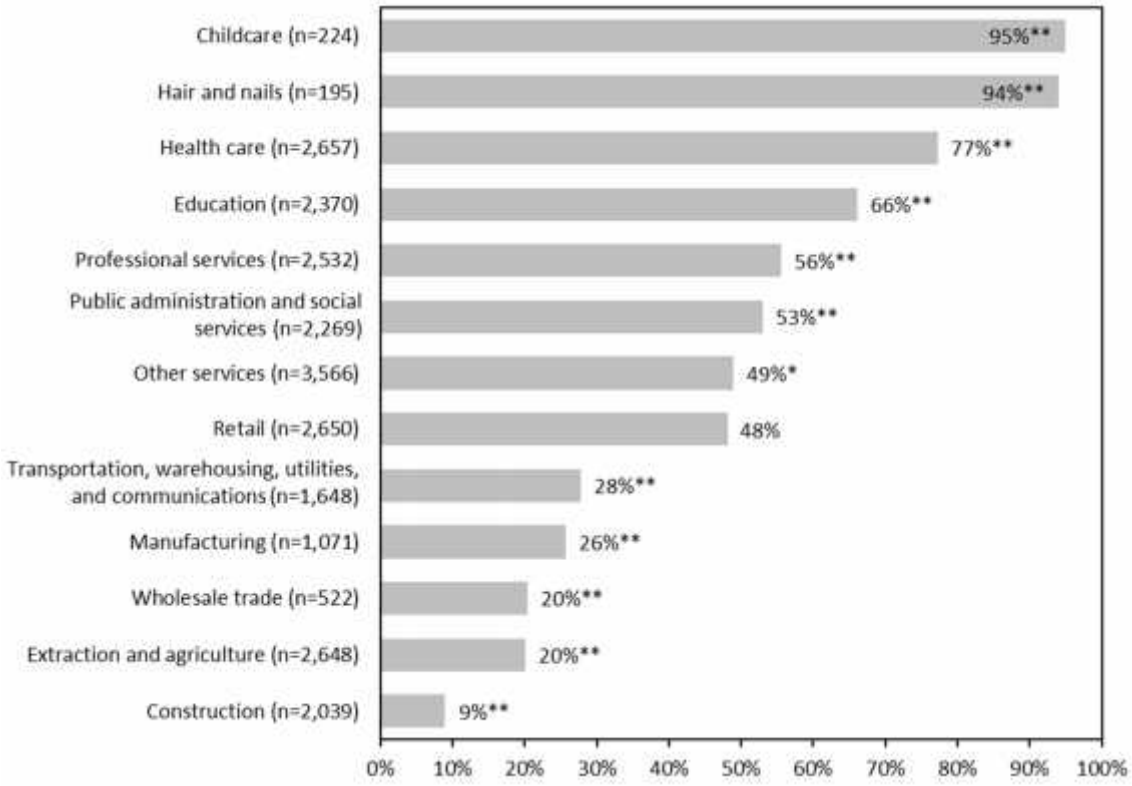
Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services.

All labels less than 2% were removed due to poor visibility.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure C-2 indicates that the Montana industries with the highest representations of minority workers are childcare, public administration and social services, and other services. The Montana industries with the lowest representations of minority workers are extraction and agriculture, manufacturing, and professional services.

Figure C-3.
Percent representation of women in various industries in Montana, 2015-2019



Notes: *, ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all Montana workers is 47%.

Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services.

Workers in the rental and leasing, travel, investigation, waste remediation, arts, entertainment, recreation, accommodations, food services, and select other services were combined into one category of other services.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure C-3 indicates that the Montana industries with the highest representations of women workers are childcare, hair and nails, and health care. The industries with the lowest representations of women are wholesale trade, extraction and agriculture, and construction.

Figure C-4. Demographic characteristics of workers in study-related industries and all industries, Montana and the United States, 2015-2019

Notes:

*, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 90% and 95% confidence level, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

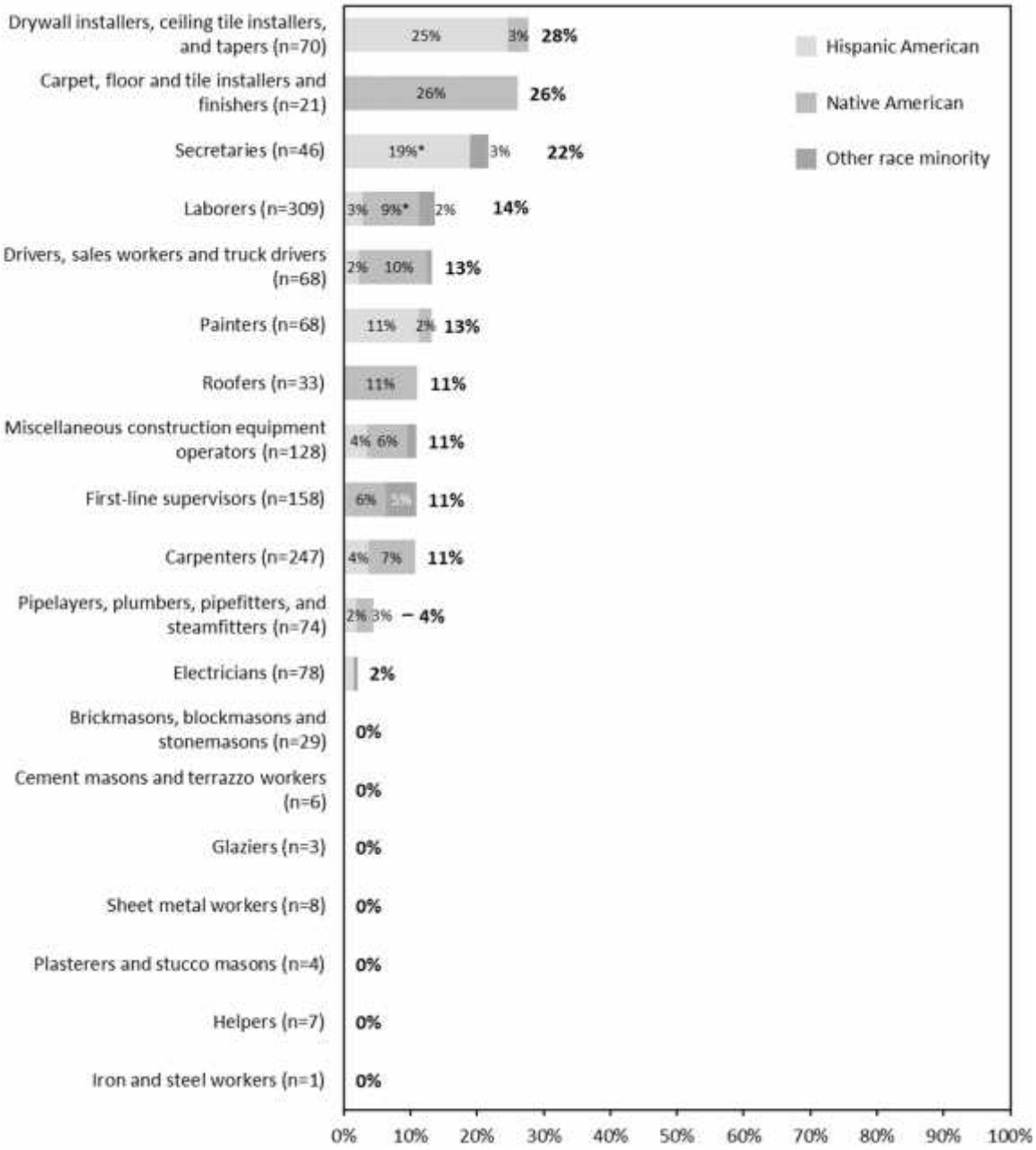
Montana	All Industries (n=24,647)	Construction (n=2,039)	Professional Services (n=470)
Race/ethnicity			
Hispanic American	3.6 %	3.5 %	1.7 % **
Native American	6.0 %	5.0 % *	1.3 % **
Other race minority	2.2 %	1.3 % **	0.6 % **
Total minority	**11.8 %**	**9.8 %**	**3.6 %**
Non-Hispanic white	88.2 %	90.2 % **	96.4 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**
Gender			
Women	46.9 %	9.0 % **	29.2 % **
Men	53.1 %	91.0 % **	70.8 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**

United States	All Industries (n=7,818,941)	Construction (n=485,217)	Professional Services (n=170,585)
Race/ethnicity			
Hispanic American	17.3 %	28.6 % **	9.1 % **
Native American	1.2 %	1.3 % **	0.8 % **
Other race minority	19.4 %	8.3 % **	16.1 % **
Total minority	**37.9 %**	**38.3 %**	**26.0 %**
Non-Hispanic white	62.1 %	61.7 % **	74.0 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**
Gender			
Women	47.2 %	9.7 % **	34.5 % **
Men	52.8 %	90.3 % **	65.5 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**

Figure C-4 indicates that compared to all industries considered together:

- Smaller percentages of Native Americans and other race minorities work in the Montana construction industry. In addition, a smaller percentage of women work in the Montana construction industry.
- Smaller percentages of Hispanic Americans, Native Americans, and other race minorities work in the Montana professional services industry. In addition, a smaller percentage of women work in the Montana professional services industry.

Figure C-5.
Percent representation of minorities in selected construction occupations in Montana, 2015-2019



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all Montana construction workers is 4% for Hispanic Americans, 5% for Native Americans, 1% for other race minorities, and 10% for all minorities considered together.

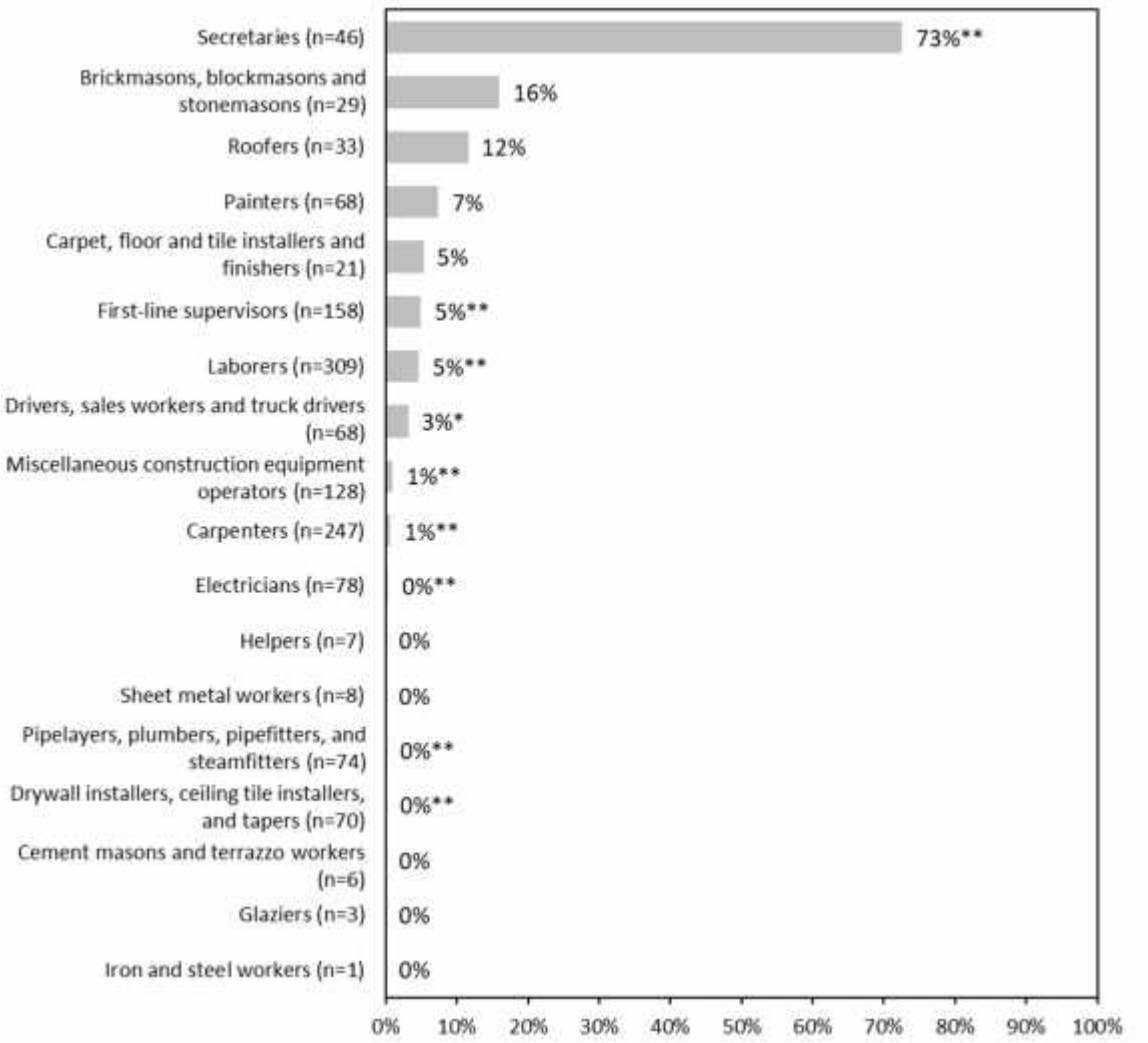
"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators were combined into the single category of miscellaneous construction equipment operators.

Source: BBC from 2015-2019 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in Montana are drywall installers, ceiling tile installers, and tapers; carpet, floor, and tile installers and finishers; and secretaries. The construction occupations with the lowest representations of minority workers are brickmasons, blockmasons, and stonemasons; cement masons and terrazzo workers; glaziers; sheet metal workers; plasterers and stucco masons; helpers; and iron and steel workers.

Figure C-6.
Percent representation of women in selected construction occupations in Montana, 2015-2019



Notes: *, ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all Montana construction workers is 9%

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators were combined into the single category of miscellaneous construction equipment operators.

Source: BBC from 2015-2019 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

Figure C-6 indicates that the construction occupations in Montana with the highest representations of women workers are secretaries; brickmasons, blockmasons, and stonemasons; and roofers. The construction occupations with the lowest representations of women workers are electricians; helpers; sheet metal workers; pipelayers, plumbers, pipefitters, and steamfitters; drywall installers, ceiling tile installers, and tapers; cement masons and terrazzo workers; glaziers; and iron and steel workers.

Figure C-7.
Percentage of non-owner workers who work as managers in each study-related industry, Montana and the United States, 2015-2019

Notes:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites or between women and men is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

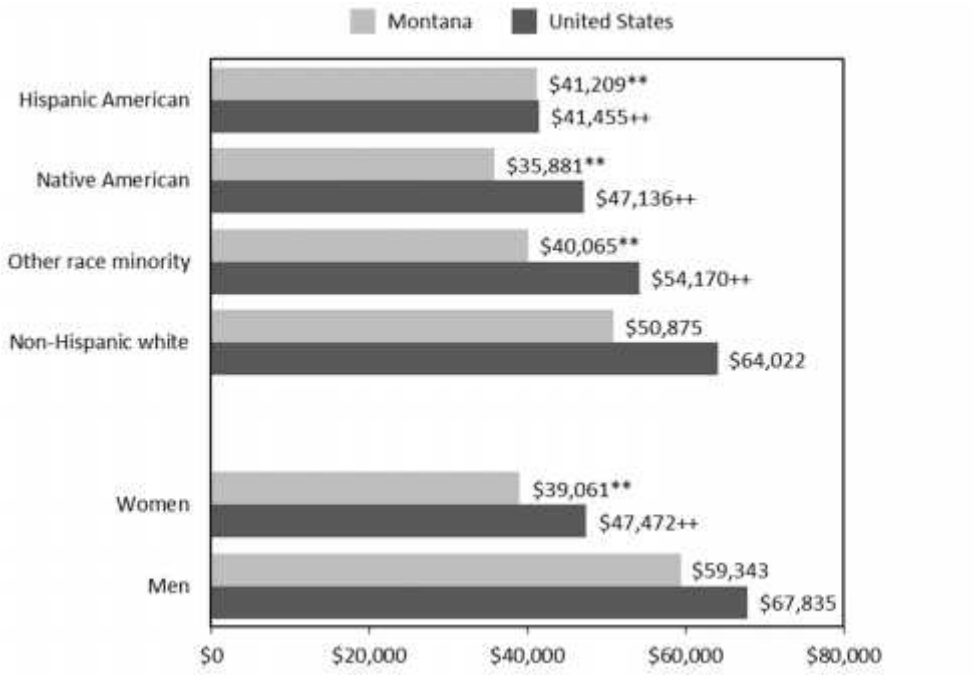
BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Montana	Construction	Professional Services
Race/ethnicity		
Hispanic American	4.4 %	0.0 % †
Native American	1.9 % **	0.0 % †
Other race minority	0.0 % †	0.0 % †
Non-Hispanic white	7.0 %	2.2 %
Gender		
Women	5.8 %	1.5 %
Men	6.6 %	2.3 %
All individuals	**6.5 %**	**2.1 %**

United States	Construction	Professional Services
Race/ethnicity		
Hispanic American	2.6 % **	2.3 % **
Native American	5.3 % **	3.6 %
Other race minority	4.6 % **	2.1 % **
Non-Hispanic white	9.2 %	3.7 %
Gender		
Women	6.4 % **	2.0 % **
Men	6.8 %	4.0 %
All individuals	**6.7 %**	**3.3 %**

Figure C-7 indicates that, compared to white Americans, smaller percentages of Native Americans work as managers in the Montana construction industry (excluding business owners).

Figure C-8.
Mean annual wages, Montana and the United States, 2015-2019



Note: The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level for Montana and the United States as a whole, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure C-8 indicates that, compared to white Americans, Hispanic Americans, Native Americans, and other race minorities in Montana earn substantially less in wages. In addition, compared to men, women earn less in wages.

Figure C-9.
Predictors of annual wages (regression), Montana, 2015-2019

Notes:

The regression includes 12,055 observations.

The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

"Other minority group" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

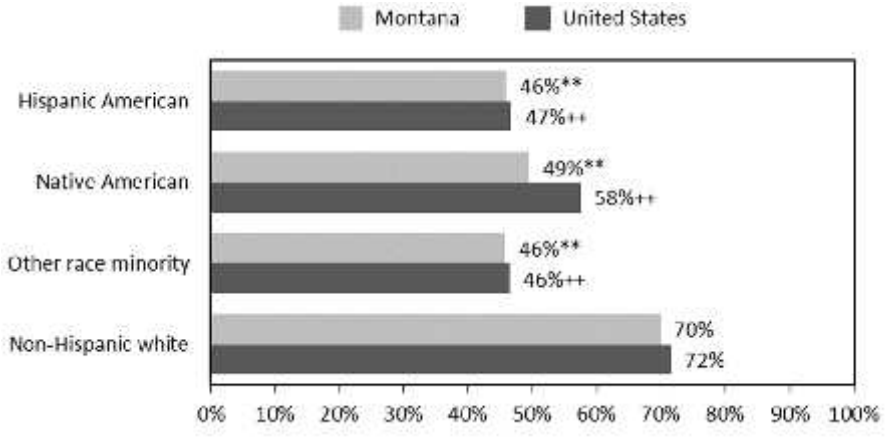
Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

Variable	Exponentiated Coefficient	
Constant	7,950.992	**
Hispanic American	0.947	
Native American	0.835	**
Other minority group	0.794	**
Women	0.749	**
Less than high school education	0.718	**
Some college	1.159	**
Four-year degree	1.438	**
Advanced degree	2.009	**
Disabled	0.776	**
Military experience	0.963	
Speaks English well	1.409	
Age	1.053	**
Age-squared	0.999	**
Married	1.158	**
Children	1.010	
Number of people over 65 in household	0.872	**
Public sector worker	1.100	**
Manager	1.280	**
Part time worker	0.369	**
Extraction and agriculture	1.088	*
Construction	1.016	
Wholesale trade	1.016	
Retail trade	0.821	**
Transportation, warehouse, & information	1.186	**
Professional services	1.075	*
Education	0.699	**
Health care	1.099	**
Other services	0.684	**
Public administration and social services	0.806	**

Figure C-9 indicates that, compared to being white American in Montana, being Native American or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Native American is associated with making approximately $0.84 for every dollar a white American makes, all else being equal.) In addition, compared to being a man in Montana, being a woman is related to lower annual wages.

Figure C-10.
Home Ownership Rates, Montana and the United States, 2015-2019



Note: The sample universe is all households.

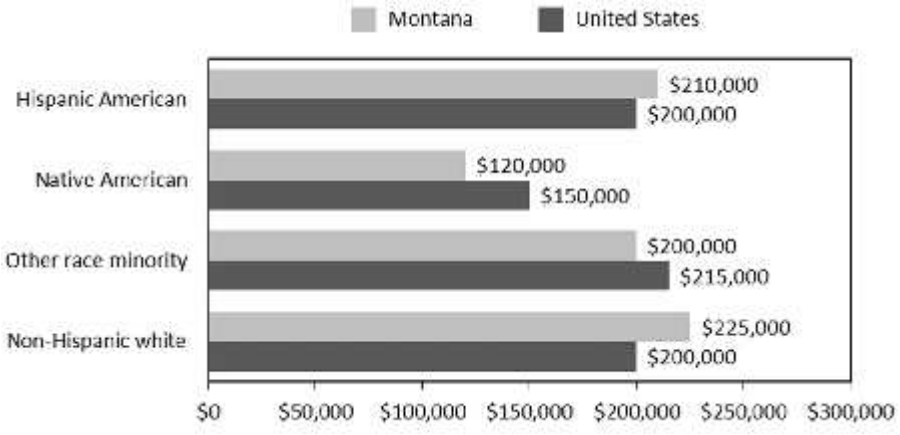
**, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for Montana and the United States as a whole, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

Figure C-10 indicates that all relevant minority groups in Montana exhibit homeownership rates lower than that of white Americans.

Figure C-11.
Median home values, Montana and the United States, 2015-2019



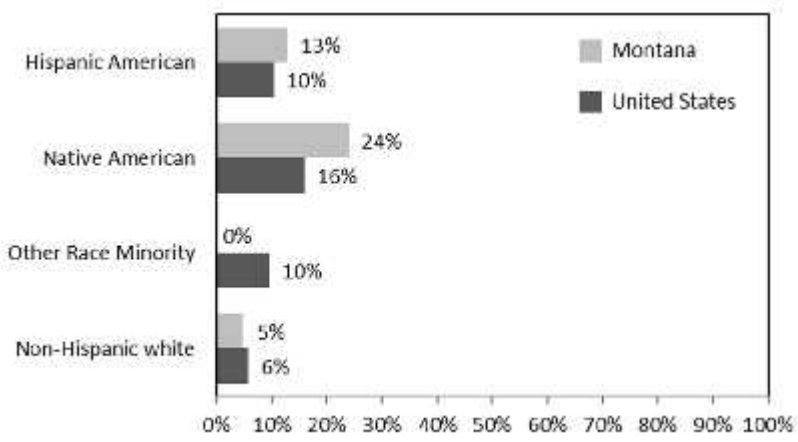
Note: The sample universe is all owner-occupied housing units.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

Figure C-11 indicates that homeowners of all relevant minority groups in Montana appear to own homes that, on average, are worth less than those of white American homeowners.

Figure C-12.
Denial rates of conventional purchase loans for high-income households, Montana and the United States, 2019



Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). MFI data are calculated by the FFIEC.

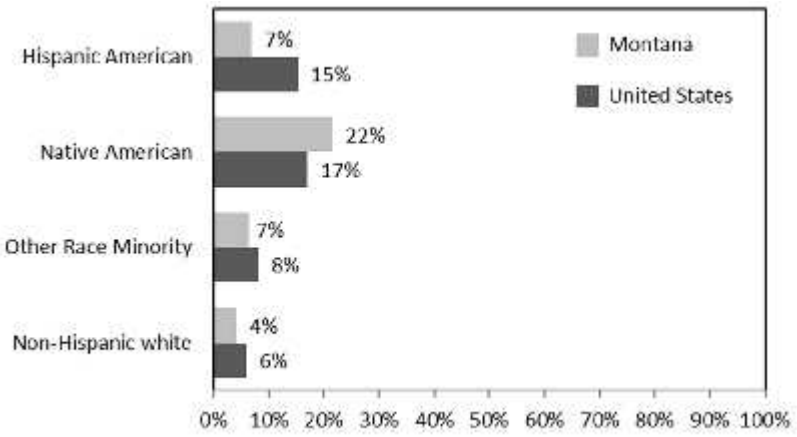
"Other race minority" includes Asian Americans, Black Americans, and Native Hawaiian or Other Pacific Islander.

Source:

FFIEC HMDA data, 2019. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: https://ffiec.cfpb.gov/data-browser/.

Figure C-12 indicates that, in 2019, Hispanic Americans and Native Americans in Montana appeared to be denied home loans at higher rates than white Americans.

Figure C-13.
Percent of conventional home purchase loans that were subprime, Montana and the United States, 2019



Note:

Subprime loans are those with a rate spread of 1.5 or more. Rate spread is the difference between the covered loan's annual percentage rate (APR) and the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set.

"Other race minority" includes Asian Americans, Black Americans, and Native Hawaiian or Other Pacific Islander.

Source:

FFIEC HMDA data,2019. The raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: https://ffiec.cfpb.gov/data-browser/.

Figure C-13 indicates that, in 2019, Hispanic Americans, Native Americans, and other race minorities in Montana appear to be awarded subprime conventional home purchase loans at greater rates than white Americans.

Figure C-14
Business loan denial rates, Mountain Division and the United States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Mountain Division consists of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

Source:

BBC from 2003 Survey of Small Business Finance.

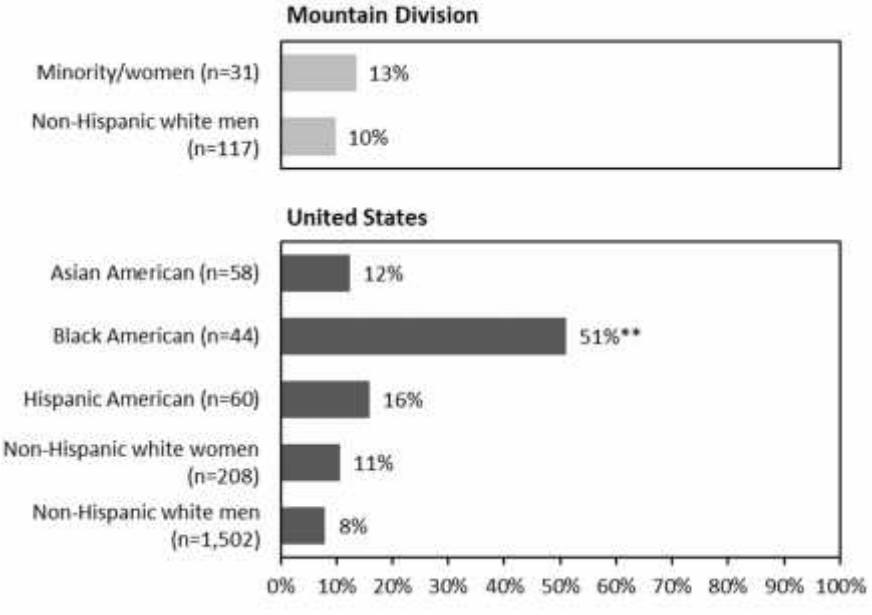


Figure C-14 indicates that, in 2003, minority- and woman-owned businesses in the Mountain Division were denied business loans at greater rates than businesses owned by white men.

Figure C-15. Businesses that did not apply for loans due to fear of denial, Mountain Division and the United States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Mountain Division consists of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

Source:

BBC from 2003 Survey of Small Business Finance.

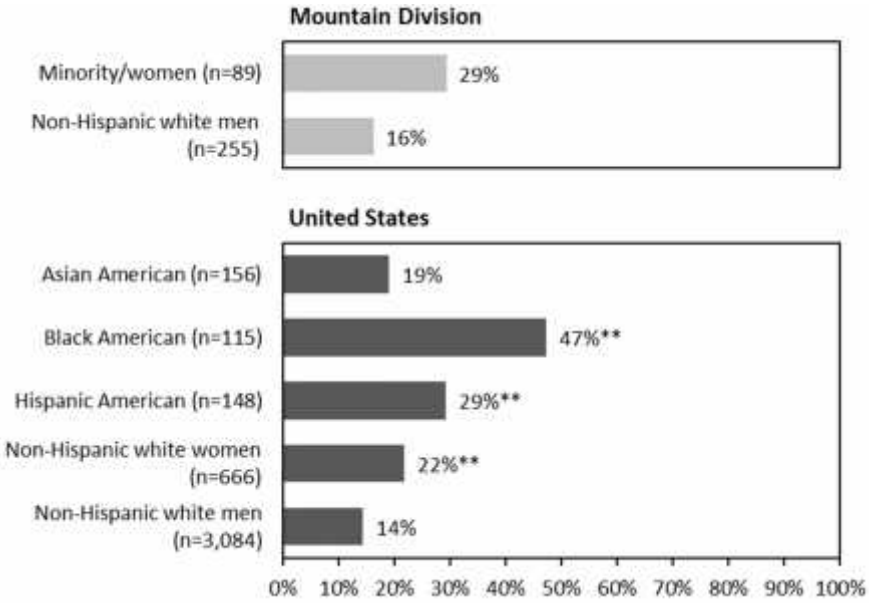
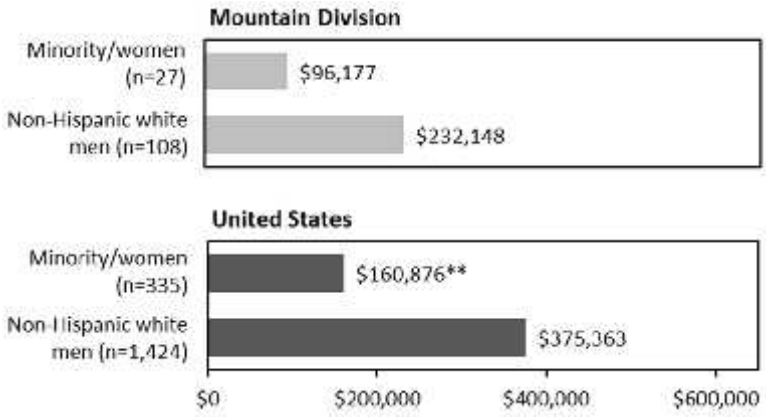


Figure C-15 indicates that, in 2003, minority- and woman-owned businesses in the Mountain Division were more likely than businesses owned by white men to not apply for business loans due to a fear of denial.

Figure C-16.
Mean values of approved business loans, Mountain Division and the United States, 2003



Note:

** Denotes statistically significant differences from non-Hispanic white men (for minority groups and women) at the 95% confidence level.

The Mountain Division consists of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

Source:

BBC from 2003 Survey of Small Business Finance.

Figure C-16 indicates that, in 2003, minority- and woman-owned businesses in the Mountain Division that received business loans were approved for loans worth less on average than loans businesses owned by white men received.

Figure C-17.
Business ownership rates in study-related industries, Montana and the United States, 2015-2019

Note:

*, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites, or between women and men, is statistically significant at the 90% and 95% confidence level, respectively.

† Denotes significant differences in proportions not reported due to small sample size.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Montana	Construction		Professional Services	
Race/ethnicity				
Hispanic American	28.1 %		5.0 %	†
Native American	26.8 %	*	20.8 %	†
Other Race Minority	43.7 %	†	15.7 %	†
Non-Hispanic white	37.2 %		34.0 %	
Gender				
Women	31.5 %		39.7 %	
Men	36.9 %		30.6 %	
All individuals	**36.5 %**		**33.3 %**	

United States	Construction		Professional Services	
Race/ethnicity				
Hispanic American	17.8 %	**	15.3 %	**
Native American	19.6 %	**	20.2 %	*
Other Race Minority	18.2 %	**	14.8 %	**
Non-Hispanic white	25.3 %		22.7 %	
Gender				
Women	16.0 %	**	19.8 %	**
Men	23.2 %		21.2 %	
All individuals	**22.5 %**		**20.8 %**	

Figure C-17 indicates that, compared to white Americans, Native Americans working in the Montana construction industry own businesses at a lower rate.

Figure C-18.
Predictors of business ownership in construction (regression), Montana, 2015-2019

Note:

The regression included 1,810 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

"Other minority group" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

Variable	Coefficient
Constant	-1.5401 *
Age	0.0446 **
Age-squared	-0.0003
Married	0.1622
Disabled	-0.1107
Number of children in household	0.0109
Number of people over 65 in household	0.1344
Owns home	-0.1670
Home value ($000s)	0.0003
Monthly mortgage payment ($000s)	-0.0409
Interest and dividend income ($000s)	0.0060
Income of spouse or partner ($000s)	0.0011
Speaks English well	-0.2165
Less than high school education	0.2354
Some college	0.0707
Four-year degree	0.0575
Advanced degree	-0.2991
Hispanic American	-0.2049
Native American	-0.3218 *
Other minority group	-0.0959
Women	-0.2502

Figure C-18 indicates that being Native American is associated with a lower likelihood of owning a construction business in Montana compared to being white American, even after statistically accounting for other personal factors.

Figure C-19.
Disparities in business ownership rates for Montana construction workers, 2015-2019

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Native American	25.3%	36.1%	70

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, BBC made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure C-19 indicates that Native Americans own construction businesses in Montana at a rate that is 70 percent that of similarly situated white men.

Figure C-20.
Predictors of business ownership in professional services (regression), Montana, 2015-2019

Note:

The regression included 438 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

"Other minority group" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	0.2853
Age	0.0148
Age-squared	0.0002
Married	0.4836 **
Disabled	0.5168
Number of children in household	-0.1262
Number of people over 65 in household	-0.0188
Owns home	-0.5470 *
Home value ($000s)	0.0004
Monthly mortgage payment ($000s)	0.0052
Interest and dividend income ($000s)	0.0018
Income of spouse or partner ($000s)	0.0014
Speaks English well	-2.4067 **
Less than high school education	0.0000 †
Some college	0.3328
Four-year degree	0.3095
Advanced degree	0.5057
Hispanic American	-1.4047 **
Native American	-0.0922
Other minority group	-0.5311
Women	0.4063 *

Figure C-20 indicates that being Hispanic American is associated with a lower likelihood of owning a professional services business in Montana compared to being white American, even after statistically accounting for other personal factors.

Figure C-21.
Disparities in business ownership rates for Montana professional services workers, 2015-2019

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Hispanic American	5.0%	28.1%	18

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, BBC made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure C-21 indicates that Hispanic Americans own professional services businesses in Montana at a rate that is 18 percent that of similarly situated white men.

Figure C-22.
Rates of business closure, expansion, and contraction, Montana and the United States, 2002-2006

Note:

Data include only non-publicly held businesses.

Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

Statistical significance of these results cannot be determined, because sample sizes were not reported.

Source:

Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

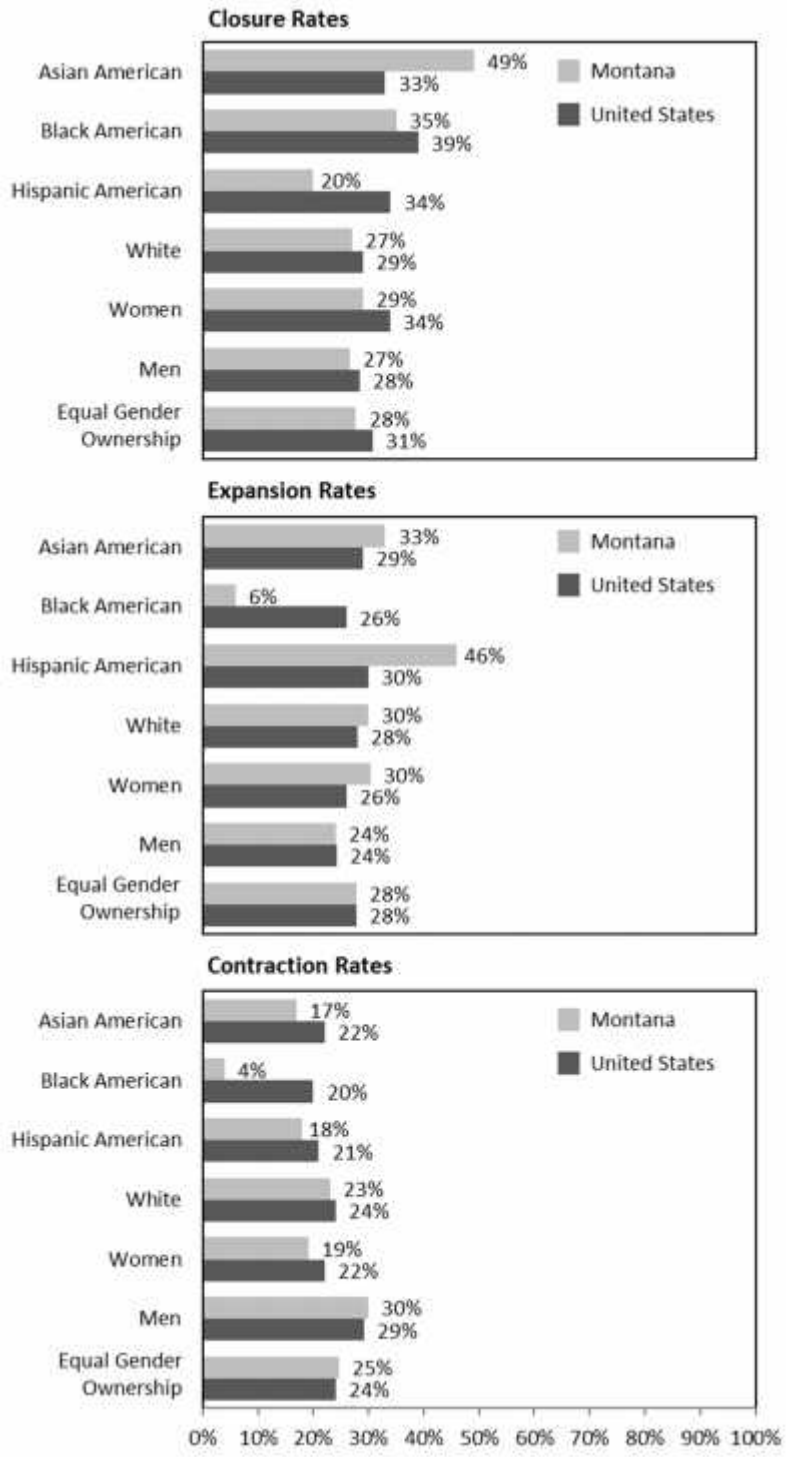
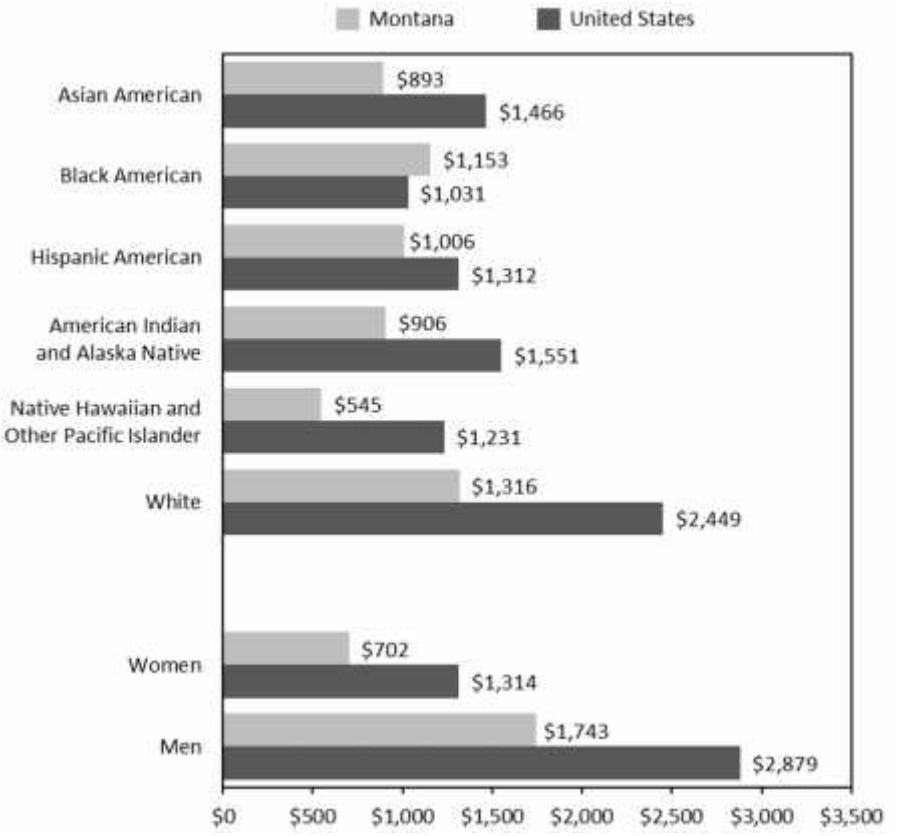


Figure C-22 indicates that Asian American- and Black American-owned businesses in Montana appear to close at higher rates than white American-owned businesses. With regard to expansion rates, Black American-owned businesses in Montana appear to expand at a lower rate than white American-owned businesses.

Figure C-23.
Mean annual business receipts (in thousands), Montana and the United States

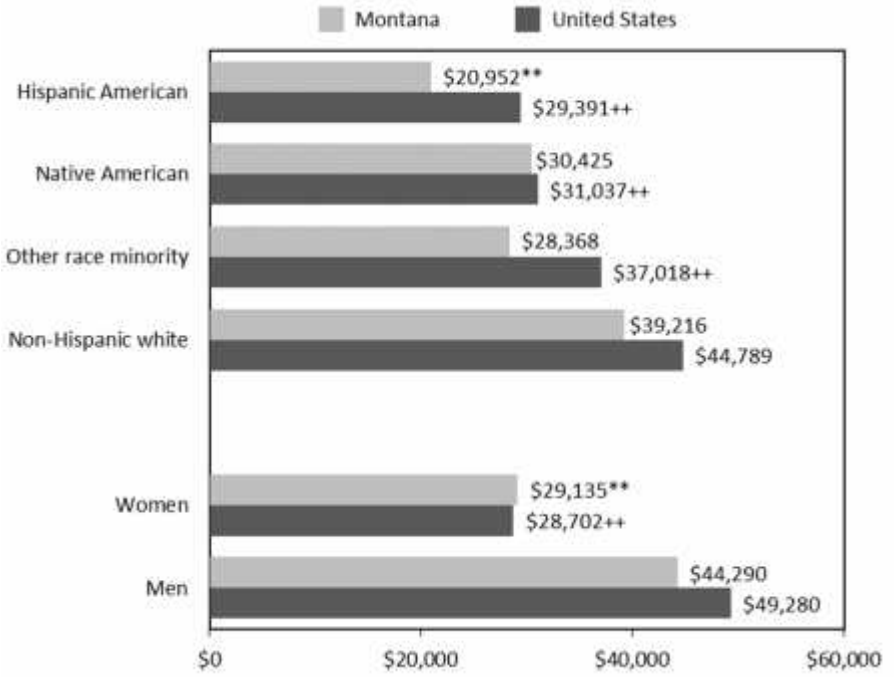


Note: Includes employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Source: Annual Business Survey data 2018. Raw data were obtained from United States Census Bureau Application Programming Interface: https://www.census.gov/data/developers/data-sets/abs.html.

Figure C-23 indicates that, in 2018, all relevant minority groups in Montana appeared to show lower mean annual business receipts than businesses owned by white Americans. In addition, woman-owned businesses in Montana showed lower mean annual business receipts than businesses owned by men.

Figure C-24.
Mean annual business owner earnings,
Montana and United States, 2015-2019



Note: The sample universe is business owners aged 16 and over who reported positive earnings. All amounts in 2019 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level for Montana and the United States as a whole, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

Source: BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure C-24 indicates that Hispanic American business owners in Montana earn less on average than white American business owners. In addition, women business owners in Montana earn less on average than men business owners.

Figure C-25.
Predictors of business owner earnings (regression), Montana, 2015-2019

Notes:

The regression includes 2,350 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners aged 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

"Other race minority" includes Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other races.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

BBC from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Exponentiated Coefficient
Constant	682.909 **
Age	1.134 **
Age-squared	0.999 **
Married	1.281 **
Speaks English well	1.458
Disabled	0.555 **
Less than high school	0.616 **
Some college	1.031
Four-year degree	1.008
Advanced degree	1.622 **
Hispanic American	0.620 *
Native American	0.513 **
Other race minority	1.238
Women	0.570 **

Figure C-25 indicates that, compared to a white business owner in Montana, being a Hispanic American or Native American business owner is related to lower business earnings. Similarly, compared to being a male business owner, being a woman business owner is related to lower business earnings.

APPENDIX D.
Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information that BBC Research & Consulting (BBC) collected from business owners and other stakeholders as part of the 2022 Montana Department of Transportation (MDT) Disparity Study. We summarize the key themes that emerged from those insights, organized into the following sections:

A. **Background** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;

B. **Ownership and certification** presents information about businesses' statuses as disadvantaged business enterprises (DBEs), minority-, and woman-owned business enterprises (MBE/WBEs), certification processes, and business owners' experiences with MDT's certification programs;

C. **Private and public sector work** presents business owners' experiences pursuing private and public sector work;

D. **Prime contract and subcontract work** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with DBEs and minority- and woman-owned businesses;

E. **Public agency work** describes business owners' experiences working with or attempting to work with MDT, National Plan of Integrated Airport Systems (NPIAS) airports, and other agencies and identifies potential barriers to doing work for them;

F. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in Montana and what it takes for businesses to be successful;

G. **Potential barriers** describes barriers and challenges businesses face in the local marketplace;

H. **Effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects DBEs and minority- or woman-owned businesses;

I. **Business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other efforts to ameliorate barriers for businesses in Montana;

J. **Race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs; and

K. **Other insights and recommendations** presents additional comments and recommendations for MDT and NPIAS airports to consider.

We denote availability survey comments by the prefix "AV," focus group comments by the prefix "FG," public forum comments by the prefix "PT," and written comments by the prefix "WT." In-depth

interview comments do not have a prefix. We also preface each quotation with a brief description of the race and gender of the business owner and the business type. In addition, we indicate whether each participant represents a certified DBE, MBE/WBE, or SBE.

A. Background

Part A presents information related to:

1. Business characteristics;
2. Business establishment;
3. Types, locations, and sizes of contracts;
4. Employment;
5. Growth; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and histories, from well-established firms to newly established firms, and worked on small to large contracts in the Montana marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 15 construction firms and 18 firms providing professional services.

Fifteen firms worked in the construction industry [#1, #12, #16, #17, #18, #24, #25, #26, #36, #4, #6, #8, #9, #10, #PT2]. For example:

- The owner of a majority-owned construction company stated, "We have logging and gravel. We have logged primarily on private property because it's really hard to get into the mid-market because you have to have so much bonding and so much money and insurance to get into it." [#12]
- The Native American owner of a DBE-certified construction company stated, "We do the gravel work. We do a lot of site work, a lot of street and road projects, and then we still do private driveways. Do a lot of concrete work, now, especially the flat work. Curb and gutter, sidewalks, slabs." [#16]
- The woman owner of a DBE-certified construction firm stated, "It's a heavy construction business. So, we do a lot of work for anybody that needs that dirt work, basically. Primarily, we're a primary contractor for Montana Rail Link. So, we do a lot of work with them. We help them put in like new sightings, news switches, new crossings or replace, and we are on call for derailment. So, we have what they call Derricks, it's like excavators with the crane type mechanism on it and all that stuff that goes with that." [#17]
- The owner of a majority-owned construction firm stated, "So we are an excavation civil business that specializes in wet utilities. So, we predominantly function as a general contractor, but we also do a fair amount of subcontract work, but it's all in the civil realm. Yeah, water utilities, water, sewer firm." [#18]

- The woman owner of a majority-owned construction firm stated, "We do concrete, walls, concrete slab, and excavation." [#24]
- The owner of a woman-owned construction business stated, "We do all kinds of building contracting and also methamphetamine cleanup and testing. So that kind of thing. Some hazardous waste type stuff." [#25]
- The owner of a majority-owned construction firm stated, "[We do] commercial signs." [#26]
- A representative of a DBE-certified construction company stated, "We're asphalt paving and pavement maintenance company. We do a little bit of concrete, but most of that work is subbed out nowadays." [#4]
- The owner of a majority-owned construction company stated, "We do traffic control, which is the signing, flaggers, pilot cars, we do guardrail installation, and we do concrete barrier. We make concrete barriers and put it on the road. That's the majority of our business" [#6]
- The owner of a WBE- and DBE-certified construction company stated, "We do concrete, excavating, any dirt and gravel work, demolition. We can build structures as well. We do remodeling." [#8]
- The owner of a majority-owned construction company stated, "My main thing is going to be electrical and dirt work." [#9]
- The Black American woman co-owner of a construction company stated, "We do infrastructure, parking lot, all the grading, and then storm drain, all of that. And then this year we started doing all the building concrete and stuff as well, do the plans and then oversee the subcontractors when they do the work." [#10]
- A representative from a respondent at a public meeting stated, "We are a highway contractor, of course. And we do traffic signals and street lighting and pavement marking. We also work on airports. We do runway lighting and stuff like that too. So, we're a line contractor. We do the underground infrastructure that supports all of that as well." [#PT2]

Eighteen firms worked in the engineering and professional services industry [#11, #13, #14, #15, #2, #21, #22, #23, #27, #28, #29, #3, #30, #31, #32, #33, #35, #7]. For example:

- The owner of a majority-owned professional services company stated, "We are a plant based ecological company. And so, we do a lot of restoration, reclamation. We've done work for EPA, almost every federal agency out there, almost every State of Montana agency. And also, for Canadian provinces, we do a lot of work for them, still do. So essentially, we're plant ecologists, but we have backgrounds in soils, range management, forestry, and that sort of thing. We've also done a tremendous amount of riparian and wetland work. That's really what I was when I was at the university, a wetland ecologist." [#11]
- The owner of a majority-owned professional services firm stated, "We do lots of boundary surveying. We do lots of mapping. We do divisions of land, major and minor subdivisions." [#13]
- The owner of a majority-owned professional services company stated, "We do construction materials, testing and inspection work. So, we test soils, aggregate, concrete, and asphalt during construction projects." [#14]

- The woman owner of a DBE-certified professional services company stated, "We do civil engineering design, construction, inspection, and testing, land survey, development, that kind of work." [#15]
- A representative of a DBE-certified professional services firm stated, "We do research and evaluation, so that's the big part of the service we provide." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Basically, we do staff augmentation for the federal government. In addition, we do have a construction company that's working on building houses in Billings and then back home on the rez." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "[We do] commercial interiors and commercial graphic and brand design." [#23]
- The woman owner of a DBE-certified professional services business stated, "It's environmental consulting. We do engineering and science." [#28]
- A representative of a majority-owned professional services company stated, "[We do] engineering consulting." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "I have two companies. I'm a landman, a land person where I do easements, right of ways, oil and gas leasing, and all of [that]. Pretty much title searches." [#3]
- A representative of a majority-owned professional services firm stated, "We predominantly provide design services for MDT on highway projects." [#30]
- The owner of a majority-owned professional services firm stated, "It's a marketing and advertising business." [#33]
- A representative of a majority-owned professional services firm stated, "[We do] historical and archeological research and consulting." [#35]
- A representative of a majority-owned professional services company stated, "The services provided in Great Falls would be geotechnical and materials testing, the services in Billings would be environmental, geotechnical and materials testing." [#7]
- The woman owner of a professional services firm stated, "Marketing. So, we do print marketing, apparel marketing, and promotional product marketing." [#32]

Years in business. Twenty-six businesses reported their date of establishment. The majority of firms (21 out of 26 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Two out of the 26 businesses had been in business for between five and ten years. Three firms were newly established, having been in business for less than five years.

Three firms reported they had been in business for fewer than five years [#10, #23, #9]. For example:

- The Black American woman co-owner of a construction company stated, "[We've been open since] 2019, so three years. We went on our own three years ago." [#10]
- The owner of a WBE- and DBE-certified professional services company stated, "The business existed for two years." [#23]
- The owner of a majority-owned construction company stated, "I started this business two years ago, but I haven't... I'm going to be right up front with you, I haven't done anything with this business since COVID has hit." [#9]

Two firms reported they had been in business for five to ten years [#22, #25]. For example:

- A representative of a Native American-owned SBE-certified professional services firm stated, "[The company was] probably [founded] in about 2015." [#22]
- The owner of a woman-owned construction business stated, "Since 2015 February." [#25]

Twenty firms reported they had been in business for more than ten years [#1, #11, #12, #13, #14, #15, #16, #18, #21, #24, #26, #29, #3, #30, #32, #33, #35, #4, #6, #8]. For example:

- The owner of a majority-owned construction company stated, "[Been] in business since 1981." [#1]
- The owner of a majority-owned professional services company stated, "Since 2007." [#11]
- The owner of a majority-owned construction company stated, "I think we incorporated in 2000 and, no ... We've been working for ourselves for probably 30 years, but we were not incorporated that entire time." [#12]
- The owner of a majority-owned professional services firm stated, "[The] company turns 50 years old this year." [#13]
- The owner of a majority-owned professional services company stated, "[We were] founded in 2005, so 17 years." [#14]
- The woman owner of a DBE-certified professional services company stated, "[We've been open] 18 years." [#15]
- The Native American owner of a DBE-certified construction company stated, "[The company was founded] in 1989." [#16]
- The owner of a majority-owned construction firm stated, "Well, I mean, this has been a family business. It's been around 40 years. But it split off another business and was incorporated in 2007." [#18]
- A representative of a DBE-certified professional services firm stated, "[The company is] about 15 or 16 years [old]." [#21]
- The woman owner of a majority-owned construction firm stated, "[The company is] 10 [years old]." [#24]
- The owner of a majority-owned construction firm stated, "The business was started in 1920." [#26]

- A representative of a majority-owned professional services company stated, "Oh, gosh. I think it's around 45 [years old]." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "[The company] was [started in] 1995." [#3]
- A representative of a majority-owned professional services firm stated, "[We've been around] 104 years." [#30]
- The woman owner of a professional services firm stated, "[We've been around] since 2002." [#32]
- The owner of a majority-owned professional services firm stated, "[We've been around] 22 [years]." [#33]

2. Business establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses. This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement [#10, #12, #21, #23, #24, #25, #28, #3, #32, #4, #8, #9, #FG1]. Here are some of the founder stories from interviews:

- The Black American woman co-owner of a construction company stated, "I've been working for different companies in Montana for better part of 30 years. All of us had worked together in some other... The guy that does our bookkeeping and our time, our CFO, we'd worked with him with a different company. Just some people that we just came together to form it. You know, we were very like-minded, I guess, in how a business should be done and were all kind of sick of working for other people and how they did business with some stuff. So, we decided to do it on our own, eventually." [#10]
- The owner of a majority-owned construction company stated, "[My husband]'s always logged off and on for most of his life." [#12]
- A representative of a DBE-certified professional services firm stated, "The long story short is that I just really recognized there was a need to provide services outside of academia, so we opened up a consulting firm, which was me at the time. A lot of times it was just me, but then we brought in other people. It grew. So, it really came about because we recognized that a lot of times tribes and other communities don't necessarily want to work with the government or universities to do evaluation and research." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "I have a business background in design and finance. I wanted to be out on my own and be my own boss. So, I started my own company to consult on projects for larger businesses." [#23]
- The woman owner of a majority-owned construction firm stated, "We just did some work at my house with a concrete driveway and all the neighbors saw it and loved it. And so, we started up and he had several friends that were concrete finishers. So, after people started calling and wanting us to do work for them, we just started the business." [#24]

- The owner of a woman-owned construction business stated, "I've been doing things like this for many years." [#25]
- The woman owner of a DBE-certified professional services business stated, "My business partner used to work on a team that I ran for a local company and the company closed the office, and she called me up and asked me what I was going to do. I said, 'I don't know.' And she said, 'Let's try something together.'" [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "Basically, I hate to say, but I just shoot from the hip. So, [my company] picked me. It was a job that needed to be done, so I started in probably 1971. That's when I started that type of business, getting signatures for leases and that. And then in 1995, someone... Being as I'd been doing this leasing, the acquisition of signatures. In '95 somebody stopped me on the street and asked me if I wanted a job and I said, 'No, I'm farming.' And then I said, 'So, how much do you pay?' And they told me to go over to this building and it was a pipeline. I think it was going from Meriwether to East Glacier. And they were having a hard time getting signatures, so they hired me. … So that's pretty much how I built my business." [#3]
- The woman owner of a professional services firm stated, "Yeah. I worked in commercial print shops and just went out on my own, so I started it from scratch on my own. And then we just grew and grew. Originally it just started as a design company. We just grew and added over the years product services." [#32]
- A representative of a DBE-certified construction company stated, "He [the owner] had worked in construction prior, done some things prior and he started his own company." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "I was an owner with my late husband and so now I'm sole owner. My husband has worked in construction since he was like 16 years old. So, it was his dream to start his own civil construction company." [#8]
- The owner of a majority-owned construction company stated, "I moved to Montana 1982. Yeah, and then I needed to fulfill out my federal government retirement, so I came out here to work at the dam as an electrician. Now I'm retired. Now I'm looking to go back to work again, I'll never retire, don't get me wrong. I mean, some of us are not wired to sit around and do nothing." [#9]
- A representative of a Subcontinent Asian American-owned DBE- and MBE-certified professional services company stated, "Those small companies don't exist. I mean, they've been gobbled up by the big companies. I mean, my owner has been approached nonstop for years and he just refuses to sell because this was his dream, and this was his thing. He grew up in [country] and he came to this country, and he was a professor at the college. He got a citizenship, he's got a structural engineer, he's a civil engineer. The man is brilliant, but he is also the kindest, humblest man I've ever met in my life. I mean, he wants to make sure his people are taken care of. This has been his dream. I mean, he said when he was a little boy, he had a dream that someday he would change, he would have an impact on the way things were built and the way things were. And he feels like he's had that." [#FG1]

Other motivations. There were also other reasons and motivations for the establishment of their business [#26, #33]. For example:

- The owner of a majority-owned professional services firm stated, "I needed a job, and I started a company because I thought I was unemployable." [#33]

- The owner of a majority-owned construction firm stated, "My dad and my grandfather had the business for a long time, and they just gave it to me when they retired." [#26]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Six firms reported working on contracts with an average value under $100,000 [#32, #26, #25, #24, #23, #13]. For example:

- The woman owner of a professional services firm stated, "Anywhere from small... $250 up to about $10,000 to $15,000 is what we've done in the past." [#32]
- The owner of a majority-owned construction firm stated, "My average order is about $400." [#26]
- The owner of a woman-owned construction business stated, "[The average contract size is] probably about $30,000." [#25]
- The woman owner of a majority-owned construction firm stated, "We perform everything from little 2,500 square foot, $2,500 cost patio all the way to $100,000 slabs." [#24]
- The owner of a WBE- and DBE-certified professional services company stated, "[We do] somewhere between $50,000 and $100,000 design contracts." [#23]
- The owner of a majority-owned professional services firm stated, "Biggest contract we've done is probably $110,000." [#13]

Twelve firms reported working on contracts with an average value between $100,000 and $500,000 [#8, #7, #6, #36, #33, #30, #3, #21, #17, #16, #12, #11]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "A small contract would be $25,000. Our average is around $300,000." [#8]
- A representative of a majority-owned professional services company stated, "Usually most of the size of the projects we have would be up to $250,000, that would be for materials or geotechnical, fairly smaller projects is due to the nature in Montana. I'd say half a million would be the largest I'd ever seen, or that bucket ... and now our company has buckets that range from zero to $250,000 and then $250,000 to $500,000 for what level of oversight we need on those jobs." [#7]
- The owner of a majority-owned construction company stated, "Most of our contracts are $200,000 range, but we have had contracts up in the $2 million range." [#6]
- A representative of a Native American-owned construction firm stated, "The average, probably $100,000 to $500,000." [#36]
- The owner of a majority-owned professional services firm stated, "On the low end, $15,000 to $25,000 to the high end, multiple millions." [#33]
- A representative of a majority-owned professional services firm stated, "Anywhere from $5,000 all the way up to over a million dollars contract value." [#30]

- The Native American woman owner of a DBE-certified professional services firm stated, "I did over a million dollars in one year." [#3]
- A representative of a DBE-certified professional services firm stated, "The range is probably like for $3,500 to, we just submitted like a three-year proposal for over a million." [#21]
- The woman owner of a DBE-certified construction firm stated, "Yeah. Yeah. It can be anywhere from a couple thousand up to a couple hundred thousand. We've done some that were over $500,000, but not very much." [#17]
- The Native American owner of a DBE-certified construction company stated, "[The average contract size] really varies. That goes from a small driveway up to a road… or something like that, which is several hundred thousand, so, from several thousand to several hundred thousand [dollars]." [#16]
- The owner of a majority-owned construction company stated, "[A typical contract size is between] 100 and 150,000s [of dollars]." [#12]
- The owner of a majority-owned professional services company stated, "Sometimes they've been, I mean, there'll be just thousands of dollars. We try not to do those, but let's just say five to 10 all the way up to hundreds of thousands of dollars." [#11]

Six firms reported working on contracts with an average value between $500,000 and $5 million [#5, #4, #22, #2, #18, #15]. For example:

- A representative of a majority-owned professional services firm stated, "From small industrial hygiene (under $5000) to road design contracts of $3 million. Road design averages $1.5 million." [#5]
- A representative of a DBE-certified construction company stated, "We'll do $400 driveways on up to, we are doing our portion of the work. I don't know what the total contract is, but our portion of the work, we are doing a job in North Dakota. That was 1.8 million dollars. So somewhere in that, on the upper end of the scale, is somewhere between $1.5 and $2 million is probably our high point." [#4]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Currently our contracts are in the range of $400 to $500, between $400 and $600,000 a year in revenue per contract we bid on basically they're all five-year contracts. So, you can do the math. It's 500,000 and five. It's $2.5 million contract over five years, roughly." [#22]
- A representative of a majority-owned professional services firm stated, "[We do] small jobs less than $10,000 for survey work to multi-million engineering jobs." [#2]
- The owner of a majority-owned construction firm stated, "So our range runs anywhere from $5,000 to 4.5 million." [#18]
- The woman owner of a DBE-certified professional services company stated, "Our design projects can be 50 to 200,000 [dollars]. But it might be on projects that are $1,000,000 projects if we are working on an MDT project or something like that." [#15]

One firm reported working on contracts with an average value between five and ten million dollars [#29]. For example:

- A representative of a majority-owned professional services company stated, "Probably the highest we have are our IDIQ contracts, and those are about $6 million." [#29]

Two firms reported working on contracts with an average value between ten and fifty million dollars [#14, #1]. For example:

- The owner of a majority-owned professional services company stated, "Small contracts are anywhere from a few $100 to 20,000, 25,000. Larger contracts are 10 million to 50 million. Some of the Federal Highway contracts we're on are quite large." [#14]
- The owner of a majority-owned construction company stated, "[Our contracts are] anything from $50,000 to $30 million." [#1]

Ten firms reported working on contracts solely in Montana [#12, #17, #36, #13, #15, #16, #24, #25, #27, #6]. For example:

- The owner of a majority-owned construction company stated, "It's mostly like in the Flathead area." [#12]
- The woman owner of a DBE-certified construction firm stated, "Pretty much Montana Rail Links area can go actually can go up to Sandpoint, Idaho all the way to Huntley, Montana. But most of the time we're between St. Regis and Billings, so." [#17]
- A representative of a Native American-owned construction firm stated, "Across the state of Montana, so 600 miles, 500 miles." [#36]
- The owner of a majority-owned professional services firm stated, "Almost exclusively in Montana. I'm licensed also in Wyoming, but we haven't found any work that's worth that commute yet." [#13]
- The woman owner of a DBE-certified professional services company stated, "The last couple of years has been all in Montana." [#15]
- The Native American owner of a DBE-certified construction company stated, "We gave up on the out of state work here, probably 20 years ago. I got wore out traveling, so. Bottom line came out of a whole lot better." [#16]
- The woman owner of a majority-owned construction firm stated, "We like to stay within about a two-mile radius." [#24]
- The owner of a woman-owned construction business stated, "[We work] all over Montana." [#25]
- A representative of a majority-owned professional services company stated, "Anywhere in Montana, pretty much. A little bit outside, but pretty much just in Montana, but we go all directions east, west, north, south." [#27]

- The owner of a majority-owned construction company stated, "Anymore we do all of our work in Montana." [#6]

Fifteen firms reported working in the Montana marketplace and with clients outside of the state [#1, #11, #14, #22, #23, #26, #29, #30, #32, #33, #4, #5, #7, #8, #FG2]. For example:

- The owner of a majority-owned construction company stated, "We do Montana and Wyoming." [#1]
- The owner of a majority-owned professional services company stated, "Our area that we've done work in, goes from Yellowknife in the Northwest Territories to the Mexican Border to the Pacific to the Mississippi." [#11]
- The owner of a majority-owned professional services company stated, "We work in predominantly Montana, but I do a fair amount of work in Yellowstone National Park, which is in Wyoming. A lot of the projects are in Wyoming, some of it is in Montana. Those would be the two states that I mostly work in." [#14]
- A representative of a Native American-owned SBE-certified professional services firm stated, "It's nationwide... We're doing work in Maryland, Vermont, Washington, D.C, Walnut Creek, California. We're bidding on projects that are in Colorado, California, Louisiana, Florida. … We actually had one project come to us that's overseas. And so, the reality is we're not afraid to go anywhere. We understand how to do work in different states, somewhat in different countries." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "Typically within the mountain west. We had like a one-off project in Costa Rica and a little bit of work in Massachusetts in the non-commercial space." [#23]
- The owner of a majority-owned construction firm stated, "It could be anywhere. It could be a mile. I just did some work for someone that was 2,000 miles away." [#26]
- A representative of a majority-owned professional services company stated, "We're national, so we've done things from Alaska to the East Coast, but, primarily, the Western states." [#29]
- A representative of a majority-owned professional services firm stated, "In Montana we have about 240 employees. And as a firm worldwide, we have almost 11,000." [#30]
- The woman owner of a professional services firm stated, "We do [work] across the U.S." [#32]
- The owner of a majority-owned professional services firm stated, "[We do work] nationally." [#33]
- A representative of a DBE-certified construction company stated, "Montana and Wyoming, we work in North Dakota and occasionally in South Dakota." [#4]
- A representative of a majority-owned professional services firm stated, "Primary business is in Montana but also works in other states where there are offices. North Dakota is primarily work in the oil fields." [#5]
- A representative of a majority-owned professional services company stated, "[We're] a large corporation throughout the United States. We have presence and I don't know how more, half the states probably more." [#7]

- The owner of a WBE- and DBE-certified construction company stated, "[We work in] South Dakota, North Dakota, Wyoming, Colorado, Idaho." [#8]

4. Employment. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (36 of 40 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

Thirteen businesses had 1-10 employees [#11, #12, #13, #16, #21, #23, #25, #26, #28, #3, #32, #8, #9]. For example:

- The owner of a majority-owned professional services company stated, "Three now." [#11]
- The owner of a majority-owned construction company stated, "Average about four employees." [#12]
- The owner of a majority-owned professional services firm stated, "There's eight of us." [#13]
- The Native American owner of a DBE-certified construction company stated, "We really got shortened because of the pandemic. We had some problems there with employees not wanting to work and stuff, but full-time, we had 12 last year. Right now, because we're still kind of on our slow season, we have the six, and that's primarily what we hold year-round, in the last few years. But we'll go up in the season, depending on the workload, we'll go anywhere from 12 to 24 people." [#16]
- A representative of a DBE-certified professional services firm stated, "So technically we only have one, in my corporation just has me as an employee, but we have about like 10 to 15 independent contractors who are basically they have their own business. But we work as a group collectively. So, there's about 10 to 15 of us that are working together regularly on projects." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "I'm self-employed but I have a small army of contractors who join on a project-by-project basis. So, there's like five of them." [#23]
- The owner of a woman-owned construction business stated, "Two." [#25]
- The owner of a majority-owned construction firm stated, "None. I'll just hire subcontractors. I subcontract things out, including accounting services." [#26]
- The woman owner of a DBE-certified professional services business stated, "They're just the two partners." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "[I don't have employees] anymore. I hire a landman to help if I need more people at work." [#3]
- The woman owner of a professional services firm stated, "We have two full-time, one part-time." [#32]
- The owner of a WBE- and DBE-certified construction company stated, "Four and a half, if you want to consider a part-time, a half." [#8]

- The owner of a majority-owned construction company stated, "I don't [have any employees]." [#9]

Four interviewees reported that their businesses had 11-25 employees [#10, #15, #24, #33]. For example:

- The Black American woman co-owner of a construction company stated, "We're up to 13 [employees] now." [#10]
- The woman owner of a DBE-certified professional services company stated, "We have between 15 and 18 [employees] depending on the summer interns we bring on" [#15]
- The woman owner of a majority-owned construction firm stated, "[We have] 17 [employees]." [#24]
- The owner of a majority-owned professional services firm stated, "[We have] anywhere from five to 15 people." [#33]

Three businesses had 26-50 employees [#14, #22, #4]. For example:

- The owner of a majority-owned professional services company stated, "I've got six full-time [employees] and we sometimes get up as many as 20 in the summer months." [#14]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Our federal direct employees are nine... 15 on federal contract support and an additional six G and A or admin type folks, both on the reservation and in various locations in Montana and on the east coast. And then we also have in the construction world, we probably have another four or five that are working on framing and housing support activities" [#22]
- A representative of a DBE-certified construction company stated, "During the main part of our season we will run about 40 to 45 employees." [#4]

One business had 51-100 employees [#29]. For example:

- A representative of a majority-owned professional services company stated, "[We have] right around 60 [employees]." [#29]

Five interviewees indicated that their firm had more than 100 employees [#1, #2, #30, #6, #7]. For example:

- The owner of a majority-owned construction company stated, "It varies seasonally but 235." [#1]
- A representative of a majority-owned professional services firm stated, "[We are] stable at 500 [employees]." [#2]
- A representative of a majority-owned professional services firm stated, "In Montana we have about 240 employees. And as a firm worldwide, we have almost 11,000." [#30]
- The owner of a majority-owned construction company stated, "It differs. This time of year, we have about 90. Sometimes we can ramp up to have 130 or 140, in the middle of summer." [#6]

- A representative of a majority-owned professional services company stated, "We got over 5,000 employees." [#7]

5. Growth. Business owners and managers mentioned the growth of the firm over time and discussed how it compared to other businesses in their industry [#11, #13, #14, #16, #2, #21, #22, #23, #24, #25, #27, #28, #29, #3, #30, #4, #6, #8]. For example:

- The owner of a majority-owned professional services company stated, "We grew for a while and we added 6... We had six to seven employees and then we shrunk down because some of the employees went on to other types of jobs in order to make additional money, make more moneys. But the three owners have stayed, the three of us have stayed and we actually had one other, but that person is not here either." [#11]
- The owner of a majority-owned professional services firm stated, "I started five years ago, and I was the only full-time person I'm not trying to grow for the sake of growing, but more trying to grow for the sake of having a life outside of work." [#13]
- The owner of a majority-owned professional services company stated, "My business is pretty constant based off of my ability to hire staff. If I had the ability to hire more staff, I could expand my business. But I generally run within just maybe $100,000 or $200,000 of where I am year after year. I always hit about the same based off of our construction season, our limits due to weather, and then just about how many people I can put in the field." [#14]
- The Native American owner of a DBE-certified construction company stated, "For recent years, I would say the last five, six years, we try to stay in that area [around 12 employees]. Back before the turn of the century, and then the first decade there, we got up to like 79 employees in one year, so. It just got too much out of hand, so I really scaled back." [#16]
- A representative of a majority-owned professional services firm stated, "Average growth. Expanded during oil boom about 10-years ago to over 700 employees. Reduced work force to 500 when oil prices increased, and oil/gas work leveled off." [#2]
- A representative of a DBE-certified professional services firm stated, "In the last year, I think our revenue was close to a million dollars, which is amazing for a small women-owned business. So, I think we have grown a lot in the last couple of years by bringing on new associates. So, I think we're really like, we're growing, and if you would compare our revenue to other small women-owned businesses, I think it would be pretty high or we'd be leading in that area." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "The growth for where we're at, I'd say that as a startup, which is really what we still are, we're still in the young stages of business, I'd say our growth is pretty average. There are a lot of tribal 8(a)s that do not make it, do not really do any work. Even though they have the credentials, they just don't understand how it works and how to get there." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "It's probably on average. We're probably on par." [#23]
- The woman owner of a majority-owned construction firm stated, "We started off with three employees, so it's just been a work in progress as we go." [#24]
- The owner of a woman-owned construction business stated, "I don't know. Probably a little bit below average." [#25]

- A representative of a majority-owned professional services company stated, "I would say just because we started from two and we're at like nine or 10 now over four years, I would expect it would be somewhat higher, but based on a percentage just because we have started out with smaller numbers." [#27]
- The woman owner of a DBE-certified professional services business stated, "Our goal was never to grow. We only wanted to have enough work to pay our bills" [#28]
- A representative of a majority-owned professional services company stated, "I would say [our growth has been] slightly below average [compared to other firms in our industry]." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "I peaked and closed [my gravel business]. I mean, in 2012 the oil companies were going full speed yet here. And August of 2012 they called and said, 'We're closing. We're shutting down the reservation, drilling out there.'" [#3]
- A representative of a majority-owned professional services firm stated, "I would say we're above average for the firm. And a lot of that is based on hiring great people and working with great clients and having a good reputation." [#30]
- A representative of a DBE-certified construction company stated, "It's kind of ebbed and flowed. At one point we were an 8(a) company. And so, we had, we were getting a lot of 8(a) contracts and, so we had a number of employees. This was several, several years ago. But since I've been here, that's been between 35 and 40 employees, 35, 45 employees during the busy season." [#4]
- The owner of a majority-owned construction company stated, "We've honestly been pretty steady for the last eight years, within 10 or 15%, either up or down. We could take on more work if there was more work out there to give us. It would probably just be the upper end of what we've done before, not probably increase in what we've done before." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I really don't want to grow as far as crew size or employee size. I always would like to have more sales because, we can just work a longer season or longer hours. So, I think that we have a pretty, during the summer it's pretty hectic, but we still have a pretty easy spring and a pretty easy fall. And we do not work during the winter. So, if something really came up to where we needed to go do something in the winter, I would be willing to do that too. So not so much more employees, just sales could always be good." [#8]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals [#1, #11, #12, #13, #14, #15, #18, #23, #24, #25, #26, #27, #28, #29, #30, #3, #4, #5, #8]. For example:

- The owner of a majority-owned construction company stated, "We have a webpage, but we aren't trying to market." [#1]
- The owner of a majority-owned professional services company stated, "A lot of the work that we do is on GSA and because we probably, 99.5% or more of the work we do is through federal, state, tribal, or provincial governments. We avoid working as much as possible for private entities because we have found them to be somewhat difficult and anal to work with." [#11]
- The owner of a majority-owned construction company stated, "Basically. It's word to mouth. I mean, reputation of years working in the Flathead. We closed our webpage on account of the

insurance lady. And we have a Facebook page. A few years ago we had hundreds of brochures made up and we delivered and mailed about all of this kind of stuff. And then if we go to an area and we're working for one person, we'll notify landowners in the area that we're there and that we could work for them as well and sometimes that works out for us." [#12]

- The owner of a majority-owned professional services firm stated, "I updated my website. I got current on all the things that basically people see. So, I worked really hard on creating an online presence in multiple different platforms. One of the first things I did when I started here is I hired a search engine optimizer. So, an SEO." [#13]
- The owner of a majority-owned professional services company stated, "Pretty quickly, you get your name out there and contact with the contractors who are doing that kind of work. Over time, we have not done so much of that because they know us. When you're in your area, you don't need to do a whole lot of advertisement. I will advertise locally a little bit with some of the radio stations. And we put ads on the phone book, which is I don't know if the phone book even exists anymore. So, like Google search or somebody Google searches you, we've got a website and stuff like that. So, we get our name out there a little bit. There are so few people who do what we do. You get a reputation of doing that work and pretty quickly, the phone calls will come because there's two or three of us in the valley who do it and so they're going to call you." [#14]
- The woman owner of a DBE-certified professional services company stated, "We don't do a ton of it, but we have ads online, websites, brochures. We try to go in and talk to various agencies. We have a lot of repeat customers. And so, we haven't had to go too far out of the box other than online and websites and word of mouth and just getting out there talking to people." [#15]
- The owner of a majority-owned construction firm stated, "I don't do any trade fairs. So, in the governmental space it doesn't matter, you have to be the lowest bidder, and much is the same with MDT. You could market yourself till the cows come home, but if you are not lowest in that bidding, you're not going to get to work. So marketing is the toughest thing to do because you still need to be viable and findable. So, investment in a website and Google keywords are probably the most important in a contracting business. And then it just depends on what avenue you work in. If you're in a residential avenue and zone, then you might want some exposure in local papers and radios, but you can waste an atrocious amount of money on marketing and get almost no money back for it if you're not operating it in a sound manner. So, I would say nowadays that search engine results, websites, those are going to be the key avenues for spending money as for a contractor in marketing. We used to do radio advertising. We've went away from that. It's quite frankly just a waste of money." [#18]
- The owner of a WBE- and DBE-certified professional services company stated, "Social media has just not been the thing for me. So, I try to network with people who are managing contracts." [#23]
- The woman owner of a majority-owned construction firm stated, "The only way we market is by word of mouth." [#24]
- The owner of a woman-owned construction business stated, "I do things like Facebook online, and word of mouth, and currently repeat customers, we have some of that, and then DEQ." [#25]
- The owner of a majority-owned construction firm stated, "[We market on the] web." [#26]

- A representative of a majority-owned professional services company stated, “A lot of it's just through word of mouth. We watch for proposals in the newspaper or whatever. We follow those and we'll submit proposals based on qualifications. We provide charitable contributions to things, but we'd like to think some of those are for marketing purposes and some of them are just for charitable contributions, but a lot of it's just through word of mouth and using existing customers for referrals and things like that.” [#27]
- The woman owner of a DBE-certified professional services business stated, “We've done some mailers and networking in the past. We have a website but truthfully, our work has almost always come from people we know and word of mouth.” [#28]
- A representative of a majority-owned professional services company stated, “We're mostly built on word of mouth and relationships that we already have, and then just responding to solicitations. We don't do a lot of, I would call, overt marketing.” [#29]
- A representative of a majority-owned professional services firm stated, “Advertisements, sponsorships at conferences also have staff that will present at conferences and submit for various awards and projects with clients, different industries. Let's see, word of mouth, personal relationships, kind of everything combined is how we market ourselves.” [#30]
- The Native American woman owner of a DBE-certified professional services firm stated, “Yes. We'll do the [company name] first because that's hard to market. Because like I said, right of ways come under engineering. If you are only doing the right of ways, it's hard for you to get into an engineering company, until they learn who you are and what you do. Which, I'm there, but I wasn't in the past. It was impossible to even know that jobs were coming out. In [the other company], I am only word of mouth, is how I get all my jobs. I have no advertising. I have a website that needs to be updated, because that's not my strong suit, is that part of the world. But since I've been doing this so long, people just know who I am. They'll just say, ‘You go see her.’ Probably, I just wasn't very good at figuring out how to market myself, in the construction, maybe.” [#3]
- A representative of a DBE-certified construction company stated, “Well, we market through our website, we do a lot, a lot of our stuff is word of mouth, repeat business. We do signage on some of the projects that we've done, especially some of the local jobs. We’ll put signage out in some of the higher traffic areas. We're working on getting our Google listing, where it needs to be. That's a winter project that, but that we're going to be working on is getting our business listing firmed up and, a little bit better traffic to our Google. A lot of our businesses repeat, we get a lot of repeat customers.” [#4]
- A representative of a majority-owned professional services firm stated, “We respond to requests for services that are out there. We do have some people in our company that have made calls to different agencies, private firms.” [#5]
- The owner of a WBE- and DBE-certified construction company stated, “That's probably almost harder than trying to find a subcontractor, because... I try to update... we have a website and I try to get out there and, on Google and stuff, but you know, I don't... We don't update our Facebook page a lot. We don't... I don't PR a lot. I don't go to those live after fives. I'm not a guy, so I don't golf with certain people, and I don't hang out with certain other guys, that's a detriment being a woman.” [#8]

B. Ownership and Certification

Business owners and managers discussed their experiences with MDT's and other certification programs. This section captures their comments on the following topics:

1. MDT and other certifications;
2. Advantages of certification;
3. Disadvantages of certification;
4. Certification process; and
5. Other certification types.

1. MDT and other certifications. Business owners discussed their certification status with the Montana Department of Transportation, and other certifying agencies and shared their opinions about why they did or did not seek certification. For example:

Ten firms interviewed confirmed they were certified as DBE, MBE, or WBE [#15, #16, #17, #23, #28, #3, #31, #4, #8, #FG1]. For example:

- The woman owner of a DBE-certified professional services company stated, "We're a women-owned, disadvantaged business. Since, I believe, 2003." [#15]
- The Native American owner of a DBE-certified construction company stated, "Minority, yes. I think it was 1982." [#16]
- The woman owner of a DBE-certified construction firm stated, "Let me see. I think they did it when we were incorporated, which is back in '92 or '93, somewhere there." [#17]
- The owner of a WBE- and DBE-certified professional services company stated, "Woman owned and disadvantaged business enterprise." [#23]
- The woman owner of a DBE-certified professional services business stated, "We are a DBE, it's a women-owned business but we have MDT DBE certification." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "I'm a disadvantaged business owner because I'm next to the reservation. I am a [tribe] Native enrolled woman. The DBE [is] with the state." [#3]
- The owner of a WBE- and DBE-certified professional services company stated, "We are certified as DBE/ACDBE." [#31]
- A representative of a DBE-certified construction company stated, "[We are] certified as a DBE, Disadvantaged Business Enterprise. We are DBE certified in the state of Montana and in the state of Wyoming." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "DBE, woman-owned. So WOSB and EDWOSB, so economically disadvantaged woman-owned small business and then we are still in certified with [the] SBA." [#8]
- A representative of a DBE- and MBE-certified professional services company stated, "We've been a DBE, an MBE, registered in the state of Montana for probably 20 years." [#FG1]

One firm interviewed was not certified but was in the process of applying [#24]. For example:

- The woman owner of a majority-owned construction firm stated, "I'm in the process of trying to do that [certify as a DVBE (disabled veteran-owned business enterprise)] right now. It's not easy. It's not easy either. It's not that it's difficult, but it's very time consuming and some of the information that they ask for is difficult to... so it's just very, very time consuming." [#24]

Nine business owners and managers explained why their firms had not pursued certification. Many uncertified firms were unaware of the certification or its benefits [#10, #13, #24, #27, #29, #30, #33, #35, #9]. For example:

- The Black American female co-owner of a construction company stated, "We're not registered or anything yet, but something that we need to get done. I don't know why we're not. Partially, because I guess the set aside stuff for government stuff like that in Montana isn't super attractive anyway. And you know, it doesn't matter if they set aside a big job or something like that for it, if you can't bond that job, it doesn't do any good. We started getting into it. We're actually looking at hiring somebody to do it for us because it's not the simplest thing. You would think it would be. It's pretty easy to tell by my wife's ID that she's a black female. She owns the [majority of the] company. You wouldn't think it would take hiring an outside party to certify that, but that's where we're at with it right now. Because when we started looking into, it's just if you're not used to it, because it's paperwork that all of that stuff has, but it's not something we were really comfortable with. We're very conscious of not trying to look like we're taking advantage of that or that that's something like that too, because I think too many people do that. To me, it's oh, there's her state of Montana driver's license, pretty easy to tell from that. Here's the paperwork for the company, pretty easy to tell from that. I don't get all the other levels too, but I'm not saying that they're not necessary. It's just a frustration. The other thing, probably why we haven't registered as a DBE or really pushed for it yet is we've been approached by a couple people that wanted to use that to get bigger jobs. And I'm just not really okay with doing it that way. To me, that's not what that was made for and it's taking it away from somebody else kind of thing. That have approached us about like, 'Oh, you guys could be registered as a DBE. You could do this job. We'll back you on it with our employees and our equipment and our...' I have no interest in doing that, but that's how corruptible that system is too, I think." [#10]
- The owner of a majority-owned professional services firm stated, "No. It's mostly just because I'm ignorant of what's out there and slammed with work in the meantime." [#13]
- The woman owner of a majority-owned construction firm stated, "I don't know what a DBE is. I didn't even know about that one." [#24]
- A representative of a majority-owned professional services company stated, "No, we are not. I don't think we would be eligible to be to qualify for that." [#27]
- A representative of a majority-owned professional services company stated, "We're an ESOP-owned company, so I don't think we would ever qualify for that." [#29]
- A representative of a majority-owned professional services firm stated, "No, we're a large business." [#30]
- The owner of a majority-owned professional services firm stated, "No." [#33]
- A representative of a majority-owned professional services firm stated, "We don't qualify." [#35]

2. Advantages of certification. Interviewees discussed how DBE/MBE/WBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification [#16, #24, #28, #3, #4, #8]. For example:

- The Native American owner of a DBE-certified construction company stated, "Opportunity. That it gives you a little bit more opportunity to actually get some work, because they have those requirements of so many percent of every project have to have a DBE. And there's a whole lot of small contractors out there, and not so many of them are DBEs. So, [it's] an advantage." [#16]
- The woman owner of a majority-owned construction firm stated, "I'm a female. I'm a white, older female but my partner is a disabled veteran. And so, what we found was that he has more opportunities to get contracts and jobs as a disabled veteran than I do as a female. I thought that we would be more advantageous as a woman-owned business, but that wasn't the case when it came to disabled veteran options." [#24]
- The woman owner of a DBE-certified professional services business stated, "We've gotten a lot out of the DBE program. They've had a lot of things that were very helpful. Networking opportunities, training when we were early on, they helped us pay to get our website up. We're both chairs for continuing education and there's been funds available for that. It's just lovely." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "The benefits of DBE was for sure getting the website up. And they do give like they were giving $600 I think a year. And I think now it's up to $2,500 or something. I'm just somebody that I don't think about how to apply for money. Or how to ask somebody for something. It just doesn't fit in me very well, so those are the good things. But, from me and the people that I know, I don't know very many that really have gotten any big jobs because of it. And like I said, I don't know how... it's not like they are not trying because they do a lot of things and they're more helpful than you can imagine. But somewhere there is a disconnect to me between the primes and DBEs. And it can't be that you just have to hire DBEs because they're DBEs. That's not fair to the prime. And I personally am not somebody that thinks you have to force somebody to do something. That just is not good relationships. Over time you may get some relationships going, but there's a huge barrier there when you force somebody to do something without an equal return. ... If for no other reason, they do have money, that they will reimburse you for business things. They have a lot of classes, and they try very hard to help the businesses. … DBE works really hard to do trainings." [#3]
- A representative of a DBE-certified construction company stated, "It gives us a chance to be competitive in the market. In the market, if we didn't have that, some of those requirements, DBE requirements, I do think it would adversely affect our ability to get certain projects on the MDT side of things. We get our name out there a little bit more. It's more of an advantage because we are a DBE. So, we get solicitations from people who need to fill those DBE requirements." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "Being DBE certified is good because once a year they reimburse you $2,500 if... for bonding or whatever, whatever, training. What a nice perk. And then when things come up, like if they know that there's going to be this gathering, they'll let you know. So, it is a good resource, but if I could literally do work as a DBE, it'd be better." [#8]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#18, #31, #4, #PT2]. For example:

- The owner of a majority-owned construction firm stated, "I don't know, and my mother is getting old enough now. So, if you read the letter of the DBE certifications, she has to be coming into the office and making decisions, and at 83 years old, that's not what she wants to do." [#18]
- The owner of a WBE- and DBE-certified professional services company stated, "We are in 14 states, but I don't work anywhere. I have certifications, but I was not able to successfully place anybody yet anywhere in a nation, including Montana, specifically for the DBE. So, it's kind of like, 'Okay, I have few contracts, clients that require ACDBE and they want us for that reason and I'm so grateful, but that's it.' It's one or two clients and I would like to expand that." [#31]
- A representative of a DBE-certified construction company stated, "I guess the stigma would be, really the only disadvantage that I would think of is a prime is more checking the box, potentially, then really interested in garnering a DBE bid, potentially. I don't know that that necessarily is the case for us." [#4]
- A representative from a respondent at a public meeting stated, "We have been certified with DBE since 2013 and we have yet to do a DBE job. And I've got thoughts about it, but I don't know quite how to help you to help me." [#PT2]

4. Certification process. Businesses owners shared their experiences with MDT's certification processes [#16, #15, #23, #3, #4, #31]. For example:

- The Native American owner of a DBE-certified construction company stated, "It's very easy, yeah." [#16]
- The woman owner of a DBE-certified professional services company stated, "Well, the initial one is a lot of paperwork and digging up your old documents and everything. And so, it was cumbersome, but it was necessary. And once you get the certification, then you have an annual form to fill out which isn't too bad. And then the DBE folks usually come down and try to meet with us once a year or once every other year to just check up with us and check on our company and see if we're still around and still legit. And so, the process seems to be pretty easy now that we're certified." [#15]
- The owner of a WBE- and DBE-certified professional services company stated, "And without PTAC, there's no way I'd still be, first of all, there's no way I'd be a female woman-owned certified business or a DBE because I just wouldn't have gotten there. Wouldn't have known it was available. Wouldn't have known how to figure it out. And it's all so simple, but it's just easier for them because they do it every day and it's hard for me because I have to learn it if I want to do it." [#23]
- The Native American woman owner of a DBE-certified professional services firm stated, "I think when you first start it probably feels very difficult. But once you accomplish it, and now it's not even as hard as it used to be 20 years ago." [#3]
- A representative of a DBE-certified construction company stated, "We are DBE certified in the state of Montana and in the state of Wyoming. Super easy. Super easy. And I know all the gals over there pretty well. So, if there is an issue, I get an email back. 'Hey, can you answer this question for me?' Sure. No problem." [#4]

- The owner of a WBE- and DBE-certified professional services company stated, "Well, the program is great and the process is amazing, but why we wanted to do DBE was because I got our business certified as women-owned business through WBENC, which is Women's Business Enterprise Council, So, through that network, I've been able to offer the certification onsite interviews for these businesses in Montana for WBENC certification, and since you have one set of documents, you might as well get your DBE, ACDBE certification at the same time. It's just a smart thing to do. It's almost like one-time stop and we are all working together, so why not support one another right throughout all these programs because if you're not using this program, nobody's going to use the program. It's going to go away, and we don't want that to happen. Right? We want the funding to be available in our state. So, because of those reasons and I have some of the customers that required me to have ACBDE certification for staffing at the airports in Montana. So, I just naturally got DBE in Montana and ACBDE in Montana. Not only that, but I also actually expanded to additional 14 states in a nation on DBE certifications." [#31]

5. Other certification types. Interviewees shared several comments about other certification programs [#15, #16, #21, #22, #23, #35, #4, #8]. For example:

- The woman owner of a DBE-certified professional services company stated, "We did get the minority women-owned business set up through the federal [government]." [#15]
- The Native American owner of a DBE-certified construction company stated, "[We're a certified] minority, yes." [#16]
- A representative of a DBE-certified professional services firm stated, "We do have the certification for a small woman-owned business, I don't think it is with the Montana of Transportation. But it is with I think the state of Montana, so maybe that covers it." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Well, we are an 8(a) federal contracting company, so we are in year five. Indian-owned, under the federal rules, we're tribally 8(a) held, we're a small, disadvantaged business, small business, Indian-owned Economic Enterprise. IEE under the new by Indian AC rules. And then also what they, they've kind of got two designations in that they've got the general Indian Economic Enterprise, and then they've got the Indian Economic Enterprise Small Business. So, the IEESB. And so, we're certified under all of those as a federal contracting division or company. We also have vertical companies within the federal umbrella that have HUBZone certification also." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "Woman-owned and disadvantaged business enterprise." [#23]
- A representative of a majority-owned professional services firm stated, "We are a women-owned small business." [#35]
- A representative of a DBE-certified construction company stated, "We are DBE certified … in the state of Wyoming." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "DBE, woman-owned. So WOSB and EDWOSB, so economically disadvantaged woman-owned small business and then we are still in certified with 8(a)." [#8]

C. Private and Public Sector Work

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work**.** Section C presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Obtaining work in the public and private sectors;
4. Doing work in the public and private sectors;
5. Differences between public and private sector work; and
6. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work [#23, #24, #27, #28, #30, #36, #6]. For example:

- The owner of a WBE- and DBE-certified professional services company stated, "Public hasn't grown at all for us, private has grown substantially." [#23]
- The woman owner of a majority-owned construction firm stated, "Towards [private]." [#24]
- A representative of a majority-owned professional services company stated, "We actively try to lean toward more public work, although there is a lot of private work available right now. But we try to lean toward the public. Just for the stability factor." [#27]
- The woman owner of a DBE-certified professional services business stated, "I'd say right now, we are to 75% private. In the past, we were 75% public. But just things have changed, partly because I'm 63 and my business partner is... What is she? 60 maybe, and we're working less now which works better with private sector work." [#28]
- A representative of a majority-owned professional services firm stated, "And a lot of that is economy driven. I think that the private sector sees the impact positive or negative faster than the public sector does when the economy turns." [#30]
- A representative of a Native American-owned construction firm stated, "Yes. In our line, yes, I would say there's a trend away from it [private sector]." [#36]
- The owner of a majority-owned construction company stated, "Yeah, in fact it probably was [a] higher [percentage in public sector] before. It used to be Northwestern Energy and them did their own stuff, but now they're kind of hiring us out a little bit. It's probably... it was probably higher before." [#6]

2. Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

Two business owners explained that their firms only engaged in private sector work [#23, #12]. For example:

- The owner of a WBE- and DBE-certified professional services company stated, "We have substantial private work. A hundred percent private." [#23]
- The owner of a majority-owned construction company stated, "Private. Basically 100% private right now is what buying all of our product." [#12]

Three business owners explained that their firms only engaged in public sector work. [#11, #9, #3]. For example:

- The owner of a majority-owned professional services company stated, "A lot of the work that we do is on GSA and because we probably, 99.5% or more of the work we do is through federal, state, tribal, or provincial governments. We avoid working as much as possible for private entities because we have found them to be somewhat difficult and anal to work with." [#11]
- The owner of a majority-owned construction company stated, "But as far as looking at doing private industry work, no, I have not." [#9]
- The Native American woman owner of a DBE-certified professional services firm stated, "Probably 98% public, 2% private, at [my professional services company]. In the construction [company], mostly, since I couldn't get into that, most of it was private." [#3]

For seven firms, the largest proportion of their work was in the private sector [#15, #21, #24, #25, #26, #28, #35]. For example:

- The woman owner of a DBE-certified professional services company stated, "We're doing 90% private sector." [#15]
- A representative of a DBE-certified professional services firm stated, "Most of our work is in the, I guess you would say private sector because it's like with behavioral health programs." [#21]
- The woman owner of a majority-owned construction firm stated, "Probably 25% from public and 75% from private." [#24]
- The owner of a woman-owned construction business stated, "Most of the work is private sector." [#25]
- The owner of a majority-owned construction firm stated, "I'd say 90% private, 10% public." [#26]
- The woman owner of a DBE-certified professional services business stated, "I'd say right now, we are to 75% private. In the past, we were 75% public." [#28]
- A representative of a majority-owned professional services firm stated, "It's about 40% public, 60% private." [#35]

For eight firms, the largest proportion of their work was in the public sector [#1, #16, #27, #29, #30, #6, #7, #FG1]. For example:

- The owner of a majority-owned construction company stated, "We generally work for the state of Montana and the state of Wyoming." [#1]
- The Native American owner of a DBE-certified construction company stated, "At least probably right at 85% of our work is actually with Bureau of Indian Affairs, and then the local tribe here. That's the way it's been throughout my career, here. Being a tribal member benefited me that way." [#16]
- A representative of a majority-owned professional services company stated, "I would say it's probably 75% public and 25% private right now." [#27]
- A representative of a majority-owned professional services company stated, "I'd probably say 90% public and 10% private. We have never wanted to do private sector work. We, very initially, started doing it and it was just not where we want to be." [#29]
- A representative of a majority-owned professional services firm stated, "Probably 60% from the public and 40% from the private." [#30]
- The owner of a majority-owned construction company stated, "Almost all of our business is with MDT, or the Federal Highway Administration." [#6]
- A representative of a majority-owned professional services company stated, "It depends on the year, but I would say probably mostly federal, state, we do a lot of work with the school systems. We do a lot of work at the airport. We do a lot; we do work for contractors doing city work. So, when we get into city stuff, all the testings on the contractor, so the city are paying for that. So, but yeah, public schools, we mentioned that hospitals, we do of work there at quasi-private sector." [#7]
- A representative of a DBE- and MBE-certified professional services company stated, "We, in the last two years have picked up a small piece of private sector. But I would say 95% of our work is public work." [#FG1]

Six firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy [#14, #32, #33, #36, #4, #5]. For example:

- The owner of a majority-owned professional services company stated, "I'd say almost half would be private sector or local government." [#14]
- The woman owner of a professional services firm stated, "Overall it's probably almost 50/50." [#32]
- The owner of a majority-owned professional services firm stated, "50/50. We have long-term relations with a number of federally qualified health centers, and we do a lot in the healthcare space, so that tends to be... it has over the last 10 years, 12 years been fairly constant. But in the other areas, it goes back and forth between technology, real estate, sporting goods, and athletic clothing, it's all over the lot. If you take a look at our website, we've done all different kinds of things, and so, one part is fairly stable and the other part has lots of change." [#33]

- A representative of a Native American-owned construction firm stated, "I would say it's almost 50/50 in our line. The public would be a lot of our service work. Private would be a lot of our bid work." [#36]
- A representative of a DBE-certified construction company stated, "It's probably close to 50-50. It might be a little slanted more towards private but, I mean, we do a lot of work for the counties, certain municipalities in the area. School districts. So, we have quite a mix." [#4]
- A representative of a majority-owned professional services firm stated, "We'd probably be 50/50-ish." [#5]

3. Obtaining work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in the Montana area.

Nine business owners expressed that it is easier to get work in the private sector. Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#13, #23, #24, #25, #26, #28, #33, #35, #4]. For example:

- The owner of a majority-owned professional services firm stated, "Well, it's far easier to establish a relationship with a private sector agency or client, far, far easier. So, you can very candidly speak to them about cost and timeframe. The contracting process is super simple and it's the opposite with a public agency. It's all this, like I said about the insurance or this or that, or the other thing, there's just all these things that you really don't account for when you are coming up with a cost. I could show many, many, many, tens of man hours of just paper pushing, trying to get a contract where if you accounted for all that time, you wouldn't get the contract you're working for free in order to get a contract that you hope is lucrative enough to make it worth doing. So yeah, with the private sector, you just don't have to jump through all the hoops." [#13]
- The owner of a WBE- and DBE-certified professional services company stated, "On the private sector, there's a lot. There feels to be less barrier to entry. I worked with a lot of startups, younger companies, companies that are from outside of Montana. And my personal work experience has been very diverse. And yeah, that's all been pretty good. It sounds kind of harsh, but it's really just the Montana government." [#23]
- The owner of a woman-owned construction business stated, "Private is you're just dealing one on one. And if you haven't broken into actually getting government contract, then you don't get the repeat customers in that area either. So definitely it's a lot easier to get private sector." [#25]
- The owner of a majority-owned construction firm stated, "It's a lot easier to get it in the private sector." [#26]
- The woman owner of a DBE-certified professional services business stated, "You go about it differently. Private sector, you're going to the people who need the work done and public, since we team, we're going to engineering companies who are, are going to be prime. So, it's very different for us." [#28]
- The owner of a majority-owned professional services firm stated, "The decision-making process in the private sector is generally easier, but it really depends on the clients. We've worked with some government clients that were really easy and some were hard. I would say it really

depends upon the primary person that you're working with and the degree to which they are empowered to make decisions." [#33]

- A representative of a majority-owned professional services firm stated, "We prefer private sector work because we can get better rates private doesn't have to put stuff out to bid if they don't want to." [#35]
- A representative of a DBE-certified construction company stated, "There's less paperwork involved with the private sector. I mean, here's the bid and that's really all there is to it. I mean, I'm not giving proof of insurance and bonding information to Peace Lutheran Church down the street. You're not dealing with certified payrolls and things of that nature as well. When I say private, I'm talking the smaller driveways and things like that. There aren't as many reputable companies doing them. There are plenty of companies doing it. There aren't very many reputable companies doing it. We have several fly-by-night companies that come in. I get several phone calls a year. 'I need you guys to come out and fix my driveway. I had company X come by and do it, and it tore up after two months and they cashed the check and they're gone.'" [#4]

Five business owners elaborated on the challenges associated with pursuing public sector work [#21, #22, #23, #25, #35]. Their comments included:

- A representative of a DBE-certified professional services firm stated, "I think the biggest difference is that, like I said, really like public feels like it's not as flexible, it usually pays a lot less. A lot of times it's actually more competitive to get those funds, so I think that would be. And then they don't care as much about relationships and your reputation or previous work. And it takes a ton of time, like the bureaucracy, it's out of control. We've had a public contract that we finally got. We've been working on it for a year, and it just got signed." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "I think one of the factors is that with a different contract officer requirements and levels... I think with two things. One, the baby boomers retiring. And two, the, COVID exodus because people didn't want to be sick or just were at the age where it was close to retirement and just thought, "I'm done with this. I'm going to retire." That there is a shortfall on contract officers. And so, last time I heard it... And this is old information, but I had heard that we were at like a forty or fifty thousand person shortage for contract officers. ... With that being said, the government doesn't decrease the number of contracts being let. They increase the load on the contract officers, which means things fall through the cracks. Things don't get let, don't come out correctly. And things get put into pools to make their officers... Their jobs easier. And so, for us as Tribal 8(a) is that's the easiest tool in the world for a contract officer to use, but they'll use it with people they know. For us startups, they don't know us. And so, they're not willing to do that as much. And then, plus we're seeing now in the marketplace, even the 8(a) contracts... So, the ones that would help us be more competitive because it's... The pool isn't the Northrop Grummans of the world, the Boeings of the world. Its smaller groups like us. Those are now being taken out of open 8(a) where we can bid on it and put into schedules. And so, those schedules then limit the pool more so that the contract officers don't have to go through as many submittals potentially." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "I think engaging in the public sector is really meaningful work because you're accessing such a diverse range of Americans and visitors. But it's just been an exhausting process and it has felt unwelcoming at times." [#23]

- The owner of a woman-owned construction business stated, “Just the bridge between being a small business and knowing how to communicate with the people that are awarding the contracts.” [#25]
- A representative of a majority-owned professional services firm stated, “We haven't pursued any opportunities because Montana doesn't have any environmental rules in place unless there's federal funding that requires the state to get an archeological assessment on a public works.” [#35]

Two business owners and managers described public sector work as easier or saw more opportunities in this sector [#16, #29]. For example:

- The Native American owner of a DBE-certified construction company stated, “With the public, where they stand, you've got your contract, you know all the specifications. When you start dealing with the private work, things seem... The owner is always coming in there, "Well, that's not the way I wanted it." Well, that's the way you explained it to us, things like that. We found out we'd rather work with the state, tribe, or whoever, because we know exactly what their specifications are, and all their expectations. Working with the public, it seems like it's just so much more organized, and straightforward.” [#16]
- The owner of a majority-owned construction company stated, “You know, I think we're just a lot more comfortable with the public thing. Everything's in the same format, usually. Everything is kind of... it's gotten easier to understand for us, so we're used to it. Where the private sector, they've even gotten a lot of this where the plans aren't even really all the way finished when you start the project, and things change all the time. It seems like there was a budget to begin with, but then they keep adding, and don't want to change the budget. It's just a lot more difficult to... I mean, I guess we're just more comfortable doing the stuff we're used to.” [#6]
- A representative of a majority-owned professional services company stated, “There's huge differences. Some negative, some positive. I mean, the reason, the biggest reason we stick with public is because if you do private, oftentimes, you come against the public sector. Does that make sense? Your developer may have a problem with MDT, and we don't want to be on both sides of the fence, but, additionally, private is riskier. You can make a lot more money, but it's riskier. I think that would probably be the biggest thing. The public sector is always very firmly and easily ... they pay at a certain time; you know what to expect. I would say it's fairer than the private sector. The private sector is much more concerned about cost versus value.” [#29]

Five business owners or managers noted that it is not easier to get work in one sector as compared to the other [#25, #26, #27, #28, #5]. For example:

- The owner of a woman-owned construction business stated, “Not anything I've noticed really.” [#25]
- The owner of a majority-owned construction firm stated, “No [difference between sectors].” [#26]
- A representative of a majority-owned professional services company stated, “I think it's pretty close. For us, I don't think it varies much.” [#27]

- The woman owner of a DBE-certified professional services business stated, "It's job specific, but there is a commodification in the private sector that you get that says, 'Okay, there's other people out there that they're going to do this work for 3000 bucks. So, if you take 3,500, you aren't going to get the job.' But in the public sector, we're a little more protected by that at, lets us qualify for work qualifications and then negotiate the price." [#28]
- A representative of a majority-owned professional services firm stated, "Public sector, generally, you know you are going to get paid in the public sector. I know that when we do our FARS overhead rate, that's where you take the base wage with the multiplier for the FARS overhead for like MDT or public sector. Our rates are lower than what we charge the private sector because our standard rates account for risk because of the private sector. There's a greater risk of not getting paid for your services and liability with most of the public sector, we know it. It may take while and it's kind of tedious to get your invoices in and gone through, but you are going to get paid, eventually." [#5]

4. Doing work in the public and private sectors. Business owners and managers commented on what it's like to do work with public and private sector clients in the Montana area.

Seven business owners discussed their experiences doing work in the private sector [#10, #11, #14, #21, #29, #8, #FG2]. Their comments included:

- The Black American woman co-owner of a construction company stated, "The only time that we actually are required to bond is when we're touching into the street so that then we have to bond to the municipal. But yeah, it's even less than 10%. It's like, I think we have to do five [percent]. I think it's 5% or 10% that we put up to them or a bond for the whole amount of the work that's being done in the street, one of the two. And they're usually pretty close to the same cost on something like that." [#10]
- The owner of a majority-owned professional services company stated, "Right. I mean, you know the game plan, you know how it's going to work, and then you've gotten rid of some of these other problems of... Because the way they are, they can't whimsically throw you off, it has to be... Because I don't know the number of private places we've gone and talked to them, and they've pumped us for a bunch of questions. And then they turned around and had the work done by someone who had completely less skills and just, they were attempting to have us build the plan and they were going to give the plan then to someone else. And so, we've stopped. When they call up now, we just tell them, 'Sorry, we're not interested.'" [#11]
- The owner of a majority-owned professional services company stated, "Commercial work and usually residential, unless it's some of the higher end homes in the Whitefish area. They don't have the resources to pay to check the quality of their materials and their work. They just have to trust that the contractor does a good job and self-observe and inspect as they get their homes built." [#14]
- A representative of a DBE-certified professional services firm stated, "I think it's way easier to do work in the private sector." [#21]
- A representative of a majority-owned professional services company stated, "Well, it probably is easier to do private because you don't have the restrictions, you don't have the standards, you don't have the bureaucracy, basically, and so it probably is easier to do private." [#29]

- The owner of a WBE- and DBE-certified construction company stated, "In the private sector, one, you don't have any testing. You don't have... so any Joe Blow can go in there and do it. But what's bad about the private sector is, they will get three and four bids and ours will be a good bid, but they think we're robbing them because the other one came in so much less. Well, if we tell you we're going to give you three inches of asphalt, we're going to give you three inches and three quarters because we compact it down to three inches. Well, that other contractor will give you an inch and a half and tell you he gave you three." [#8]
- A representative from a focus group consisting of prime contractors stated, "That the job we did at the mine, it never actually went out to bid and they had approached us over a year ago and just working back and forth, it took almost a whole year to finally get plans and to get us in there and actually get the work done. And this and this one down by Billings probably started about seven, eight months ago with just initial discussion. And what it is, is these people, these entities reaching out, trying to figure out how to proceed. They know they want to bridge there, what do they need to do to get it done? And so, a lot of times they'll just cold call us and say, 'Hey, we got this coming, will you help us through it?' And so, we help them navigate, we get them in touch with an engineering firm that can start with initial design, maybe give them some preliminary estimates. And so, we start working through that and hold their hand through the process. And I think eventually we just, this one looks like it's going to pan out, where we just get the work, very similar to the mine, where they just say, 'Here, why don't you just handle it?' So, walk them through the process from initial conception to actually building the structure. But it's not always that way, sometimes these entities will just say, 'Hey, really, we're not the designers. You need to talk with an engineering firm. There's Geotech that needs to be done, substructure work. All just needs to be designed.' So, we just get them in touch with an engineering firm or a couple of them, so they can call around and then eventually we'll see it come back out for bid later. And just really no rhyme or reason, just how things work out sometimes." [#FG2]

Sixteen business owners discussed their experiences doing work in the public sector [#14, #15, #24, #26, #30, #8, #AV, #FG2]. Their comments included:

- The owner of a majority-owned professional services company stated, "There can be quite a bit of difference [between working with local government agencies versus federal or state agencies]. The government agencies tend to be a little bit more rigid, a little harder to get involved in their work to begin with. And some of the requirements are a little more complicated. The local firms, they're generally fairly easy. They'll call you up one day, and you wouldn't even have known that there was a project. It wasn't large enough to be part of the Plans Exchange. And they call you up and say, "Hey, we want you to come start testing tomorrow on our project." So, those are generally easier. The upside to the federal or large FAA or state projects is, obviously, they're larger. So, you get a larger amount of work at one contract instead of dealing with a whole bunch of smaller contracts. I like being able to have a mixture of both federal dollars and local dollars. It insulates us against the economy going up or down too much, because we're stable with a certain percentage of our work being tied to federal dollars." [#14]
- The woman owner of a DBE-certified professional services company stated, "With any government agency, when we do MDT projects, there's so much more paperwork. I mean, it's incredible. Which drives up cost, obviously. I know the first time we ever worked with MDT, we gave them our cost proposal after we were selected and they came back and said, "You need to raise your price because you're not going to be able to do all the paperwork and everything for

this price." Because we were giving them a price comparable to private work. So just the added government red tape and forms, it makes a project more difficult, but we can do that." [#15]

- The woman owner of a majority-owned construction firm stated, "Public [work is easier to do]." [#24]
- The owner of a majority-owned construction firm stated, "They would require SAM registration to do business with them." [#26]
- A representative of a majority-owned professional services firm stated, "I think each owner has their own unique process. That if you're not as familiar with it as other owners, it could seem easier or harder until you perform work for that company or that owner. Once you figure out how each agency operates and how they work, once you get familiar with it. I think it's just easier to understand in their process, but as a first time in any public agency that we work with the first time, it's always a little bit harder to make sure that we're doing things the way that it's expected to be done." [#30]
- The owner of a WBE- and DBE-certified construction company stated, "Oh, government, it's got its pros and cons. What I like about working for the city and county and I can't really state how much I've... because we haven't worked with the state, but with the city and county, what's kind of nice is, everybody should be on the same playing field. Everybody knows that you have to put in six inches of gravel and test it. And then, I mean, it spells it out what you need to do. And it's kind of nice, but it's only as good as the superintendent from the city, or from the county, who is out there during every single phase and makes these people do their jobs. So, if they weren't there when that gravel was put in, and instead of putting it in at six inches, they hog it in at a foot, and where [are] the testing results? Then, not only did that GC fail, so did that inspector for city. With the city and county, what I don't like about the inspectors is that's... Okay, the federal government inspectors are incredible. They will, it's like, you're all a team. They will come out there. You guys have their... you have your meetings. They... you give them... you tell them what you're going to do. They tell you that yes or no. They don't wait until you've screwed up and then said, 'Oh, hey, by the way, you did that wrong, you got to tear it out.' City and county inspectors will. They will watch you do something wrong, and then have you tear it out. It's like they want to see you fail. Whereas the federal government... It's... because it is a team out there. Your truck drivers, your material suppliers, your inspectors, your project managers, your laborers, your operators, they're all a team. And gosh, when it... when you all work together for that job, to make that job turn out wonderfully, in a timely fashion, at the best price possible, life is good." [#8]
- A representative from a woman-owned construction company stated, "I've never had a problem getting work and I have a good rep and I get calls from general contractors all the time. It's all the paperwork you have to submit. Having your EEO and proof of the fuel you're using. It's all the paperwork and red tape that's hard." [#AV208]
- A representative from a majority-owned professional services company stated, "Lack of available employees. A lot more hoops to jump through but they're defined. So just two to three more steps." [#AV214]
- A representative from a majority-owned construction company stated, "Paperwork is harder than the work." [#AV220]

- A representative from a majority-owned construction company stated, “We have way more work than we can do, we need employees. Just paperwork. A lot of paperwork.” [#AV223]
- A representative from a majority-owned construction company stated, “We are not looking to expand any other locations. Typical government paperwork nightmares. The flow of paperwork.” [#AV329]
- A representative from a majority-owned professional services company stated, “We haven’t done it in the past several years because it was overly bureaucratically encumbered.” [#AV352]
- A representative from a woman-owned professional services company stated, “It is challenging working with certain political entities. I have found that working with some governmental entities, the COVID thing has given a lot of people license or excuse to seemingly not do their job in a timely manner." [#AV354]
- A representative from a majority-owned construction company stated, “It is just a long process with all the paperwork. The hardest thing is obtaining more workforce or people. Starting a business is fairly easy if you have the people.” [#AV31]
- A representative from a woman-owned construction company stated, “Overall Montana is pretty easy to work with. We have really good relations with government officials including MDT.” [#AV72]
- A representative from a focus group consisting of prime contractors stated, “Working for them [private sector companies], it's just different expectations. With MDT, we know, I mean, this is our bread and butter. We do it day in and day out. We know exactly what the specs say, we know what we need to do. We know what the MDT's expectations are, they know what ours are and it's fairly straightforward. When you start venturing into the private sector and things are a little bit more difficult, just for the simple fact of trying to learn their means and methods. And sometimes getting paid is just a little bit more difficult. With MDT it's very strict regimented monthly pay estimate, we know what all those expectations are. So yeah, with the private sector, it's just a little bit more difficult as far as that's concerned. As far as maybe oversight, not as difficult, you don't have somebody out there over your shoulder the whole time, but the expectation's obviously for a good quality product. And so, we maintain our own quality control and then working on a mine, we have to have everybody MSHA [Mine Safety and Health Administration] trained, which is extensive, it's 40-hour MSHA training requirement. And it's just difficult, lot more rules and regulations as far as being on a mine site.” [#FG2]

5. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Eleven business owners and managers highlighted key differences between public and private sector work [#11, #12, #2, #22, #24, #27, #30, #32, #3, #36, #6]. Their comments included:

- The owner of a majority-owned professional services company stated, “A lot of the work that we do is on GSA and because we probably, 99.5% or more of the work we do is through federal, state, tribal, or provincial governments. We avoid working as much as possible for private entities because we have found them to be somewhat difficult and anal to work with. At least with the feds or the state agencies, there's rules and regs, and we know what they are, and we can follow them and so that's not an issue. It's just that we have some of these others that don't

want to a lot of this stuff. And then they go and try to figure out ways to... The Bitterroot Valley is rife with wealthy people who moved here and want to find a way to screw somebody. … We have in the past done a tremendous amount of work with one particular private entity and it was in Montana. And that one was... We had absolutely no problem. They were great to work with, great to work for, no issues whatsoever with that one. That was Ted Turner and his property. But then we have others who have moved and other parts who don't respect small businesses. They just want to take advantage of them. Right. I mean, you know the game plan, you know how it's going to work, and then you've gotten rid of some of these other problems of... Because the way they are, they can't whimsically throw you off, it has to be... Because I don't know the number of private places we've gone and talked to them, and they've pumped us for a bunch of questions. And then they turned around and had the work done by someone who had completely less skills and just, they were attempting to have us build the plan and they were going to give the plan then to someone else. And so, we've stopped. When they call up now, we just tell them, 'Sorry, we're not interested.'" [#11]

- The owner of a majority-owned construction company stated, "When we're bidding on private, that's what we do. We write up a bid quote to them and then usually anymore there's quite a bit of competition. So, most of the landowners we're working for are out of state people that are moving in. And a lot of them don't even live here yet or have never been here and seen their property. So, look at 100 jobs and take one. It's pretty difficult to convince people, they bought a mountainside somewhere that's not accessible or something. It looks good out of map, but when you actually get there it's worthless piece of property. Or they got to build a driveway that you get up and probably drive in the summer, and they want to move here in the winters here or something." [#12]
- A representative of a majority-owned professional services firm stated, "The biggest difference from private and public is it's qualification-based versus price-based a lot of times. And so, it's a lot more trying to be cost competitive on the private side. It's almost more targeted towards that relationship is if a private entity or a person is more comfortable or more familiar with working, you know, stay with one engineering firm, a lot of times they're just going to stick with them." [#2]
- A representative of a Native American-owned SBE-certified professional services firm stated, "There are not very many public sector contract acts that are worth 200 million over five years. And so inherently they're different, but again, for the most part the federal, the private sector is not building many destroyers or aircraft carriers or those kind of things. So just the magnitude of what's being bought is different in the public sector. … There hasn't been a huge difference for the most part. We cannot sell something to the federal government at a price greater than what we sell at in the commercial market. So, for us being in the staff augmentation world, an hourly salary is an hourly salary based on region and experience and what you need and what the requirements are. So, we don't see a ton of difference, but the total contract value, we do see a difference because most companies in the private sector they're good at, you pick it, cyber security services, accounting services. And so, they don't necessarily need a whole accounting staff from us. They need maybe one person. So just the magnitudes of the needs are different. Then based on that basic fact, then the magnitudes of the contract values are different." [#22]
- The woman owner of a majority-owned construction firm stated, "I just think probably the private sector isn't as well educated on construction maybe as the public sector is." [#24]

- A representative of a majority-owned professional services company stated, "I think a lot of the work is similar. The public sector may be just a little bit more regimented and not so... You don't get a call every day from the private person trying to push you along and things like that. So, it may be just a little bit laid back, but it's... I guess, I don't know. There definitely are some differences, I guess it would just be mostly that, I guess. You're kind of more on a regimented timeline with the public project. You kind of know what your timelines are instead of just get it done as quick as you can get it, you know?" [#27]
- A representative of a majority-owned professional services firm stated, "Generally yes. Mostly as it relates to risk and kind of management of the contract itself." [#30]
- The woman owner of a professional services firm stated, "The private would probably be easier just because that's a lot of mostly where we go to because it's marketing. So, the private it would be more personal things or smaller organizations and things like that. So yeah, it would probably be... Just because of the marketing, the private doesn't do as much of that." [#32]
- The Native American woman owner of a DBE-certified professional services firm stated, "The difference is, in the public you have to have a lot more stuff. More insurance, more, that kind of stuff. In the private, you don't have to do that." [#3]
- A representative of a Native American-owned construction firm stated, "I would say the private sector is a lot more cutthroat as far as bidding. That competition's tough. It's a high risk, low reward, in my opinion. I'd say the public sector, if you're established and known in your community for the work you do, then I would say public's a little easier." [#36]
- The owner of a majority-owned construction company stated, "Yeah, the public stuff, at least you know you're getting paid all the time. The private stuff, it's an electrical company, like a Northwestern Energy company, you're fine with that, but then there's some stuff where, like Big Sky area and all that kind of stuff, they can put you way back on payment. They kind of go back there after, trying to negotiate after all the works done. The private stuff is harder for us. We prefer to work with MDT or the Federal Highway Administration where you know you're getting paid. The only time we'll be a prime, really, on a private one, is if it's a guardrail job." [#6]

6. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

One business owner perceived public sector work as more profitable [#24]. For example:

- The woman owner of a majority-owned construction firm stated, "The public's more profitable." [#24]

Nine business owners and managers perceived private sector work as more profitable [#13, #16, #21, #29, #30, #32, #35, #36, #4]. For example:

- The owner of a majority-owned professional services firm stated, "You already have to know how to navigate the system to make it [public sector work] cost effective." [#13]
- The Native American owner of a DBE-certified construction company stated, "I believe maybe the profit margins a little better in the private sector. I think with the private sector, I just,

through experience, I've just learned that, well, you're going to have some problems there, so you'd better raise your costs on it a little bit." [#16]

- A representative of a DBE-certified professional services firm stated, "I think the biggest difference is that, like I said, really like public feels like it's not as flexible, it usually pays a lot less." [#21]
- A representative of a majority-owned professional services company stated, "Private can be more profitable. Well, geez, that's a tough question. It depends on the public as well. So, let's say FHWA, their contracts are a lump sum, so they can be very profitable. MDT's are cost-plus, they are not very profitable." [#29]
- A representative of a majority-owned professional services firm stated, "The public sector in saying, in some cases the public sector has required overhead rates and audited rates that must be used with the contract, in a lot of cases, especially with the Montana Department of Transportation, and the private sector, we are able to manage our business and do lump sum contracts or use higher multipliers depending on the type of project that we're working on." [#30]
- The woman owner of a professional services firm stated, "Profitability would probably be higher in the private." [#32]
- A representative of a majority-owned professional services firm stated, "Private sector is more profitable." [#35]
- A representative of a Native American-owned construction firm stated, "Private is more profitable than public, in my opinion, from what I've seen." [#36]
- A representative of a DBE-certified construction company stated, "We tend to be a little more profitable on the private sector work. Again, part of that is, has to do with our private sector work that we're doing, there's not quite as much competition involved as well. You've got a couple of three contractors. When I say private, I'm talking the smaller driveways and things like that. There aren't as many reputable companies doing them. There are plenty of companies doing it. There aren't very many reputable companies doing it." [#4]

One business owner did not think profitability differed between sectors [#11]. For example:

- The owner of a majority-owned professional services company stated, "It just depended. Most of ours is, we don't do time and material. It's more of a bid in terms of what it's going to cost to do the work. And then if you can figure out how to get it done in a more efficient way within that you make more money and if you don't, then you make less money." [#11]

D. Prime Contract and Subcontract Work

Part D summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' decisions to subcontract work;
3. Prime contractors' preferences for working with certain subcontractors;
4. Subcontractors' experiences with obtaining work; and
5. Subcontractors' preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Eight firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise [#10, #13, #28, #3, #35, #36, #6, #FG1]. For example:

- The Black American woman co-owner of a construction company stated, "It takes it out of your hands with that, but I mean, it's way less risk on our part because we don't have to put up the whole kitchen sink and everything to get to the game kind of thing. So, I mean, I'm fine doing it that way." [#10]
- The owner of a majority-owned professional services firm stated, "Survey companies would almost always be a sub from somebody else. But maybe if we had a big design team, we could be the primary, but I can't find an engineer remember." [#13]
- The woman owner of a DBE-certified professional services business stated, "There's always a size issue because we can't spend a ton of time, putting time into work that doesn't pay. So, there's always a size issue, but we almost always are subbed to a prime and they carry the load there and that's how we've gotten around that. We've never worked as a prime." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "Okay, back in the day, for the [current business], I always did the prime. Because I couldn't get a job other than that, in the engineering. But as time went on, the highway department changed the way they do things. Now I am a sub, and I really love it. Because they have the process now, where you can meet the primes, or you can even almost choose the prime you want to work for. But that all has to do with my expertise. I have to say that that whole process, to me, is much better." [#3]
- A representative of a majority-owned professional services firm stated, "We're most always a sub." [#35]
- A representative of a Native American-owned construction firm stated, "I would say prime, not very often, maybe 20% of the time on big projects." [#36]
- The owner of a majority-owned construction company stated, "Yeah, we're a prime once in a while, not very often. We're a subcontractor 90% of the time too, maybe 95%. The only time we'll be a prime, really, on a private one, is if it's a guardrail job." [#6]

- A representative of a DBE- and MBE-certified professional services company stated, "Why spend a billion dollars writing a 30-page RFP when all you have to do is be a DBE and you can get on a big project?" [#FG1]

Sixteen firms reported that they usually or always work as prime contractors or prime consultants [#1, #11, #12, #16, #18, #21, #23, #25, #26, #27, #29, #30, #33, #8, #FG2, #PT2]. For example:

- The owner of a majority-owned construction company stated, "Well, we're generally the prime contractor and we generally work for the state of Montana and the state of Wyoming. We occasionally are subcontractors for contractors that are working for the same entities." [#1]
- The owner of a majority-owned professional services company stated, "Eighty [percent] as a prime." [#11]
- The owner of a majority-owned construction company stated, "We haven't [worked as a sub]." [#12]
- The Native American owner of a DBE-certified construction company stated, "We tried a lot of subbing in the past, and with the Montana Department of Transportation generals, we seem to get kicked around pretty easy, that way. They weren't very profitable for us, because of that. They have a way of manipulating, and pretty much put the bad stuff onto the smaller guy. It becomes a little costly for the... So that's why we, myself, just got it in my head that I was going to be a general, and I wasn't going to bid anything unless I was a general." [#16]
- The owner of a majority-owned construction firm stated, "Yeah. 80-20 is probably really where we're at. And it just depends because one of our historically looking, we did a civil job on a college, which dollar figure would've put us in a normal GC project. But obviously, we're not set up to lead a building of 50,000 square foot of college. So, we're a subcontractor, even though that job was pertinent 2 million civil work." [#18]
- A representative of a DBE-certified professional services firm stated, "We usually always work as a prime contractor. Yeah. I can't think of a time where we've been a sub." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "I'm always prime." [#23]
- The owner of a woman-owned construction business stated, "Actually, most of all of our work is prime." [#25]
- The owner of a majority-owned construction firm stated, "I'd say that my subcontracting parts would be less than 10%." [#26]
- A representative of a majority-owned professional services company stated, "I'd say 95% of the time, we're the prime consultant. And then we have subconsultants, so I'd say 95% of the time, we're prime." [#27]
- A representative of a majority-owned professional services company stated, "Changes within our group. So, for example, our highway streets and highways, almost always a prime. We're very rarely a sub, versus our site development group is always a sub. So, it really does depend upon the type of work we're doing, but, primarily, we're a prime." [#29]
- A representative of a majority-owned professional services firm stated, "Probably at least 75% of the time [we are a prime]." [#30]

- The owner of a majority-owned professional services firm stated, "95% of the time [we are a prime]." [#33]
- The owner of a WBE- and DBE-certified construction company stated, "I think we were seven years into our business, and we bought faulty asphalt and we laid it and we didn't get [the correct] densities. And so, we had to pull out the bad asphalt and then the plan was to repave it. And the contractor, the general contractor pulled the contract. So not only did we not get a penny from that job, we had to pay two suppliers for the product. They didn't cover it at all. So, because you have to have, oh, there's a name for it. Our insurance didn't cover that. And, say you're a home builder and you purchase the lumber package, and they deliver it. And then a tornado comes through. You can have coverage for that. But it's pretty hard when the product is down. We did hire an attorney and go after it, but nothing was recovered from that either. There was an agreement, and it was a mutual agreement, but no monetary value was recovered. It was a lesson learned to us. And what we learned from it is we do not want to be subcontractors. We want to be general contractors and that's what we are. Because we will not take advantage of our subcontractors, like other GCs take advantage of their subcontractors. It's kind of like if you're a painter of a house, you're the last one in, but yet if you are a sheet wall guy or your sheet rock guy did a bad job, they'll blame the painter. It's the exact same thing. So, we used to come back in and pave after the trench work was done like underground utilities. And then if we couldn't get densities, it was always blamed on the asphalt where they never looked at the gravel. And so, it's always like the... I kind of sometimes especially asphalt, asphalt subcontractor, if you're an asphalt subcontractor, you're kind of a scapegoat. So now say this project was maybe it was a three-month project, the GC had a three-month project and then they got behind schedule. So now they finally call us in, and we get in there. But now we put them back beyond their contract date. So now this company's in liquidated damages. They'll try to pass it on to me because we were in their past their contract date. We've had that happen. We've had a general contractor try to assess us $1,500 a day in liquidated damages because they went beyond their contract date. The other is they... the scheduling, they'll say, 'Come in. Come in on this day.' So, you will leave another job, move to that project, and they're not ready for you. So, their scheduling is awful, and lack of communication. So, it's like... when we work with the federal government, we have to give them a schedule. On these days we're doing this, on these days we're doing that. And if you don't abide by it, then you tell them, 'Hey, can we change this because of this or blah, blah, blah,' you know? General contractors will not do that. They think that their subcontractors are at their beck and call." [#8]
- A representative from a focus group consisting of prime contractors stated, "We actually are a prime contractor more often than not." [#FG2]
- A representative from a respondent at a public meeting stated, "I would, but then that leads me to another is when we first started asphalt, plus it was back in 2005 and all we did was sub. We had to be the sub I should say. And larger companies, knowing that we were new, took advantage of that and it really bit us in the butt hard. And so, we decided we're not going to do that anymore. We're going to become a general contractor and we'll bid the entire site and we'll hire subs for things that we don't do, like lots of milling or curb and gutter." [#PT2]

Three firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project [#11, #24, #4]. For example:

- The owner of a majority-owned professional services company stated, "Well, we work with... Sometimes we will sub a piece out and sometimes we're the prime and someone's the sub to us. Other times someone else is the prime and then we're a sub to them." [#11]
- The woman owner of a majority-owned construction firm stated, "We probably work as a subcontractor 50% of the time, and as a prime the other 50%." [#24]
- A representative of a DBE-certified construction company stated, "I think it depends on the year. Some years we're a sub on a lot of stuff. Other years we're prime on a lot of stuff. I would say it's probably pretty close to 50-50 if you looked at it over a long-term period. But we do as many jobs as a prime as we do sub. But I think it just depends on the year. Some years we were a sub a lot more. We were only a prime on a... Trying to think, we were only a prime on two or three jobs this year. And we were sub on six or seven. But the year before we were the prime on four or five and probably the sub on four or five. So, I think it just varies. I think a lot depends on what comes out to bid." [#4]

2. Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

Nine firms that serve as prime contractors explained why they do or do not hire subcontractors [#12, #14, #16, #29, #32, #33, #35, #36, #4]. For example**:**

- The owner of a majority-owned construction company stated, "We don't have any of our own trucking industry at all, so we subcontract to [company]… We have one other owner operator that we're subcontracting with. We have like most of the equipment for the logging job and he owns the processor. So, we subcontract out processing, or at the gravel pit, he will subcontract with us to run each machinery and he's a mechanic." [#12]
- The owner of a majority-owned professional services company stated, "Occasionally, we'll have somebody require some specialized testing that we can't do. And we'll send samples off to other laboratories as a consultant for a sub. But the bulk of our work, we do ourselves. There's very little. If I had to put a number on it, probably less than 5% of our total work is subbed out." [#14]
- The Native American owner of a DBE-certified construction company stated, "We try to do most of the work on our own. Not too often that we sub out a lot, but we do sub it out, so." [#16]
- A representative of a majority-owned professional services company stated, "We subcontract out because, let's say, there's not enough market share for us to be able to support somebody in that. Let's say, wetland delineation, we don't have enough need to have a full-time person. That would be one reason, and the other reason would be, say, geotechnical work, where we feel there's too much risk." [#29]
- The woman owner of a professional services firm stated, "A few things we will subcontract, some design work or some labor workouts, some sewing and stuff like that. Some specialty sewing projects that we'll have for specialty projects. So, there's a few times that we do." [#32]

- A representative of a majority-owned professional services firm stated, "It usually is to fill a niche or expertise that we do not have employees with those credentials." [#35]
- A representative of a DBE-certified construction company stated, "Generally, there are certain aspects of the job that we'll subcontract. So striping, we will subcontract out as a general rule, and concrete. And trucking, you know?" [#4]

Nineteen firms that the study team interviewed discussed their work with certified subcontractors and explained why they do or do not hire certified subs [#1, #14, #16, #2, #21, #23, #25, #26, #27, #28, #29, #30, #35, #4, #5, #6, #7, #FG1, #FG2]. Their comments included:

- The owner of a majority-owned construction company stated, "Well, first of all, it's part of the requirement in special provisions, we have goals to meet, and a way to be able to make a good faith effort is doing that. The state of Montana, they did a disparity study years ago and then they implement some [hard goals]. And then they were sued … and then they went to a voluntary system, what do you call it? Race-neutral system. But, when we had to meet the goals, we had one person almost dedicated to sending out notifications to subcontractors of the type of work we wanted, following their responses, and documenting the responses and doing follow up calls. It took a lot of work, and it took way more work than it needed to be because we haven't gotten to it, but if you look at the state of Montana's website for DBEs, you might find they have 150 DBEs listed. If I look at those companies, they would have been good companies, even if they'd never met the state of Montana DBE programs, they were businesspeople. They understand business, they understand labor burden, they understand specs. Now, we can't even go through the list of people who didn't make it… [One DBE firm we know] has turned into a good subcontractor. He works really hard. And you'd have to look at his previous experience being he did bridge work with somebody new. He didn't just start doing it. He learned, he worked for somebody. He got out on his own." [#1]
- The owner of a majority-owned professional services company stated, "It's just like everybody else, [when you work with certified subcontractors]." [#14]
- The Native American owner of a DBE-certified construction company stated, "We go through that list, yeah, and try to locate the local ones. We definitely want to work with it [the DBE Program and DBEs] because we do support that program." [#16]
- A representative of a majority-owned professional services firm stated, "If it's a requirement of an RFP, we would, if it's not what... we typically will solicit what the best qualified person would help win the project. Whether that's a DBE or not, that's... I guess that doesn't play a role. They're either ones that we know, or there is a list you can go to as well. I personally prefer the ones that I know or have relationships with, or other people have a relationship with. So that's why for me, I think building that relationship is a big thing for all small subs, all small consultants, really." [#2]
- A representative of a DBE-certified professional services firm stated, "That is the core of what our work is. It's all about bringing and elevating the voice of underrepresented groups, communities. That's it. Like if you're part of a privileged group and for example in academia, white males have privilege and power. We don't usually contract with them because they already have that privilege, and they have a lot of opportunities that many people don't have." [#21]

- The owner of a WBE- and DBE-certified professional services company stated, "I don't know any firms run by non-white males." [#23]
- The owner of a woman-owned construction business stated, "You know that's a funny question because I would prefer to do that, but the opportunity has not presented itself. It's funny because I've even thought about it even this morning. I took a girl in to a building supply place just to get her foot in there and meet the people in there. And she was just purchasing some bits for her husband, and I wanted her to go in there and experience that because I wanted to basically introduce her to things there. The people and things like that. And so, I really would love to do that, but really there aren't a heck of a lot of females where I live anyway that seem to be real interested in doing kind of work I do. I can't find them." [#25]
- The owner of a majority-owned construction firm stated, "If necessary, but there's not really that many of them that I would use for subcontractors." [#26]
- A representative of a majority-owned professional services company stated, "We have in the past. I don't know if it's a specific focus, but I guess we would select those firms if they were available and qualified to do the work. I guess I would say rarely. It just doesn't seem to... I don't know if we know which ones are those businesses and maybe we should get a list and look at them closer, but we don't make it a focus typically." [#27]
- The woman owner of a DBE-certified professional services business stated, "We don't solicit, but I'm a bit fond of using them. If I have an opportunity, I do. I'm more likely to pick up the funds for a women-owned business or an 8(a) business then. It's reverse discrimination probably. … I don't think there's much difference." [#28]
- A representative of a majority-owned professional services company stated, "We do, and, again, that's a per project thing. If we're going in to work on the reservation, we try really hard to use native-owned businesses. We, in the past, had the DBE requirements, and we had a number of firms that we had really great relationships with that we would've used whether they were DBE or not. We just really liked working with them, but it seems like there's fewer and fewer DBEs to choose from than there used to be. For our cultural work, it's frequently. We do definitely try to use them, for sure, on that. I wouldn't think there's really been any difference. I mean, we use two different DBE cultural firms, and they do a great job. They do ... just pretty much comparable as any other firm." [#29]
- A representative of a majority-owned professional services firm stated, "In Montana, probably rarely for our design contract. Utilize the industry networks, look at pre-qualified DBE firms through Montana's website and their list that they have. We've also attended, I forget what they are, but I think it's a workshop or a convention for attendance to meet new firms, small firms, minority-owned business firms, that sort of thing with the state of the firm. I think they're in on a level plain view. I think there's some that are very high quality, very responsive, do great work both on the DBE side, as well as the non-DBE. And there's some that need some additional training or coaching or other things. And that's the same as a DBE or a non-DBE. I say we haven't had differences one way or the other and some do great high-quality work and that is a reason why we continue to use them when the opportunity comes up." [#30]
- A representative of a majority-owned professional services firm stated, "It's fine. As long as they have the qualifications, we have no issues." [#35]

- A representative of a DBE-certified construction company stated, "I'd have to do a DBE search and see if any of them are. I would imagine that there are a couple that are just because they're kind of smaller in scale as well. And they might be minority-owned. Without looking, I wouldn't know, off the top of my head who is or isn't. But I know we have." [#4]
- A representative of a majority-owned professional services firm stated, "Mostly it's been with people that I've known because I've been in the industry for 39 years. One of the things that we do is I bring them on a team, and it winds up we have quite a few sub-consultants on those, but it's better to do it that way. I think it helps some of those firms like that, specialty areas, to get started. They'll work for us and a bunch of others, but unless we can get a large volume of work, their involvement on a transportation project is pretty short and sweet. On a three-year design contract, they're six weeks of field work and a month writing up a report and they're done. It's hard to keep that going. I think I got more females on my teams than I use males which I never thought about it until now." [#5]
- The owner of a majority-owned construction company stated, "No mandatory requirements, no. Most of the time, if we're the prime, almost all the work is ours, but we have had an electrical contractor work for us that was a DBE, on one job. The last big prime job we had, there was actually some bridgework on it too, which we took quotes from everybody, and the DBE was low, but we weren't low on the job. Someone else got it, but we do ask around. We ask everybody for quotes, when we are the prime, we'll take quotes from everybody to see who's the lowest." [#6]
- A representative of a majority-owned professional services company stated, "Our things that we provide are so niche that we do work for these preferred companies, like you had said, a lot of these federal military jobs. They have half of their jobs or what you... Minority-owned, what are they, 9(a) [8(a)]? I can't remember what the federal or the military term is, but they have a certain list that you have to use these minority-owned and stuff. We still provide services to them because once again, we're Army Corps accredited. So, we're so specialized that it would be very hard to find minority-owned, small business Army Corps accredited in the state of Montana. And that could be true elsewhere in the country. Anyway, working with them, they're smaller entities. They tend to need a little more assistance from our tech. They might... They're not as big or have as many employees that have done similar work or they just.... We tend to help them a little more on the signal they need a little bit more assistance from our end. Like what the heck does this report mean? Because they usually hire us to take care of things and as long.... And then they just submit it along. So, they rely on us a lot more, which is fine. We're willing to help them through that. But dealing with larger non not the traditional giant contractors, they usually have a little bit more in-house expertise or somebody specifically that's their job doing, submitting our test reports, and keeping up with that. I mean, tribal, I don't know if you're about that. The reservations are a unique situation where they do force upon or require certain laborers from the tribe. And it's just mainly, they don't have the experience. I would have said it's just that, they have to do that and try to find something for them to do. So, then there's that. I think we've had to hire tribal members to help with road signs and stuff. And we don't resist it, it's just that that's part of the process and we're more than willing to accommodate them if they can help us out." [#7]
- A representative of a DBE- and MBE-certified professional services company stated, "You can go out there and see on this website, who's certified, but I mean we've been certified with Montana

for decades, but we really haven't done any work here. We haven't really pursued any work here and nobody's just called us up and said, 'Oh, you're a DBE firm. Would you like to do some work for us?'" [#FG1]

- A representative from a focus group consisting of prime contractors stated, "So MDT has a pretty extensive DBE list in there. However, most of them don't pertain exactly to what we do. And so, I think it's been a challenge and especially boutique construction… So, traffic control has been historically one of the main DBEs that we've dealt with, that has taken up a fair percentage with regards to the goal. But we only have probably three or four major traffic control companies and having one of them fall off and no longer DBE, I think it really adds the difficulty of trying to reach those percentages. Fencing is another one that we see quite a bit. So, fencers, we typically see some DBEs come through there. Environmental erosion control, BMP inspections, we see a little bit there and so it's just not an extensive list as far as the work that actually pertains to what we do. So, we do see a little bit of difficulty trying to find DBEs sometimes. And especially, it's a big state with regards to area, but small with regards to the amount of contractors that actually work here. And so, I guess, I'm surprised every year that we're continuing to come close to meeting our goals. And I think you're probably going to see a little bit of drop off now, the [a local company] is no longer a DBE, but even big projects, we bid the $72 million job in Billings, not small by any stretch imagination. In fact, it was the largest MDT project ever let in the state by more than double. And I want to say that maybe we had four or five DBEs on the list for quotes and it's not for lack of trying, we reach out and that's really just all you get as far as who's actually qualified to do the work." [#FG2]

3. Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors [#1, #11, #13, #2, #26, #27, #28, #29, #30, #33, #36, #7, #8]. Prime contractors shared the methods used to find subcontractors and the factors considered when selecting a subcontractor. For example:

- The owner of a majority-owned construction company stated, "It's a very tight market. It's a clique-y market so we're all a little uncomfortable selecting a new company that we've never worked before, because if they fail, it means we don't meet our budget. We take money out of our pocket to finish their work. So, if they don't have the financial resources behind them or the management behind them, they very likely could fall back on us to finish their work. Of course, the state has to approve all subcontracts. So not only for us when we issue a subcontract, and the subcontractor's got to have all these EEO policies and all this stuff in order as well. You just can't issue. The Feds don't care, but the State of Montana reviews all that stuff and approved subcontracts. What I'm saying is, there's a lot of risk in this business. And us using a known quantity is very important. So, it's really hard to convince us to use some new DBE that we have no experience with. We'll ultimately give them a try on some low-risk project. But today a $72 million project bid in Billings, we're a sub on that job. But I'll guarantee you, if you look at those two subcontractors on that job, [the low bidder] picked all known quantities. There's not enough margins in this business to lose money on a sub." [#1]
- The owner of a majority-owned professional services company stated, "I mean, we have nothing against startups because obviously everyone was one at one point in time in terms of your

career or whatever you're doing, it's just that those are a little more tricky, so you got to understand a little bit more about them to make sure that, because they don't have much experience and sometimes the experience could have been bad, but at no fault to them or it can be good. And so, you just have to make sure that you understand that their experience was bad, but it was because of something else that had nothing to do with them as a prime." [#11]

- The owner of a majority-owned professional services firm stated, "We don't really sub anybody unless we already knew them." [#13]
- A representative of a majority-owned professional services firm stated, "I think in the engineering world, I mean, we'll be the prime consultant and our sub-consultants, you know, again, it's usually based off of the experience. We know that some firms maybe more expensive, but we know that they bring better experience or more experience. And so, their price usually doesn't matter; you'd usually work with somebody based on those relationships. When we hired a sub, so ultimately the liability will fall on us as the prime. So how we... like you're asking how we manage the quality and stuff from the subs. Some of that's tricky. If it's out of our wheelhouse, you know, we'll review and look at it as best we can, but we rely on their professional licenses as well. There's times where we do have the capability in-house to do some of that stuff, but for whatever reason, maybe we didn't have the staff to do it at that time. And so, we'll sub something out, and a lot of times we'll try to have the qualified staff review it as well, just to do a double check on it, to make sure, you know, 'Do you have any questions on it?' And so, if we have a qualified staff, we will have them look through it before we, I guess, ultimately submit it under our name." [#2]
- The owner of a majority-owned construction firm stated, "Just the way I might feel about somebody and what they can do. I'll go talk to them, say for instance, it's some welding or something, go by and see the people, see if they actually want to work or not. Do they just want to talk, or do they want to work?" [#26]
- A representative of a majority-owned professional services company stated, "If it's specialized work that we don't know how to do or we don't feel like we would be able to do as good a job at it, we will sub that work out with somebody that's very qualified. Typically, a lot of the types of work we do, we've been doing for a lot of years, and we have relationships, and we know who can do what, and who's good at what. We look at the project and say, 'Oh, this would be a good fit for this person. We worked with them before.' So, we'll ask them for a proposal." [#27]
- The woman owner of a DBE-certified professional services business stated, "I would say that sometimes, there's only one company that does the work in Montana. And sometimes it's somebody that we've had a good working relationship with in the past. So, experience, and their qualifications. We do high quality work and so we don't like to go with some of the nickel and dime operations." [#28]
- A representative of a majority-owned professional services company stated, "Typically, if it's an MDT project or a Federal Highway's project, we will speak with the client and make sure that they are positive about them. We try to select them from past working relationships, maybe not within that group but within the company, or companies that already have a past history with that particular project. So, I would say, our subcontractors are very much selected individually per project to find the one that brings the most to that particular project. We almost always have a history. We've used the same subcontractors for many, many, many, many years… Most of our other subs, … when we first started using more of the native-owned ones, we spoke with the

reservations and asked them who they wanted to see and if they had someone that they felt comfortable with. So that's how we started those relationships with those firms. We did a huge fiber line, environmental document, and we used multiple firms across Northern Montana that had ties to the individual reservations that we were working on. Then, once we build a relationship with them, then we tend to just use them again. If it was successful and we like them, we just use them again and again and again, even if they're not necessarily tied to something specific to their cultural or whatever background." [#29]

- A representative of a majority-owned professional services firm stated, "It varies, so it could be relationships. It could be ability to perform the work, having specialized skill sets and then looking for opportunities for future partnering relationships on future projects as well." [#30]
- The owner of a majority-owned professional services firm stated, "Either people in our network or people that are referred to our network. We care an awful lot about two things, their technical expertise and whether they're going to play nice with others. In other words, we have a culture and some people fit in our culture and some people don't. It doesn't mean because somebody doesn't fit in our culture, they're not a good person, it's just they're not going to be as effective. …. If we found a company that did good work and we needed to use their services and they did a good job, we would go back to them again and again and again. What we look for is quality, ease of working with them, affordability, and chemistry. If that works when the need comes up, we'll go to somebody that we've worked with before. But generally, what we're looking for is somebody that can provide a specific service when the need arises. We would work with black, white, green, yellow, women, veteran... doesn't matter, we're open to everything." [#33]
- A representative of a Native American-owned construction firm stated, "We just worked with them all long enough that there's certain people you go to. Every once in a while, you put it out for bid, but you try and keep it close-knit with the guys that you know are going to get the work done in timely fashion and professional fashion and all that good stuff." [#36]
- A representative of a majority-owned professional services company stated, "We have a bid process too. Drillers are very unique, there's very few drillers. There's usually one, maybe two drilling companies that'll be willing to do what we're asking them to do. So, they have a, I wouldn't say monopoly, but we just have a good working relationship where we'll ask them for a quote and mainly trying to have them fit us in their schedule. Now, if we go to Missoula or any other town where it's more cost effective, if to look locally for drillers, we'll start there and then get multiple bids on the drillers that we know of." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "The subcontractors that we hire, are ones that specialize in certain things that we just could not do. Like we had to do some zip-lining, and one, we didn't even know how to do it. And so, we've been really fortunate because we found a company that, one, will go to a remote area, because most of our jobs are remote. They came, they did a good job. They came when they told us they were going to. We've had some good experience with it. But now our subcontractors, this might be the key, too, and I don't know, a lot of our work is outside of Billings. It's outside of Yellowstone County. And when you get those, when you grow up in those rural areas, those people up there know how to work. And there is their bond. And when they say they're going to do something, they do it. Down here in Billings, it is becoming more pronounced that they will tell you what you want to hear." [#8]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. Preferred subs usually have a long-standing relationship with the prime and are responsive to the needs of the project [#1, #16, #18, #2, #25, #26, #28, #29, #30, #35, #5]. For example:

- The owner of a majority-owned construction company stated, "So we normally don't... I mean, we get involved in it a little bit when there's issues or problems. I got a job going on right now and I don't think they're a minority, but their work has been just... Fencing has been horrible, I've got to go back and do stuff, it's been going on for two years now and it gets a little bit old after a while. But the chances of us probably using him again on a project are not real high. But what makes a difference for me, for the subcontractors I have a good relationship with. Those are the ones that I know. The ones that I have a good relationship with, that I call up and we can work through together issues together over the phone or whatever happens on a project. If we need something they're going to tell me, 'Yeah, I can be there.' And if they can't, they're going to tell me no, but they're going to try anyway. The ones that I don't have the good relationship with are the ones who are getting out of the job and maybe didn't spend the time upfront to understand what they were getting into and are going to complain and ask for- Don't really know the job that well, and aren't going to say, 'Well, I need a [loan]. I need more money.' Or everything's a struggle to get them to do something. These jobs can be complicated and difficult enough dealing with the state at times that I don't want to have the additional heartache and headache of a bad subcontractor. So, if I have a subcontractor that I know I work well with, that I know it's going to go the extra mile and be agreeable and work together on issues versus somebody who I know is going to be a little bit more hardheaded and maybe not put in the effort upfront, and there could be issues there. I'm going to take the guy that's going to make life easier every time. Accountability. Accountability to their work. [Not] trying to nail it on somebody else continuously if there's problems." [#1]
- The Native American owner of a DBE-certified construction company stated, "A couple of subcontractors we've had in the past just didn't perform. We had to remove them from the job, because we didn't want to get into a time situation where we were being penalized for running overtime. Right off the bat, be really open and honest with them, and what you were expecting of them. And having them be the same way with you, so that you understand, basically, what they're telling you about being experienced is exact. And then, we also check on their past experience. We try to find somebody that they've worked for, and find out how they perform for them, and if they had any problems, et cetera. The key to getting a good one is to be really open with them, but also be real blunt with them, about what you expect from them." [#16]
- The owner of a majority-owned construction firm stated, "We need to get to know. So, on our projects, just because you send a lower quote than your competitors doesn't guarantee you that we will choose you as a subcontractor. So, it's that relationship with contractors. I think the Contractors Association, it doesn't cost the sub very much to belong to that organization. I think $500 a year and take the time and get to know these general contractors. I know it as a subcontractor. Getting to know the general contractors it provided me a lot of in roads that I know on the one project, we were actually about 3 or 4% more than our local competitor, and the GC picked us because they'd had a 10-year relationship with us in the Contractors Association. So that gave them more of a comfortable feeling when dealing with us as a subcontractor. You know who these guys are. They've been around for a long time. So, the

relationship with the general contractors is the biggest thing a sub can do. And I think it has to be more than phone calls and emails." [#18]

- A representative of a majority-owned professional services firm stated, "We'd had issues from time to time of them meeting the schedule. I wouldn't say which turned us not performing, I suppose, but the quality of it was there, just the schedule... They're on a different timeframe than we were. And how I dealt with it, I guess, is just wide communication, like back and forth, and talking about why the deadlines and that this is a hard deadline. And I mean, the reality is if somebody keeps missing deadlines, they know that they may not give it another shot. I mean, it may be hard for them to get another shot with us. And so, in generally they try to hit the deadlines, and I've told them like, 'If you can't get those deadlines, you know, let me know early, not the day they're due.' I'd say whether it's a DBE or not DBE, if they're demanding and not wanting to work with you, saying, 'This is the way it's done. This is why I'm going to do it,' instead of working together as a team, that's one of the big turnoffs for me for rehiring a sub, is, 'It's my way or the highway,' when ultimately, we're the prime, not them. And so, as a prime, I don't like saying that either. I like to say, 'Let's work together.' So, when they're not willing to really understand our side and work with us for certain things, that would turn me off. Just poor communication skills a lot of times leads to just a breakdown of those relationships. And it seems to trickle into maybe missing deadlines and the quality of work kind of declines. And again, that's any separate sub, it's not specific to just DBE or not. Like an example, I'd want to work for insurance, and they said, 'Nope,' but you know, a smaller one said, 'Nope, I've never seen it done that way. I'm not doing that for you,' whereas all the larger or other subs we work with are like, 'Yeah. Okay,' because this is how it's done. And so, they understood it, but a smaller one just hadn't worked at seeing that type of thing go for larger projects. And so, they said, 'No, I'm not doing it.' The flexibility, and ultimately, it came down to cost. It was a $250 thing they had to do, like, 'Put it on your contract.' And they just said no. And so, I really... kind of threw a real hiccup in it when they had just absolutely just flat out, said, 'No, I'm not doing this thing for you,' when some of the other ones that are easier to work with and they'll say, 'Okay.' And if it's something that's not normal, they can ask a question, but they'll, typically... You know, there's a reason why we're asking them to do something, like, 'Oh, okay. If it's a couple hundred bucks, whatever, throw in it the contract.' We typically go back to the same firms a lot of times, not only based on the past relationships, but just knowing that they understand the expectation is that they know what is going to be required of them." [#2]
- The owner of a woman-owned construction business stated, "I use word of mouth because just hiring somebody that's looking for a job that ... I learned very early on that doesn't work out really well because a lot of times they're ... I want somebody that has a reputation for good work. So, I go word of mouth and I'll know somebody. We use subs that we've known for a while that have worked with us here and there. And also, when we need someone new, like I said, it's word of mouth." [#25]
- The owner of a majority-owned construction firm stated, "[I like working with primes when] they're good at what they do." [#26]
- The woman owner of a DBE-certified professional services business stated, "It's just, if they do good work, then it's great. If they don't do good work, I don't want to be involved with them." [#28]

- A representative of a majority-owned professional services company stated, "I would say we've had some suppliers more than subs that we probably try hard not to work with. Our subs ... I'm trying to think of any sub we don't want to work with yet. We have ones that are a little more difficult that we'll only use if we have to. I mean, if they're the right sub for that project, we'll still use them, but if there's another sub that's a little easier for us, we'll use the easier sub." [#29]
- A representative of a majority-owned professional services firm stated, "It's relationships, it's the trust. The work that we do is about delivering high quality products. And so, we want to make sure that our teaming partners are also having the same expectations of delivering high quality work." [#30]
- A representative of a majority-owned professional services firm stated, "[We prefer working with primes when] we know they can produce a quality product." [#35]

4. Subcontractors' experiences with obtaining work. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Three subcontractors discussed how they find primes to do work with [#11, #12, #3]. For example:

- The owner of a majority-owned professional services company stated, "Our reputation precedes us. That's how it is. I was at the university for a long time, and then we left. And so, the number that would call me to ask about something, that's how a lot of our work is done and dealing... The subs, the primes call us." [#11]
- The owner of a majority-owned construction company stated, "Usually they contact us, and we look at the job and say, yay or nay can we do that? They can't quite figure out how to do it or something." [#12]
- The Native American woman owner of a DBE-certified professional services firm stated, "Okay, so to get projects now, for the highway department, if it's in my area, and I know that that's where I want to work, then I have a couple contractors or primes. That if they get the job, then I can go directly to them, or they to me. I have a couple primes that, they know my work, so if they get a project, they call me in advance and say, 'We're looking at this project. Would you be a sub for us?' That's the only way that I know." [#3]

Eight subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because of they are known in the industry [#14, #15, #3, #35, #4, #7, #8, #FG1]. For example:

- The owner of a majority-owned professional services company stated, "A lot of times, we'll get called by the contractors who notify us that they're putting in a bid for a particular amount of work and ask us to provide them numbers for testing or inspection services. I'll reach out to them, and they will reach out to us. So, if there's somebody new coming into the area, they pretty quickly, through word of mouth, find out who they are, who the quality control testing firms are. I think they inquire through Federal Highway Administration too, because I will have worked with some of their engineers in the field for a long time and I think they inquire among them." [#14]

- The woman owner of a DBE-certified professional services company stated, “I don't know that we really go out and market to primes. They tend to call us because we're on the DBE list, to be honest with you.” [#15]
- The Native American woman owner of a DBE-certified professional services firm stated, “If [it’s] on the reservation because that's my expertise and there's nobody else. It's very difficult. I mean, it's not like they can hire somebody themselves. This, [my company] on the reservation is a niche.” [#3]
- A representative of a majority-owned professional services firm stated, “Typically, people reach out to us.” [#35]
- A representative of a DBE-certified construction company stated, “I know we have certain situations where a prime will call and say, ‘Hey, we're looking at this job. Have you seen it yet? Would you be interested in giving us a quote on the asphalt or on the chipping,’ or things like that. And we'll take a look at those as well. I think it works both ways, depending on the relationship with the prime.” [#4]
- A representative of a majority-owned professional services company stated, “I had no previous experience in this industry when I took the job here. So, I am a civil engineer, so I did get some of this, but it was kind of eye opening to the whole side of the construction element that I was not aware of but RFPs, we use plans exchange, so just like the contractors use. So, we see anything bidding in the state or in the local [area], things that we're interested in or could possibly propose on contractors, usually contractors that they are going to seek a project that it needs some third-party testing. They'll reach out to us and ask, ‘Hey, could you look at this and send us some materials testing proposal?’ And now look at it and see if we can help them in any way, shape or form and get it to them before their bid date. So, our things that we provide are so niche that we do work for these preferred companies, like you had said, a lot of these federal military jobs. They have half of their jobs or what you... Minority-owned, what are they, 9(a) [8(a)]? I can't remember what the federal or the military term is, but they have a certain list that you have to use these minority-owned and stuff. We still provide services to them because once again, we're Army Corps accredited. So, we're so specialized that it would be very hard to find minority-owned, small business Army Corps accredited in the state of Montana. And that could be true elsewhere in the country. it's either yes, through personal contacts work with them previously, or the other thing is once again we offer very specialized services that are necessary for Army Corps, FAA… going back to the accreditation, our lab is acknowledged.” [#7]
- The owner of a WBE- and DBE-certified construction company stated, “And I do get those notifications, but a lot of like, we are set up with builders exchange and they do projects that are federal, city, county, private jobs that are actually out like for an open bid. And they do a lot of different states. I'll get stuff for the Dakotas, Montana, Wyoming. I don't think Idaho's in there. So, I just haven't gotten into eMACS much or look to see if I'm getting all the stuff, because it's just too big. They usually look for us for DBE. So, I get a lot of emails from individual people or individual companies looking for a DBE company. But usually, I'm so busy bidding on jobs that we can general ourselves. I kind of ignore those unless I have time.” [#8]
- A representative of a DBE- and MBE-certified professional services company stated, “Why would they give away work to somebody else when they can do the work in house? We've tried to approach firms that don't maybe do the structural side, that maybe they're more of the civil piece and we can reciprocate in that way, and I'm new to this whole game.” [#FG1]

Ten interviewees said that they get much of their work through prior relationships with or past work performed for primes. They emphasized the important role building positive professional relationships plays in securing work [#2, #26, #27, #28, #29, #30, #4, #5, #7, #PT2]. For example:

- A representative of a majority-owned professional services firm stated, "Past experience with them or word of mouth from somebody that knows them or has worked with them in the past. That seems to be the most common I would probably say that, I mean, they can do their research on the different firms that they would like to team with and then try to set up, say a lunch meeting or whatever breakfast or whatever, something just to start building that relationship and just kind of checking in with those people and start building that relationship. So, they show them what you've done and type thing. We've done lunch meetings, breakfast meetings. We've even had some firms come here and give like a short presentation to say, 'These are the services we offer.' It's mostly relationships and us just reaching out. If we see something like, 'You know what? I don't think we could be the prime on this and win it,' because I don't know if we have the experience for the whole project, but we do provide this thing that this other firm may not. So, we'll reach out to the firms. And typically, a lot of times it's one of the ones we've built a relationship with in the past or have word of mouth. But we'll just reach out to them and be like, 'Hey... interested in teaming with us?', say if an RFP came out, we can identify that perhaps our qualifications would not stand alone to win the project, but we know that maybe another firm that we worked with could, and so we may approach them and say, 'Would you guys like to prime this and we'll offer these services as a sub-consultant?'" [#2]
- The owner of a majority-owned construction firm stated, "Just know who the people are that have the bigger jobs. They'll come from other sign companies usually, but not always." [#26]
- A representative of a majority-owned professional services company stated, "We just have relationships with certain companies that we work with a lot. I wouldn't call it marketing to them, it's just maintaining a relationship. It's just based on who we've worked with in the past or ask somebody we have worked with in the past if you know somebody that could do this or just learning about it that way." [#27]
- The woman owner of a DBE-certified professional services business stated, "Relationship with the prime, through work and word of mouth in people we've known before, and companies we've been at and then people go other to other companies and still use us, that sort of thing." [#28]
- A representative of a majority-owned professional services company stated, "So most of those are through architectural firms, and so those are ... we market to those architectural firms, build relationships, like I mentioned before. We have a lot of personal relationships. Obviously, we're so small and we live in the communities we work in, and so a lot of those relationships are built that way." [#29]
- A representative of a majority-owned professional services firm stated, "Similar to how we find subcontractors. We'll reach out through conferences, through industry events, using relationships and try to be as much out in front of the project prior to it coming out for bidding to develop those relationships and have an opportunity to be on a prime team for that." [#30]
- A representative of a DBE-certified construction company stated, "You have to build that relationship. Once you've built, I mean, it's kind of hard for me to go, hey, how should you handle this as, we've been around for 30 years, 32 years. We have relationships with my two estimators

have a list of contacts for virtually every contractor in the area. Probably in the entire state. And so, they could call up and say, 'Hey, I saw you on the bid list for this job. Are you interested in subbing this out?' Or that contact will call them and say, 'Hey, we're going to bid this job. You want to work with us again?' Those relationships take time, though. I think as a new one guy, I think you definitely have to be proactive. I think you have to, 'Hey, I'm looking to do some sub work for you. You got anything that's coming up that I could send you a number on? Trying to get my foot in the door.'" [#4]

- A representative of a majority-owned professional services firm stated, "I get people, hey would you be willing to provide these services for us here or there." [#5]
- A representative of a majority-owned professional services company stated, "For instance, our [city] office started doing a lot of work locally with [company], and then they expanded it because [company] got big and they started growing, but they had a wonderful relationship with the [city] office and then they expanded it. So, how they do that, it'd be the local guy doing a really good PR and provide a good enough service. It's either through personal contacts, [our] work with them previously, or the other thing is once again we offer very specialized services that are necessary for Army Corps, FAA… going back to the accreditation, our lab is acknowledged." [#7]
- A representative from a respondent at a public meeting stated, "Some subcontractors they'll get like proud I guess, and say, 'you know, well, they've had me for 10 years, so I'm just going to keep creeping up my prices'. How do you go into a company and say, hey, have you shopped lately and without, I don't know, maybe burning some bridges or something? And so that's probably my hardest part." [#PT2]

Ten business owners reported that they actively research upcoming projects and market to prime contractors. Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services [#14, #23, #24, #26, #29, #30, #35, #4, #6, #FG1]. For example:

- The owner of a majority-owned professional services company stated, "If there's a project that I'm interested in at the Federal Highway level, I can actually put my name on that project on their website that I'm an interested vendor. And so, I give them my contact information and they can get a hold of me directly through that process. If I see through the Plans Exchange somebody or a project that I'm interested in, I will just cold call contractors and say, 'Hey, are you interested in putting in numbers on this project? And if so, would you like me to provide you a number?'" [#14]
- The owner of a WBE- and DBE-certified professional services company stated, "Just the same as anything else. Just try to get myself in front of someone who might have a project that made sense to work together on. Usually, I just get to know the company if they do the kind of work that I'm looking to do. And it usually takes a personal contact. I've never been able to successfully cold call anyone." [#23]
- The woman owner of a majority-owned construction firm stated, "Just put your name out to all the generals." [#24]
- The owner of a majority-owned construction firm stated, "I'd market it to whoever." [#26]

- A representative of a majority-owned professional services company stated, "We're always constantly monitoring who's getting jobs and who's been on jobs, and so you identify architecture firms that are getting work and then reaching out to those firms." [#29]
- A representative of a majority-owned professional services firm stated, "Similar to how we find subcontractors. We'll reach out through conferences, through industry events, using relationships and try to be as much out in front of the project prior to it coming out for bidding to develop those relationships and have an opportunity to be on a prime team for that. Attend conferences, try to find opportunities to meet individuals, find opportunities to present at conferences. So, they get to know our firm better. Attend industry events and a lot of times we could work on projects for the same client we share experiences and then discuss the ways that we can team to make things even better. Usually, it's just phone calls or word of mouth to find out who's actually going to be bidding on it. And if they plan to go after it as prime, and if there's opportunities there. To my knowledge, there's not a list of contractors that we would be going, and this is particular to design contracts with that we work on that, that we would know exactly who's going to be submitting on those contracts." [#30]
- A representative of a DBE-certified construction company stated, "I think a lot depends on the relationship that we have with that particular prime. There are certain contracts that we will see that there's certain amount of work that we're interested in, and we'll send it off to the list of bidders. There's a list of bidders that, my understanding is that they've applied for a bid packet as a prime. And so, once they've applied for a bid packet, they go on, or once they've accessed the plans, they become part of the bid sheet. We'll go down the list of bidders on a bid sheet and send [quotes] to these particular ones or everybody, depending on the, there are certain contractors that we've worked with in the past and worked well with. There are other contractors we've worked with in the past and things have not gone as smoothly. Or we know that they tend to, I'm going back to the bid shopping, they tend to go with subcontractor X for geographical reasons, or they've got a strong relationship with that particular subcontractor. And so, we generally won't send a quote to that particular prime because we know that they're going to basically bid shop at that point." [#4]
- The owner of a majority-owned construction company stated, "We know most of the players in the thing. Before, I guess, when we first started, it was really going shaking hands and calling... people used to... When we started, the electronic stuff wasn't there, so you got to actually physically hand your quote to the prime contractors, and that meant you got to meet them and you got to... like I said, that's a little harder now. Now I guess you could call them or whatever, and we still do some of that calling, especially... which doesn't happen very often, but some of these bigger jobs now, with these out of state firms coming to bid these $70 million jobs, we're calling trying to talk to people and telling them what our qualifications are, and kind of selling ourself on them that we can do the work and we'd love to work with you. I guess that's how we market ourselves to the people we don't know now, which we're seeing more of it, I guess." [#6]
- A representative of a DBE- and MBE-certified professional services company stated, "We just do a lot of research, and we can go onto the MDT website. We know that it takes time. You got to build a relationship. There's another firm up in Helena that he reached out to that has done quite a bit of work. And I think they're more of a civil firm, but it's just really researching. We just bit the bullet and went out and got some RFPs. It's more of a government, but it does local agency. Pre-work, what's coming up, where's the funding coming? And so, we're doing a lot of research

in that regard, trying to maybe pinpoint jobs we want to go for in a year, try to build a relationship with a firm so that ... But it is hard. It's hard to break in." [#FG1]

5. Subcontractors' preferences to work with certain prime contractors. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Nine business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly [#2, #22, #28, #29, #30, #4, #5, #6, #7]. Examples of their comments included:

- A representative of a majority-owned professional services firm stated, "We keep on falling back to this relationship building and past performance. But yeah, obviously, if we work with a prime and, and that relationship maybe turned sour or the work agreement did not pan out as it should have, then you know, we'll generally be hesitant to sub with them again." [#2]
- A representative of a Native American-owned SBE-certified professional services firm stated, "I really try to make sure I know who I'm working with, and they understand who we are before I get into that. I try not to get us into a situation where those not getting paid comes up. It does happen, but I really try to be careful of how much exposure I have, especially the people I don't know. I've been at this for quite a few years, and so I've built a kind of a Rolodex of folks that are in the industry that I trust, that I know, and that have a similar mindset that I do, and so I try to stay, kind of limit the pool of partners to the folks I know. If it's somebody who I don't know, then it takes me about two or three steps to figure out whether I want to do business with them. And that's one of the factors. I mean, they'll lie. You got to try and read between the lines … [For example at] the tribal Councilman steak dinner at the big conferences. The big guys that just want to use the tribes because they don't think they're very smart by all our councilmen. They get to drink and eat like kings for a week. So, and those type of companies, I'm not a huge fan of." [#22]
- The woman owner of a DBE-certified professional services business stated, "The next thing is quality of work first, and then because I like them or they like us, or we are easy to work with. Good working relationship." [#28]
- A representative of a majority-owned professional services company stated, "For an example, there's a developer in Helena that has a huge history of suing people. We've been indirectly sued by them when they sued the county, or the state, they've listed us before, and we won't have anything to do with them." [#29]
- A representative of a majority-owned professional services firm stated, "They treat us and our staff fairly, they have a mutual respect, treat us basically like they would treat their own employees and try to make the project as successful as possible for everybody involved, including us." [#30]
- A representative of a DBE-certified construction company stated, "We got into a dispute with a prime over a change order that ended up not getting resolved favorably for us, with regard to there was a change order and it had been supposedly approved and it didn't get approved and we're not going to pay you for that particular amount of work that we did. And generally, what happens in situations like that, at least in our company, is we just, depending on the situation,

but in that particular situation, we finished out the project... Well, the project was already finished before the squabble began and we've just opted not to work with that contractor in the future. Most of the people that we work with on a regular basis, we work with, we're pretty happy with and we've built a good rapport or relationship with them, so we don't have too much trouble with them. I mean, some of them, we've worked with them for so long that it's a handshake agreement. They come do this work for me. I'll write up the contract, but here's the handshake agreement so we can get started on it. And that is what it is." [#4]

- A representative of a majority-owned professional services firm stated, "Some of our contractors I don't generally deal with them. I know there's a couple we just won't work for. They've burned us. We trust everybody until they burn us. I've subcontracted to another firm here and I have an invoice outstanding from October of last year. Am I going to jump up and down and run to be their sub again? Probably not." [#5]
- The owner of a majority-owned construction company stated, "I shouldn't say we would never work with, but there's some we're hesitant to work with sometimes, I guess. Just with some of the dealings in the past. Most of that is not... most of it is like poor planning and poor communication and changing. Some of it's been a payment issue, but not much. We still work with almost everybody. But we prefer to work with some others, sometimes." [#6]
- A representative of a majority-owned professional services company stated, "Usually we work for a contractor for two years and we say, 'Ah, we're over them.' And then it's water under the bridge. But once again, go back, you contractors, they do have a short-term memory, but if we're slowing them down costing them more money. They're going to... They'll, they can be mad, whatever, but we're here to provide services. We're not going to try not to hold grudges or, but if it is historically bad, we will not work for some individuals, but yes, we have some on our blacklist here so just... But that's usually because they did something to, we didn't think was fair or we didn't want to deal with that anymore." [#7]

Subcontractors discussed the effect working in the public or private sector has on their decision or ability to work with certain primes [#2, #24, #29, #30, #4]. For example:

- A representative of a majority-owned professional services firm stated, "I really haven't seen it crossover much like that. I mean, the only situation I can think of is that we are an engineer for our public sector and people that are on the board area for that public sector, their son has hired me on the private sector just because like their parents said, 'Hey, you know, they're good to work with.' And so, it's not really the same, but it's word of mouth type of thing that private and public do talk." [#2]
- The woman owner of a majority-owned construction firm stated, "No, I don't really think it differs [between sectors]." [#24]
- A representative of a majority-owned professional services company stated, "The private, I think I said this before a little bit, is often more driven by money. They'll use a sub that maybe isn't great quality, but they don't really care on a lot of stuff. I would not say that on our structural, because we have a structural group, and, of course, they will pay a little bit more to get really good quality, probably because of the liability." [#29]
- A representative of a majority-owned professional services firm stated, "It's the trust. Knowing that we can work together and deliver high quality work." [#30]

- A representative of a DBE-certified construction company stated, "We generally work with a certain group of them, at least on private stuff. Public sector, you're kind of at the mercy of whoever. If you don't want to work with that particular contractor, then you don't bid to that particular contractor and hopefully they don't get the job." [#4]

E. Public Agency Work

Interviewees discussed their experiences attempting to get work and working for public agencies. Section E presents their comments on the following topics:

1. Working with public agencies in Montana;
2. Barriers to working with public agencies in Montana; and
3. MDT's bidding and contracting processes.

1. Working with public agencies in Montana. Interviewees spoke about their experiences with public agencies in Montana.

Forty-two business owners described their experiences working with or attempting to get work with MDT specifically [#1, #11, #12, #13, #14, #15, #16, #17, #18, #2, #22, #25, #26, #27, #28, #29, #3, #30, #32, #36, #4, #5, #6, #8, #AV, #PT1, #FG2]. For example:

- The owner of a majority-owned construction company stated, "The State of Montana, somehow with the State of Montana, you get on your list, and they send you the invitation to bid once a month or every other week. Everything's on their website. It's very easy to bid with the State of Montana." [#1]
- The owner of a majority-owned professional services company stated, "I kind of like that because then your world is down to three, or four, depending upon whatever it is. The problem with that, some of the pre-qualifiers, the window to get on a prequalifying list maybe, if you don't get it in now, you have to wait seven years or five years before list comes back up again. That's the only problem with some of that, but we figured out how to play that game. Well, it's like any person coming out of school or starting in a business, they want to have so many years of experience. Well, how do I get that if I can't get... It's that same thing. We don't have that problem, but I understand it with other people quite a bit. And so, how do I break into this? We're already broken in. ... So, it's much simpler for us. … They're [pre-bid meetings] helpful. It's the ability to ask questions, but there's also a game being played by the consultants at those pre bidding. So, you got to... No one wants to say anything because they don't want to tip their hand in any way, shape, or form. And I get it. I understand it just kind of... But they're helpful from the standpoint, I go there, and I don't care about that stuff. I just want to ask questions that I need to have answered in order to do the work. That's all I care about." [#11]
- The owner of a majority-owned construction company stated, "I've gone into eMACS and tried sign up with stuff there. … So, and I've gone in there and I've looked at stuff and I get confused with it definitely. And then it's like, in order to even see what the project consists of, you have to say, yes, I'm going to bid on it. And then you look at it and it's like, it's in Missoula or it's [across the state] and it's like, yeah, we can't go over there, you know? Then you have to say, nope I'm not bidding on it because it's too far away or whatever. So, I think that's funny that you have to say, yes, I'm going to bid on it and then you're not, and you have to change your mind so to

speak. The one with eMACS like it opens the door but on the other side of the door, it's so overwhelming and it takes so much time that I don't have enough time to commit to it because I have all these other things that I have to work on." [#12]

- The owner of a majority-owned professional services company stated, "We are part of the Montana or the Flathead Valley Plans Exchange, which lists projects that are upcoming throughout the state. And actually, they list projects in Idaho and Wyoming, too. So, I get that weekly and I go through there and look at the projects that are upcoming and see whether or not there is any work in our area." [#14]
- The Native American owner of a DBE-certified construction company stated, "We monitor their websites and all the solicitations, and when they're coming out, et cetera. They're all pretty consistent about doing it, in both the state and the federal, so you just get on their websites and, yeah, it's pretty easy to pick them up." [#16]
- A representative of a majority-owned professional services firm stated, "I guess the online stuff for us is mostly just digital type of submissions. It's not really bidding per se. It's more just submissions online stuff, which is not... I don't feel like it's a hard thing to do. I actually think it's easier. It's pretty similar [to other states] They seem to be ahead of a few other states. I know North Dakota still requires all wet signatures. They don't do any electronic signatures yet. So, it is a little bit easier in that regard." [#2]
- A representative of a Native American-owned SBE-certified professional services firm stated, "The contracts of the state and some of the stuff that they let for companies to bid on through the state. I've noticed that those... There hasn't been a whole lot of them." [#22]
- The owner of a woman-owned construction business stated, "Even learning how to access it, yes I tried to navigate the website and I really just couldn't really figure out exactly what I needed to do. And the biggest thing I think I had problems with, if I remember right, was bidding because I just really didn't know how to bid it without ... I felt like I didn't know enough about what they were requested to know how to bid it. Specifically, about exactly how many hours it is going to take to get this kind of work done and things like that. Just unfamiliar. So, it was hard to break through. Department of Transportation is, I think, the only one I've actually tried to do here, and it was not easy. It's online and I just couldn't figure out exactly what I needed to do." [#25]
- The owner of a majority-owned construction firm stated, "They don't seem to be putting out any information to any of the potential contractors as myself. It's still kind of a mystery to get these bids. I know some of them are online. Some of the stuff, the bigger jobs involve interstate highways, and this type of thing, may be part of a bigger federal bid. That kind of thing. So, they need such and such amount signs, and they have to be government specifications, that's not a big problem. Most of that stuff is they furnish blueprints and things that make it... It's easy to understand what they want, but a lot of times, I feel like they're paying too much money for stuff. It's overdone." [#26]
- A representative of a majority-owned professional services company stated, "Typically, we have a clipping service and we typically, I guess I don't know what I don't know, but I believe that we find out about the RFPs if they're available public on public information. I believe we get notifications by email of when things are going to come out." [#27]

- The woman owner of a DBE-certified professional services business stated, "I think MDT does real well with all their lists and their transportation program planning. And you can see what's coming up." [#28]
- A representative of a majority-owned professional services company stated, "The MDT will give us the information if we asked for it. MDT is just because it's all posted and we're very used to it, more than anything, I'd say." [#29]
- A representative of a majority-owned professional services firm stated, "So primarily with the Montana Department of Transportation, we haven't done any work with their airports yet, but otherwise just attempting to get work has been good. Usually have awareness of projects that they intend to go out to consultants such as their selves and have the ability to talk to people, to find out more information about the project." [#30]
- The Native American woman owner of a DBE-certified professional services firm stated, "Since 2012, when the oil companies left, which is, that's the people that I knew. That's what I worked with, all the oil companies. … When the oil companies left the reservation in 2012, I could not jump in with the big boys, you might say, in the Highway Department, or any of that. It just didn't shift. That's the way it worked. It's different. People say, when I first went to work for the Highway Department, they asked me for a quote. This is on the [current company] side. They asked me to give them what it costs me to do this job. I said I did all the financing, and I did all the everything. They said, 'You can't do that.' I said, 'Excuse me?' They said, 'No, you have to have a project manager, and you have to have financing people.' I said, 'I don't. I have to do that myself.' They couldn't grasp it. Now I have to say, she was the right of way director for the Great Falls area. Absolutely a fantastic woman, that really put it together for companies like mine. Because we're not big engineering companies, but we fit in engineering. It's a hard place for the right of way companies to get anything, because you can't just say, 'Okay, I do this.' You have to find out who the engineer is. That engineer has to want to hire you to do his right of ways. It's a real hard place to go. She really has instrumented the highway projects for the land consulting, and done a very good job, I have to say. Because now that I don't have as many workers, I'm still the person that knows the best way to do the right of ways here. Now the prime contractors know that that's my expertise. So, she has made it easy for me to fit in with a prime. I don't know how to say that, but there is a process now for the right of way people. There is not that in the construction. … MDT has been I would say majorly consistent. As long as the projects are on the reservation then I'm probably the best qualified to do it. So, I have that. Off the reservation, not so much. I don't think I even have any projects off the reservation. You know, I have to say that because I have a person in MDT that actually when she came to MDT and became the right of way director or whatever, the right of way person is. She's right under the director, the guy. So, she actually hired me, and I never could get in with MDT before that. And I tried for years. Probably 20 years, because let's say she worked there for almost 30 years for the highway department now. So, showed me how to do all the paperwork to get the prequalification. Because I already have the... I had everything; I just didn't know how to present it. And she was very instrumental in helping me get all that done. Otherwise, I probably would never have got a highway job. Thank God for the MDT person that worked with me. She actually really... she literally streamlined MDT to work with DBEs. Before that, it didn't happen … I have worked with MDT for 30 years now. I have a very good relationship. Like I said, the MDT rules, or whatever you want to call it, process, so that it works very well. … I did think that airport one was harder. Then I just thought, 'Well maybe it's just because I didn't understand.' Because I was still new to

the business. … MDT now has a different process for the jobs that I do when I'm not at the engineering company. So, they have made it easier. Well, the best process by far is MDT, and working with subs and primes. It was almost, they don't really pair you up. But I think they make it easier for you to be seen. That's the best way I can explain it. … For MDT, it wasn't hard for me to do their requirements. It was quite straightforward, what they needed. All I had to do was do the process. I sent it in, it got approved, and they paid me. That was originally when I was a prime. Now that I'm a sub, I can do the same, once you get your engineering company to understand that you are a small business, and you can't wait for ... For instance, I can send a whole packet, a parcel. I could send it to my prime, and they're busy, and they don't get to it for a day, or a week, or whatever, because they don't care if they get paid for it right away. But in their paper, in their contract, they want to say, 'We pay you 30 days after we get paid.' That does not work for me, and I don't work for anybody if that's their requirement. My thing is, 'I get you the project, and it is approvable. Then I will wait 30 days for you to pay me. I don't care when you get paid.' The only reason I can do that, is because I have been doing it for [many] years. Not everybody could do that." [#3]

- A representative of a majority-owned professional services firm stated, "The RFP responses with MDT tend to take more time than other states. They put out some pretty detailed, especially in the alternate contracting, the design build, and that type of thing. The effort to put into a proposal for MDT design build is far more than the other states." [#5]
- The owner of a majority-owned construction company stated, "They are pretty good about putting that out. They have an updated, or a future projects schedule, which kind of goes out six, seven, eight, nine months sometimes, with dates and bid lettings which projects might be going. If it doesn't tell you all that's involved in them, it kind of tells you what it might be, like a mill and overlay, or a bridge job. Then it also has, then usually a lot of these jobs, like three or four months before they bid, they'll come out preliminary plans, so you can actually go in and look at the preliminary plan, so you at least know what kind of job is coming up at those certain times. All that on their website is very, it's good, and same with the Federal Highway Administration, they put them out well in advance, so you have a pretty good idea of what's coming. Honestly, some of the bigger prime contractors, now, they have been... we've been getting emails months in advance. We're looking at, 'Here's the jobs on the list we're looking at. If you're interested, click yes,' whatever. We're kind of getting double hit, but as far as the MDT stuff, we're on top of that." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Like does MDT only do highways? I mean, what... don't... do they do parking lots?" [#8]
- A representative from a majority-owned professional services company stated, "I think there are a lot of opportunities out there. I would like it if MDT decided to hire outside firms instead of doing things themselves. When shovel ready jobs were ready, I approached MDT to do all of their bridges and evaluations. Instead of hiring companies, they bought all the equipment and wanted me to train their personnel." [#AV238]
- A representative from a Native American woman-owned professional services company stated, "I'm probably going to open up a shop, because I'm just mobile right now, but I can't find anything to rent right now, it's crazy. A lot of times I don't know who to get ahold of for questions, and when they do new stuff, they don't make sure everyone knows about it. Like, when they changed the chain of custody, I didn't know until 30 days before." [#AV268]

- A representative from a majority-owned professional services company stated, “Can’t win a bid can’t get any experience with MDT. We bid on jobs, we don't get the job goes to out of states contractors or consultants, not MDT contractors.” [#AV282]
- A representative from a majority-owned professional services company stated, “Sometime, it seems difficult to get MDT work if you have not been working with them for several years.” [#AV305]
- A representative from a majority-owned construction company stated, “Communications with smaller business; we don't hear about the projects, or I am not smart enough to find the projects.” [#AV38]
- A representative from a majority-owned professional services firm stated, “We do set up a debrief meeting after every proposal we don't get to figure out why. And obviously, sometimes it's something, and we missed in the thing. I'm not going to say we're perfect or great, or they should always select us. But a lot of times, it's truly, well, they just have more people, they've had more experience, and they've had with this exact thing. And so, it's more just the, well, it's pretty tough to get experience when you've tried for years to get a project.” [#PT1]
- The owner of a majority-owned construction company stated, “You get used to working for people. Usually when you step out of your comfort zone, then you have a problem. We're very used to working with the State of Montana. We know what their expectations are, generally. That was part of our problem with federal highway. You do a job and then three years later, you do another job with them. You've got to relearn everything because it's a whole different than... Airports are kind of the same way, too, not as bad. But better highways like that. The state, we pretty much know because you're continually doing highway projects. Where you get away from federal highway for a while and you're thinking, ‘Why are we [doing xyz]?’ And they're end product might not be any different, it's just a different way of getting there. We're very, very familiar with the State of Montana and the State of Wyoming, so it's easy for us to work under those agencies. We know the expectations, we know the paperwork, we know the bidding processes.” [#1]
- The owner of a majority-owned professional services company stated, “So we were on an IDIQ list. We've been pre-qualified. And so, when something comes out for that work, they send to the three of us and we put in a bid and go on from there. We don't work for MDT anymore because we've given up on them. And they're horrible. They're run by engineers who don't have any idea on any reclamation or restoration processes. And so, all they want to do is throw something down as close enough. And they go... The State of Montana's Department of Transportation has a reputation in the west. We do work for Washington State Department of Transportation, Idaho Department of Transportation, California. We've done work for Oregon. And every one of those, they refer to the department MDT as a neanderthal. Because they're not looking for the future, they're doing stuff as how they've done it forever and they're not very good about making changes. That's why. We've done work for them. And it has... We've been... There's a number of times in which we've done work for them, and we finally just decided we're done. We're done doing because the working relationship was... We work with engineers all the time on these Superfund sites. Those engineers are enlightened on how to do things in a more responsible way. And the Montana Department of Transportation Engineers only want to build a road and they could care less about anything else. So, all they're interested in is moving the yellow toys up and down to build that road. And that's it. So, they'll spend zillions of dollars on this and then a

buck 98 on restoration, and it can't be done. And so, it shows. And that's why. Like I said, I'm talking to Washington Department of Transportation employees who are telling me that the Montana Department of Transportation is a neanderthal group, not contractors over there, but the actual agencies themselves." [#11]

- The owner of a majority-owned professional services firm stated, "I'm not holding my breath, I've got plenty of experience working with MDT when I was working at other firms and just every step of the way it felt difficult." [#13]
- The owner of a majority-owned professional services company stated, "Occasionally, we will do work where we are working in conjunction with them. We're generally hired by contractors. So, we would be quality control and MDT would be quality assurance. So, we do the same similar roles, but we don't directly work for MDT. The only work that we would ever do on an MDT project, so we have done, like I said, some mix designs for upcoming work. And so, that almost always happens after the contractor has already been awarded the bid. They'll contact us and say, 'Hey, we're going to drop you off some materials. Can you perform us a mix design?' So, we will do that. And occasionally, if there's some conflict in the field between MDT test results that the contractor doesn't like, they might hire us as an independent to come out and run test as well. That happens occasionally. But yeah, so it's a different group. We don't have hardly any contact with MDT." [#14]
- The woman owner of a DBE-certified professional services company stated, "One thing I'll mention with MDT that was always a hurdle is that they would only allow firms that use a certain CAD program called MicroStation. And a lot of small firms in the private sector use AutoCAD instead of MicroStation. And so, to be able to work with MDT you had to buy MicroStation in addition to CAD. And so that was very expensive. So, the new Consultant Design guy that came in early 2000s, he made it so that small firms like us could design without using MicroStation as long as our final product looked like what they're used to, same kind of fonts, same tech sizes, same arrows, that kind of thing. So that was very helpful because then we didn't have to purchase MicroStation. And now in the last year, MDT has decided they're going to switch to AutoCAD, which is going to be very helpful for small firms, I think." [#15]
- The Native American owner of a DBE-certified construction company stated, "We always found it was quite tough to bid them [MDT], because their projects are so big." [#16]
- The woman owner of a DBE-certified construction firm stated, "We have to go through some of their safety trainings programs, which we've all done. And then you have to have within the last three years, I think it was, now we have to have drug testing, whatever. We got to be on some drug consortium. … So random drug tests now and then, so. MDT. Well, you got to have inspections for your trucks and trailers and all that kind of stuff. And in fact, I just had to go put everything in the trucks here recently, we did that. And you got to have copies for everything. And then of course you got to have copies of insurance, copies of registration, copies of your analysis and your GVWs and then your permits. And then there's that stupid 2290 form, heavy highway use tax, which I think is the most ridiculous thing. If you've ever read it, it doesn't make any sense. And then we got your field tax, registration tax, your GVW and then logbooks. Thankfully with the logbooks, we don't have to be on the digital stuff. … because we are in state and we're pretty much within a certain miles range. So, kind of get away from doing that. Figured. Okay. The safety training, Montana Rail Link had one of their own and it was just one through what you say, the internet that we did, their own pattern. And then some of these other

outfits, like the top plants, they'll have theirs also, but yeah. And some of them it's like an onsite site specific, you got to go every time you're on the job, but Montana Rail Link, theirs is just kind of like an annual thing. And then they have refreshers. And we have to do MSHA [Mine Safety and Health Administration], but that's not with MDT. … We've got a really good relationship with them right now, and they put out a request for a proposal, but usually there's... there's not very many people that are in this kind of work. So, you kind of end up with most of it, so. Well, that's another thing, stuff that comes through email, a lot of times you open it, look at it and think I'll get back to it later and you forget about it, and you don't. Whereas if they sent it with mail, it's right in front of your face generally. It might get under the stack, but just the State of Montana wants you to file everything through email anymore. It's just like, come on, people. Do your own work yourself, why do I have to do the work for you?" [#17]

- The owner of a majority-owned construction firm stated, "So a great example that we have and its inconsistency in their organization. But a great example I have is we're working on a bridge abutment on a gravel road, and bridge abutment backfill is challenging to get density because of all the constraints of it. And the spec reads 98%, and we were routinely getting 97.9%. And the technician onsite would not accept that as passing. He was a young new technician. And then when an older senior technician came along, and we'd hit 97.7, 'Oh, that's good enough.' So that affects our profitability because there's two days or three days where we're removing this material and rewetting it, and re compacting it and getting it that 0.1% bump to make it pass. And then the other guy comes along and said, 'Guys, this is a gravel road. They'll constantly be grading it. If there is that every little bit of settlement, it's really not an issue.' That is why I say there's an adversarial relationship with contractors, and perhaps it's just construction project management in this area. I've had several contractors say that other project managers for MDT and other areas are not as adversarial. For example. So, we don't do any paving. So, what we do is water and storm work. So, you'll see the bigger companies, the Riversides, the Schellingers, the LHC, you name it, come in, they'll do their own pipe, and there's no opportunity there for you." [#18]
- The woman owner of a DBE-certified professional services business stated, "It's been very transparent. They have factors and they show you your ranking and you can debrief after you don't get something. They'll say, 'This is where we saw weaknesses.' It's all been very transparent that way." [#28]
- A representative of a majority-owned professional services company stated, "Contracting is very, very, very, very slow. Even when we are right on top of it, we're getting stuff to them very, very quickly, it is extraordinarily slow. Amendments are extraordinarily slow." [#29]
- The woman owner of a professional services firm stated, "The Department of Transportation has always been, is very easy and upfront on everything that they've done. As far as the ease and what's available, yeah." [#32]
- A representative of a Native American-owned construction firm stated, "Yeah. I mean, we've worked with the airport. Airport's tough because it's a high-risk type of work with not, actually, a whole lot of reward in it. The MDT we've worked with them. They're great. They've, they've been good to work with. Let's see. I'm just trying to think. It's kind of a 50/50, whether the job works out well or it doesn't. It all depends on who's running the job, but no, the experiences haven't been horrible." [#36]

- A representative of a DBE-certified construction company stated, "Overall, I think we're pretty happy with the state's specs. Once in a while they throw some crazy spec out for something, but generally those kinds of things can be worked through. And if that's what they want, it just costs accordingly. As long as it's available to get, and generally that's the... The major hiccup is can we obtain the specific spec that they're wanting for a particular job, but generally it's not usually a huge problem." [#4]
- A representative of a majority-owned professional services firm stated, "With those contracts, there are a lot of things, 'Well, we don't normally pay for that.' There's a lot of little extras you seem to have to do. Our overhead rate, I was looking at that and I thought, 'Yeah, I can see that because the invoice submittal process is pretty cumbersome.' There's just a lot of extra administrative effort that goes into having them as a client versus other clients." [#5]
- The owner of a majority-owned construction company stated, "We pretty much bid every single job in the state every month. Almost all of our business is with MDT, or the Federal Highway Administration." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "We have yet to do a job with the state. And the reason why is because the jobs are just too big." [#8]
- A representative from a woman-owned professional services company stated, "We are in the area of Bozeman, and it is growing wildly so there is a lot of work. Well, we have worked a lot with them in the past. In the last five years we feel that we get beat out on the contracts. They have their own companies they like and that is on the design side. The more you work with them the higher you get ranked." [#AV204]
- A representative from a woman-owned construction company stated, "No problem and we are quite happy working with MDT." [#AV232]
- A representative from a woman-owned professional services company stated, "It is tough to break into the agencies. They are extraordinarily difficult to get through the bureaucracy of the contracts, MDT is the worst. A lot of time is spent on that." [#AV243]
- A representative from a majority-owned construction company stated, "MDT is terrible to work with. They don't have knowledge in the fields they are critiquing the contractors on. No real-world experience, all out of a book and they don't listen to contractors that do have experience." [#AV246]
- A representative from a majority-owned construction company stated, "My most recent interactions with the department have been very positive. Previously I'd had less than positive experiences with the department, so much so that it had severely affected my interest in working with the department in the future." [#AV249]
- A representative from a majority-owned construction company stated, "The inexperience of the owners understanding contracts. MDT and other government entities administer the contracts yet don't understand them in making decisions." [#AV286]
- A representative from a majority-owned professional services company stated, "Pretty steady. Work well MDT, with all public agencies." [#AV291]

- A representative from a majority-owned construction company stated, “Right now Montana is really booming. There are really lots of opportunities. I have no complaints. I've worked on a couple of projects in the past for MDT and I've had no problems MDT.” [#AV304]
- A representative from a majority-owned professional services company stated, “MDT is very difficult to work with. They are an engineer driven organization who does not care about doing any kind of reasonable type of revegetation. If they're looking to spend $40 million on project, they think it's too much to spend a couple hundred dollars.” [#AV314]
- A representative from a majority-owned professional services company stated, “MDT work went smoothly.” [#AV315]
- A representative from a majority-owned construction company stated, “[It is] hard to get people/workers and material MDT is difficult to work with, very restrictive.” [#AV318]
- A representative from a majority-owned construction company stated, “For snow removal they are hard to get in touch with. No good point of contact.” [#AV330]
- A representative from a majority-owned construction company stated, “I've worked for the highway department before and never had any problems.” [#AV347]
- A representative from a majority-owned construction company stated, “... Be ready to travel.” [#AV35]
- A representative from a woman-owned construction company stated, “MDT just sucks. Permits, … , equal rights. Hard to work with.” [#AV110]
- A representative from a focus group consisting of prime contractors stated, “MDT is it. So as far as relationships concerned, right now it's better than ever, but I will tell you that starting out the early or '90s, early 2000s, when I was working out in the field, I would say a lot of times it was strenuous at best. I think that old mentality of us versus them was pretty prevalent and it carried into this probably the most recent decade. And then I think the last five years, I think a conscious effort on both their part and our part to see this more of a team aspect as opposed to us versus them mentality. And it's been nice. We've been tried to participate in more meetings and spend more time with MDT and working through problems together. And MDT has worked on a partnering, a commitment to most of the projects where they're having level one or two partnering on those projects. And I think we're actually seeing a noticeable difference in how things are getting handled, a more project level and working through issues together.” [#FG2]
- A representative from a respondent at a public meeting stated, “I think that—I’m not going to downplay the fact that there's discrimination out there, but I feel like sometimes when working with the MDT, they kind of, their default position is that there is discrimination. It's kind of a hard thing to prove a negative. And so, we work really hard to not discriminate and to create opportunities for everybody. But when you come up against that attitude that you're kind of guilty until proven innocent, it gets kind of difficult to work with them and to want to be forthcoming with them about things that are going on, because it is sometimes seen in the worst light possible. I think that there's more difficulties in some part of the states than others. And so, we have to kind of gear our bids towards, honestly, it's more difficult to work in the Eastern districts of the MDT. You get a lot less cooperation with the project managers over there. At least we've experienced that. So, if we're working in the Western half of the state, it seems like they're more willing to work with you. And if you're working in the Eastern part of the state, it's very

combative almost at times. More adversarial. And I know they have that partnering stuff going on right now, and I'm hoping that that will help, but until we get a few years behind us of that, I'm not sure what that will change. We do see differences in how business is conducted with the MDT, depending on what district you're in. And that gets difficult because we're trying to, when we're bidding, we have to make some assumptions about how things are going to go. We feel like there's more risk when we're working with the Eastern districts and therefore our price goes up accordingly. So, it does cost them money in that way. It costs them money in order for us to, because we're trying to make a profit. There's not a lot of ability for us to say, oh, well, how about this? And they actually listen to us. We feel like we don't get listened to on that end as much, even if things don't go our way in the west, at least we feel like we've been listened to, and we make our case." [#PT2]

Nineteen business owners described their experiences working with, attempting to get work with, and getting paid by NPIAS airports specifically [#10, #13, #14, #16, #18, #2, #27, #29, #3, #36, #4, #6, #7, #8, #9, #PT2, #1, #14, #4]. For example:

- The Black American woman co-owner of a construction company stated, "It seems a little fairer because it's not just state, the way I understand it. I'm not averse to that. But yeah, it seems a little different, but then you're also, most of those jobs are pretty big jobs as well. I would say one of the biggest things is just that it's you almost have to be willing to learn the rules for those jobs. You have to have one of those jobs. And so, you've got to be willing to gamble your whole company on whether or not you're going to learn fast enough to pick that up. It's not an inclusive system. You know what I mean? They try to say because they went to that eMACS bidding and stuff and it's all online. Well, it used to be a lot different than that though. I mean, there used to be walkthroughs for every job. There used to be all this stuff and they think that they've streamlined it. Well, they have, but that's the thing. If you think about it, those walkthroughs were very informative before that they used to do. I mean, and all that, now it's like, 'Oh, it's all online.' Okay. So now you're just asking somebody to pretty much blindly bid. And it is laid out, but once again, if you're a company that that's all you do is that kind of job, of course, it's a huge advantage, which is fine. They're just as high, and the insurance is higher. Working on the airport is kind of like working in a... I don't know. I mean, it's not really DOT stuff, but it's still state of Montana. But there were jobs where it was going to cost us $60,000 to upgrade our insurance to meet the standards of what we needed to have. You needed to show proof of that when you submitted your bid. So, we had to spend all this, granted, you could cancel the policy afterwards if you didn't get it, but it was you're still going to pay at least 10% of that up front." [#10]
- The owner of a majority-owned professional services firm stated, "At this point, the Missoula Airport, they're doing a whole new build. The whole place is getting rebuilt. And that was definitely a job that I did not want. We just didn't have the staff." [#13]
- The owner of a majority-owned professional services company stated, "We were hired by the Airport Authority. And so, there's a group of engineers and architects that basically they hire as a team to whether do design or inspection work or whatever else. They put together a team of people to perform quality assurance and design work. So, we're part of owner's representatives on that project. It's directly with the airport. So, that's an interesting thing. The Federal Highway Administration, which is a federal agency, they have their own engineers do their own design work and administer their own contracts. Now, the FAA, they hire engineers in an area to design the projects and administer the contracts. So, they went in a private sector direction, where the

Federal Highway Administration still retains quite a bit of their own control over their projects. So, I have no direct contact with the FAA. We deal with an engineering firm, who did the design, who responds to the FAA or has contact with the FAA. But we have no contact with the FAA whatsoever, whereas I will have contact with Federal Highway Administration. … We can be doing either role. I just put in a bid with a contractor who's looking at an airport project in Polson. And I put numbers in directly with that contractor and we would be a subcontractor in that regard. Where if the Polson Airport Authority had contacted me, I would have been a contractor to the Airport Authority. So, the airports are a little bit of a different type of a contract relationship. You can be either or." [#14]

- The Native American owner of a DBE-certified construction company stated, "It's been a few years since I've actually done one. I've bid on some of this last couple years, but we were unsuccessful. The Polson Airport, I know this week is advertising for some work, so we'll be going after that." [#16]
- The owner of a majority-owned construction firm stated, "Yeah, that was quite a while ago, but yeah, we've done. It was animal fence project, and there was some culvert and earthwork stuff on it. And so, we just came in for that contractor and did that stuff." [#18]
- A representative of a majority-owned professional services firm stated, "It seems like we do get our contract pretty quick with them, and they're pretty good to work with from what I've heard. So, I haven't really seen many issues with that." [#2]
- A representative of a majority-owned professional services company stated, "No airports. We don't have that capability." [#27]
- A representative of a majority-owned professional services company stated, "With airports, we generally work with just cities and counties. We have not been successful getting work through MDT with our airports." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "I tried to do the airport things. We went to several of the airports. But when you're not knowledgeable in that respect, it's hard for you to ask the right questions. It's just a hard way to maneuver when you don't have anybody that helps you. Things are closed off, or ... This is going to sound really, not very nice. But it's really hard for you to get in if you are a real straight shooter, like I am. I am as honest as the day is long, and I don't cut corners. I do things exactly, that I see things need to be done. I don't think everybody is like that. … Public airports was very difficult for me to figure out. I tried several times. I went to different towns when the airport thing was coming. I just didn't feel like ... I felt like I actually wasted my time going. Even though I always got an email saying, 'We're doing this, we're doing that,' by then it was like, 'Yeah, I need to be working. I don't need to go listen to ...' It was not conducive to me. It was a waste of my time. I did think that airport one was harder. Then I just thought, 'Well maybe it's just because I didn't understand.' Because I was still new to the business." [#3]
- A representative of a DBE-certified construction company stated, "I know that the airports are a little bit different [when it comes to bidding], but I don't know that they're any more cumbersome. Most of it is pretty cut and dry. You got to have your insurance, you got to have your bonds, you got to have your licensing. I handle most of the licensing, it's not anything too cumbersome or difficult. And then, I usually electronically file, or I mean, electronically save the different licenses that we have, and the guys can just pull those for the bids. The only complaint I

heard this year on the couple that we did was that somebody didn't get the memo that the airport was closed and tried to land their helicopter on the runway while our guys were working. So, we had some communication issues, but generally we don't have a ton of trouble as far as working on it." [#4]

- The owner of a majority-owned construction company stated, "We have some airport barricades, and stuff, but mostly we'll rent out to a prime. But it's very, very little." [#6]
- A representative of a majority-owned professional services company stated, "We did do a job in Lincoln airport where we worked locally, out of Great Falls where the owner's rep for MDT [was], where they had a small taxiway improvement at the Lincoln Airport. So that, to be honest with you, that was very similar to what we did for traditional FAA. So, to be honest with you, [the owner's rep], knowing our expertise and FAA work, relied on our expertise, and helped them through. And as a team effort, because we were hired directly by [the owner's rep] as their QA testing. So, I provide a lot of insight on what's been traditionally done at larger airports, like Great Falls International. What is the FAA interpretation? I know MDT uses that as their cookie cutter, but MDT can make their own changes to it. So, knowing what has been commonly done for airports from a federal entity and applying that to MDT aviation funds, where they are getting their money from FAA as well. So, they have to follow very similar rules. So, but very similar, maybe not as highly scrutinized Lincoln Airport, there's just not as much plane traffic. When you go to a bigger airport, it's just bigger and more and a little more, few more levels of complexity to those. Well, you go back to our business model. I mean, where we want to work traditionally federal jobs would allow us to charge more due to the complex nature of the testing and rigorous nature of it, the private sector, little more leniency, not the level of scrutiny you'd see there so we can provide lower rates, but just dealing with security and all the fun stuff, trying to get into an airport, it's not easy to do, but it's just, the specs are so much more rigorous where we have to do more. So, we provide more intricate services at the airport in a special way. They want a lot more hands on. So, we just end up charging a lot more time to it, because it is, they want a little bit more one on one private sector. We send a guy out to do concrete testing. They give the guy the field results in the field and send the report a week later and no news is good news. So, the administration side and project management become really key on any MDT or FAA jobs where knowing how to invoice it, going back to that just requires higher level employees to understand the technical and managerial side of stuff. So that would be... That's what occupies most of my time." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "We've done those two phases here in Billings. We did some pond work for the Billings International Airport years ago. And then we've been in West Yellowstone, same scenario. They have a parking lot for airplanes for their firefighters. So, it was BLM, so it was still federal. Some of the jobs that we just will not bid on because they have such high specs. They'll have a ride spec... they'll, I mean, there is so much room for error and failure that we shy away from it. But now we did bid a job at the Cody Wyoming Airport because it's a secondary road. So, there're things that we will bid for an airport, but we will not bid like... Lots of times they're looking for runway or they're looking for things with the specs that we feel like we would not be able to achieve." [#8]
- The owner of a majority-owned construction company stated, "There's one guy down there got a bid because... I think it was through the Army Corps of Engineers, but they wanted to cut all the trees down around the airport, which he came in, cut them, and left big slash piles. Cut them

down, left them. And it's like, 'Why don't you clean that stuff up? All you're doing is making big rats at the end.' I tell you what, you go out there in the woods and you pile up a bunch of trees and everything, you'd be surprised what kind of animals want to roost under them and everything. Most of them are mice and rats, and I'm just thinking, 'Yeah, I would consider doing work like that for small airports.'" [#9]

- A representative from a respondent at a public meeting stated, "I think the airports have been pretty much across the board there." [#PT2]
- The owner of a majority-owned construction company stated, "If you're training at a new company, the first thing you [should do] is never bid to airport, never bid as a sub on an airport. Because airports generally pay once a month and there'll be an estimate cutoff date, from that estimate cutoff date, it might be a month and a half before the prime sees the money, and then the prime in Montana has to pay the sub within seven days. So, you could be strung out close to two months from... It could almost be three months if you did something at the beginning of the pay period, the cutoff was here and then it's a month and a half here in 10 more days. That's almost three months from when you did the work, so a new business needs to understand that there's places they shouldn't start doing business. If you don't get your certs and stuff in a week before the cutoff period or the 25th of the month, and you've done the work, you don't get paid. Sometimes that's a struggle with getting our subs to get us fencing certs or whatever, in a timely manner. If they don't do it, then they don't get paid. Yeah, [a small company] up in Glacier, they're new to Montana guardrail. They wanted to do materials and storage, so the cutoff was the 23rd, they asked me if we could do materials and storage two weeks prior. And I said, yeah, you need to get me all this stuff by this date. They got it to me the day of, like on the 23rd and it was not complete, and it was wrong. And I said, well, they're not going to accept this, so when it was three days later that they got it, then they actually started work that Monday after. So now they've got the no materials and storage, they started work at the beginning of the peak with the new estimate period. With no payments, so we're going to be close to two months out before they get paid on half a million dollars in material that they were looking to get paid for. If they're making out an estimate and they don't have it, it's done, they don't say, hey, turn it in tomorrow, it'll be fine. It's over, they don't pay it. So, most people would think, God, maybe have like grace period or be a little... But it says they don't have it, they push the button and that's it, they don't get paid. If you haven't checked all the right boxes because you're missing a submittal, the computer will undo." [#1]

Eight business owners described their experiences getting paid by public agencies in the Montana area [#14, #15, #22, #27, #28, #7, #AV, #FG1, #18, #29, #30, #5, #FG2, #14, #4]. For example:

- The owner of a majority-owned professional services company stated, "At the federal level, the Federal Highway contracts, I've had issues where they would dispute an invoice or withhold invoices, payment on invoices because they basically thought they could. And there's a fairly robust system set up inside Federal Highway, FAR clauses, to make sure that they don't do that. It still can be a problem. Those larger contracts, they only can submit for payment to the government once a month. And then, it can take four to six weeks before the contractor gets paid. And then, they have one to two weeks before they have to pay their subcontractors. So, we'll experience at the beginning of a project, sometimes a couple of months before we'll get any payment for any of the work that we've performed. Federal Acquisition Regulations, I believe, is what FAR clause is. So, there's a whole series of contract clauses that the government has set up

to basically they cover everything, how to handle subcontractors, what kind of insurance people have to have, contract specifics about contamination of soils or SWPPPs, which is stormwater runoff. They cover everything. They cover how a general contractor can relate to a subcontractor and how all of that gets paid. So, a general contractor will have to have two kinds of bonds. They have to have a performance bond and then a bond to make sure that we get paid. So, they have two bonds on Federal Highway contracts. It definitely [helpful to have two bonds] is because we have no contract relationship with the government, whatsoever, as a Tier 1 subcontractor. Our contract is directly through the general contractor. So, we can't really even have conversations with the Federal Highway folks about getting paid. We have to deal directly through that relationship between us and the contractor. So, I can't call up a Federal Highway engineer and say, 'Hey, these guys aren't paying me. Could you do something?' They won't even take my call. They won't respond to an email. You can rattle the cages a little bit, but they're not going to respond directly to us. They'll respond to the contractor and say, 'Hey, I'm hearing rumors that you guys are not getting your subs paid, so you better take a hard look at that.' The airport contracts, I'm working directly for the contracting authority, which is the Airport Authority. So, it's a little bit different. And I have to say that in general, I don't think we see the lapse in payment from them as we do on federal work with larger contracts. So, it's a little bit different." [#14]

- The woman owner of a DBE-certified professional services company stated, "They take longer to pay than the private sector, but we're used to that." [#15]
- A representative of a Native American-owned SBE-certified professional services firm stated, "For us, the timely payment from the feds has been awesome. They understand the small business and as long as your invoices are correct, and it's tracked correctly, our payments have been awesome. They've been even shorter than what the government requires. So that's been awesome." [#22]
- A representative of a majority-owned professional services company stated, "With the public work and agencies, I don't feel like we've ever been held out for very long for payment, so no." [#27]
- The woman owner of a DBE-certified professional services business stated, "I've done some work recently for the reservations and that's sometimes a little slow, but that's just because they have so many steps of bureaucracy to go through. And, but we've done work for Rapid City and Bozeman, and Billings and they're always quick to pay it. The reservations have their own set of issues." [#28]
- A representative of a majority-owned professional services company stated, "I think the private sector's a little more straightforward. There's probably one, maybe two layers of review. In order for us to get paid by MDT, since they're federal agency, they can require certified billing, or payroll, excuse me, which requires assistance from our corporate office because I don't have access to that information. So, our corporate gets involved on any MDT job. So, billing and getting paid from the state can be a little harder, but that's, once again, that's a federal requirement. But when we work directly with contractors, which is more than half, we are working directly with the contractor payment process is much smoother, less oversight. It's the contractor reviewing our invoices and then submitting it. So, they get the flak from whatever federal agency there is. Then if we work for hospitals, that's a good private sector example. We're usually working for the owner's rep or the hospital directly where they'll review it. They'll

have one or two levels. They're very meticulous too, but they pay prudently. I know the state, there's so many levels to it, but the private sector, we're usually dealing with one owner's rep, and we just work with him directly. And, if he has questions, he just calls us, and we can get things answered on the phone right then and there and not have to red tape it or have a 35-email chain trying to satisfy something." [#7]

- A representative from a majority-owned construction company stated, "Long time to get paid, you have to overbid with state, and they keep 1 percent [which] seems fishy." [#AV89]
- A representative of a DBE- and MBE-certified professional services company stated, "I feel with our local agency work, our cities, we have no problems for the most part. Where we have problems is design build and we've had WSDOT OEO office involved recently. We're a third tier down on a huge design build. We're doing some landscaping work and some structures for bridges. The contractor is unhappy with the prime. We work under the prime. What they've done is they've withheld payment. Currently the last I heard, they owed the prime $11 million. $11 million. They were holding payment on us. Well, we called the DBE office and said, 'You got to intervene because they owe us like $300,000. And that's a lot of money,' especially for a small business. They got involved and we got paid. I don't know how we got paid because the prime hadn't been paid, but we got paid. But that's the beauty of having that office, understanding your situation as a small business, and making phone calls. I worked with a woman there and she called the contractor who then asked me for every invoice that had not been paid. Somebody's got their attention." [#FG1]
- The owner of a majority-owned construction firm stated, "So yeah, I could file all the complaints I would in the world, but I'm going to alienate myself in the contracting community. I may alienate myself with MDT. So, what generally happens is we dip into profits to pay overtime, to get the job done, and to move on. And then what happens is, when an MDT project comes along, guess what? I find other projects to go work on because, in my opinion, MDT is an ungrateful client. They have an adversarial relationship with contractors, at least in this area. And I will go to great lengths not to work with them because it is just not worth it for me. Yeah. And I get in trouble from my bond company, but we're a little bit old school. So, for example, we did a project recently, and me and the engineer were fighting over quantities, but I've already paid the subcontractor for those quantities, but that creates a hole in my cash flow. And so, I think that's just something that you do as reputable contractor in an effort to maintain good relationships with subcontractors." [#18]
- A representative of a majority-owned professional services company stated, "Payment method is great. I mean, there's never an issue with MDT at all." [#29]
- A representative of a majority-owned professional services firm stated, "I don't think MDT only does electronic payments, but if it was only electronic payments, then maybe some banks aren't set up as well as others were receiving that. To my knowledge, the public agencies in Montana are good at paying. They're paying their bills, paying their invoices." [#30]
- A representative of a majority-owned professional services firm stated, "The only thing I can think is that there's MDT is a good client because they pay their bills." [#5]
- A representative from a majority-owned construction company stated, "MDT is difficult to work with and they back pedal on payment issues when it comes time to be paid." [#AV292]

- A representative from a woman-owned construction company stated, "Only complaint is slow to pay. It took 6 months, and I was upset." [#AV323]
- A representative from a focus group consisting of prime contractors stated, "In all my years doing this, there's a few times you're like, 'Hey, why did you only pay this?' And there's some things that can be at the discretion of the engineer, for the most part it's spelled out very clearly in their provisions. And a lot of times it's, 'Hey, it looks to me like you might have mis-paid us here or whatever.' And they're very quick to fix and whatnot. So, no, it's very straightforward, rarely do we ever have any issues and most time it's more just a human error of input. And if there is any... And there's a lot of things too that might be just, like I said, their discretion and most the time we just work through the issue. So no, it's not a bad deal at all. It's nice to have that consistency." [#FG2]
- The owner of a majority-owned professional services company stated, "The airport contracts, I'm working directly for the contracting authority, which is the Airport Authority. So, it's a little bit different. And I have to say that in general, I don't think we see the lapse in payment from them as we do on federal work with larger contracts. So, it's a little bit different." [#14]
- A representative of a DBE-certified construction company stated, "It seems like the airports pay significantly slower than some of the other public work we do. It seems to take a lot longer. Now, I don't know if that's because of the size of the airports and the staffing or all the red tape and such, I don't know. But it just seems like it takes us a long time to get paid and then a really long time to get the retainage released. We've sometimes waited eight or nine months to get the retainage released on an airport, even if it's a significantly sized project that retainage which can be several thousand dollars. So, that becomes kind of a frustration." [#4]

2. Barriers to working with public agencies in Montana. Interviewees spoke about the challenges they face when working with public agencies in Montana.

Twenty business owners highlighted the length and large size of projects, allowable profit margins, communication with decision makers, and lead time before projects are announced as challenges, especially for small, disadvantaged firms [#1, #2, #5, #9, #AV, #13, #15, #2, #26, #28, #29, #30, #32, #4, #8, #FG1, #FG2, #PT2]. For example:

- The owner of a majority-owned construction company stated, "I don't know what. You get used to, we bid jobs in every district in the State of Montana. Every district has different engineers. And you generally know what the engineer is when you're bidding a job. So, we actually bid away from some engineers that are more difficult. But if you look at, in general, when you go from the State of Montana, the airports, there's a lot of paperwork. The people that are actually administrating the airport projects seem less knowledgeable. I don't know if that's fair to say or not. The airport projects are generally understaffed from an engineer's perspective, in my opinion. For Valley [County Airport], the only person that made a decision out there was [one employee] and she was tied up on one thing. You couldn't get an answer over here. Federal Highways is a completely different animal because on a Federal Highway project, we basically do most of the functions that the State of Montana does. So, if you're a new business, you want to start simple. You want to start with the State of Montana. You want to work into airports. And the last thing you want to do is work federal highways. Well, Federal Highways they'll have inspectors there, but they take the... not directing the work to a flaw. [They come] and watch you

do something wrong and wait until you're done and then come back the next day and tell you that's wrong, you need to redo it." [#1]

- A representative of a majority-owned professional services firm stated, "When you're working on projects, I guess that's the one challenge that we have too, is there's a lot of start and stop in certain public sectors. MDT is one of them too, where sometimes it's out of their control where there's a lot of the start, stop, start, stop for a year, start back up, 'Oh, we need this next week now,' but you haven't worked on it for a year. And so managing workflow for us sometimes is challenging with that, you know, managing our staff because we need to make sure they're all busy doing something. So, that can be definitely a challenge." [#2]
- A representative of a majority-owned professional services firm stated, "For a firm our size, people like MDT requires a host of skillsets. A comprehensive road design company or a comprehensive structural and we do structural. We do some road design. We do geotech. We have a material testing lab, which a lot of other firms don't. All the training, software, and experience that they required. A lot of their rating system and the way they do things, they keep say[ing], 'The proof is in the pudding.' Not only do you have to show that you have people with extensive experience doing this thing, then you have to prove it on what jobs they did, for the rating. I completely understand. If I'm hiring somebody, you want somebody that knows what they're doing. That emphasis is there, that you just about have to be overqualified to be able to rate enough to get a project. … If a firm hasn't done any work with MDT before, that is a barrier. Because if they haven't done any work for them, they're going to be at the bottom of the list and they're never going to get shortlisted. That one, I see that process as a barrier for startup. It's kind of interesting. MDT is the only one I know of that does a pre-qual list like that. The Forest Service one we got. We were one of several firms. We submitted to an open solicitation. They give assignments based on availability and they called us to do some. The pre-qual list to be short listed to compete for a project or something like that. They used to just pick them off the short list. Now, at least, they'll short list a couple of firms and then you can write a proposal for it. Which I think is fairer than just picking down the list. I was personally involved in it when it was there. We always tried to spread the work around, but it can turn into a good old boys favor of win. I do like the fact there is a competition even if it is a short list. That's better than what it was. The only alternate to that is going to open solicitations and just takes more MDT staff time." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "One thing that we like to work with the Federal Government about is because, they will ask our opinion. They will ask, 'Is this the best way to do this project?' And by gollie, that is unheard of with the city, County, [or] State. We've been on a parking lot with the city before and know full well that parking lot's not going to drain, and we will tell them that and they will get totally ticked off. They do not want to be told that maybe it's engineered wrong. And so that's a big issue if the City, County, and State has officials in that position, that official needs to be flexible and not think that now since they have four years of college, that they know more at that job site than someone who's been in the field for 30 years. And I think that's what it is. They have such big egos that they're not even willing to listen. The ultimate goal is they're hired, they want to do the best job for the best buck in that timeframe. But yet they don't go in with that attitude, I don't think. … We are certified in Wyoming and as a DBE contractor too, but now with Wyoming, it has gotten so, their restrictions are so hard to where, if you're not a resident of Wyoming, you might as well not even bid on it unless we're doing something wrong. Like Wyoming was just, if you were out of state, they'd add

5% to your bid. So, you give a preference, which drives me insane because Montana doesn't do that. And it pisses me off." [#8]

- The owner of a majority-owned construction company stated, "I guess what really irritates me when you work in high voltage electricity, when that phone rings, I mean you better jump on it and answer it. Don't sit there and let it go into voice recording and everything, because I guarantee you somebody's going to be on the hot seat, because when you got a transmission line goes down, they want to get it back up and running because it's money. And I see this so much, it's so clever. You try to call, like last week I tried to call the Montana Board of Electrical at Labor and Industry. Just kept ringing into voicemail, voicemails, voicemails, and started going right to this person's desk where it says that's her desk phone number. You weren't running into somebody else. They don't even have their switchboard set up properly. That really irritates me, but boy, when the power goes out and it's blowing snow and you got... I can show you a picture up here at the 500 switchyards, me and this other gentleman had to go out there and work in snow about four feet deep just to keep power on, just because we had a malfunction. And it wasn't like, 'Oh, I don't feel good. I need to go home.' No, I don't care how bad you feel. You get out there, that's your job, that's your responsibility. And that's what I'm seeing with all this COVID stuff, it's made a bunch of people just hide behind their telephone and their answering, start picking up the phone and say, 'How can I help you?' It's just like, 'Oh, sorry. It's not my day to answer the phone.' I guess I'm pretty, very adamant with that, because I have run into this so much. And one thing really, I have to stay positive. I can call these PTAC people, and they pick up their phone and answer, but you call like the people who work for the Montana government and it's like they're hiding behind their phones, behind the recorded message, or even they don't even go in. I find that appalling and it really irritates me. I mean, I like working, so I find that very disgusting to me. I mean, it's like you're trying to get information. Takes a lot of money to get your license, and not because you got to take a test. I want to talk to that person. I want to know what he expects. I want to know what his desires are, his objections, and when he wants the job completed. Those are the things I want to do. I want to talk to that person. I don't want to do this stuff where we just, oh, look at this piece of paper and make a bid. I'm not into that game. I'm more, like I say, I'm sure when you go shopping for clothes before COVID, I bet you walked into a department store and you touched the material, you would feel it, you would try it on. So, it's the same principle." [#9]
- A representative from a majority-owned construction company stated, "There's a lot of paperwork involved for small things that do not seem like they should involve paperwork. Everybody is very busy at the moment." [#AV1]
- A representative from a majority-owned professional services company stated, "The barrier is you have to know all the right people, the bids and you must have the time to do them. MDT often contracts outside the state. Or if there is a grant, the state does it instead of us." [#AV42]
- A representative from a majority-owned construction company stated, "All government is difficult because they are administrative top heavy for the work you do. Good, but over the long-haul MT was not business friendly. Since COVID hit, it's better. Don't know why?" [#AV60]
- A representative from a respondent at a public meeting stated, "I'm a very competitive person and I'll be driving around Billings going 'well geez that would be a really good job. How come we didn't know about that?' We are part of the Builder's Exchange and Yellowstone County News. And my estimator is on sam.gov and so I think we've reached out and we'll put in our NAICS

codes, we'll try to get lots of alerts or notifications on potential jobs. So, I think that we're aware of them, but I do believe a lot of these jobs don't even go out to bid. They've got their subcontractors, if you will, or their GCs that they work with traditionally. [There] would be jobs that I think of the company that we worked for [was very] small, I think they were like a three-person company, but they didn't touch a lick of the work. And it was just a public job. So, it was no city, state or federal. So, there was no requirements that they touched it. So, we kind of call them briefcase contractors, it's like, wow, how does a person get to there?" [#PT2]

- The owner of a majority-owned professional services firm stated, "Well, I'll tell you what makes it easier is to be contacted by somebody, because then it starts out more like a private sector relationship and interaction. And so, the first DNRC (Department of Natural Resources & Conservation) contract we got, there's no way we made any money on, no way. We spent so much time trying to figure out what they needed, trying to communicate with them via email and them telling us we had to do this or that. And we came back and said, but you didn't tell us we needed that when we were going at the beginning. So now we got to pay another 350 bucks to get some certificate that you guys require from some insurance company that's not good enough to begin with. And just, I mean, all that stuff takes time. And then that just chews into your profit margin on any kind of contract. So, the first DNRC contract was just a fricking nightmare." [#13]
- A representative of a majority-owned professional services firm stated, "Pretty big difference with local governments and the MDTs and all... Make the MDTs more fair and open. Some of the local governments have their consultants that they would like to work with. And so, you can be the most qualified, the best proposal, and you're still not going to land. They already know who they're selecting before they put it out. So, there are a few communities like that. They're not all like that. I know I talked to one just recently, a county, and during the debrief, talked to him about how they could do better and change their RFP process. And the next RFP came out, actually did. They took what I asked them to do and changed it that way… You have [to be the] one that was recent work with that entity. And so, that really limits to only the people who've ever worked with them. So, no one else could even... You know, you automatically lose the proposal almost. So, I asked, 'Can you change the entity to [a] similar entity.' And they're like, 'Oh, that's a good idea.' So, the next one that came out actually said that kind of opened it up to more. So, things like that, I think debriefs are good for both ends, really. I'd say for us, you know, in the line of work that we do primarily is the most difficult public sector, if you could call it that, would be tribes. And that's simply just because they generally don't have the resources behind their programs like a local government or a state government would have. There's a lot more, I guess, for lack of a better term, handholding, when we go through those contracts with them. Now working your way up to being one of the top projects to get selected, that is a lot. That is more difficult, really. So, I know one state agency that we've tried to be pre-qualified with, we're always being pre-qualified, but we can never work our way up because you can't work your way up unless you have passive grants with them. And so, that's a challenge is to figure out how do you get that? Most of them when they get pre-qualified, even if they don't say they're ranked, from what I found, they really are. So, they may not say they're 1, 2, 3, 4, 5, but I guess I'm not aware of any that really don't actually... They really probably rank you." [#2]
- The owner of a majority-owned construction firm stated, "I'd say the Department of Transportation would be one of them. I just think the whole thing is mysterious, and they're going to do business with who they want to do business with, and I don't think it has anything to

do with bids, the price, or anything. It's the same old people that are getting the work. It's all so-and-so down the road, so-and-so, they've done stuff for us for years. They're not going to change and get anybody else to do anything, not open to new ideas or products. It's the same old thing. There's a lot of new stuff out here that state agencies and others need to look at, save them a lot of money, not interested in that stuff. I question whether some of the people that are actually buying these goods actually understand exactly what the product is or what they're doing. Just not knowing." [#26]

- The woman owner of a DBE-certified professional services business stated, "MDT environmental is very difficult to work with. They micromanage and a lot of times, you get to the point where it's like, if you have such a specific idea of exactly what you want, why don't you just do it yourself? But the other agencies that we do environmental for, you have much less micromanagement, more, 'Okay. Here's our format, do it in this format and then we'll be happy with it.' And you do good work in there, they say thank you. MDT comes back with not liking the Oxford and things like that." [#28]
- A representative of a majority-owned professional services company stated, "We had a hard time with ... they monitor the dams in the state. That would probably be MDT again. With this bridge group that I've talked about us trying to start, and it's a complete non-starter with MDT to try to get in the door. I would maybe go back to what I mentioned when maybe there's this project that's not significant, maybe allowing some of the smaller firms in. The way that MDT used to do it, and I know that this is not their problem. I mean, this was not their choice to move away from it. It was the Federal Highway's choice to move away from it, but, whatever, you just ranked and then they just picked the consultant they thought was best. I mean, obviously that wasn't perfect either, but it was a lot easier." [#29]
- A representative of a majority-owned professional services firm stated, "So on our side, the most challenging is more when there's multiple steps involved. So, there's some agencies do a request for call qualifications first and then a request for proposals and then an interview process after that, which takes a lot more time and effort to try to be successful on those types of contracts. Just start earlier, start out in front of it, so it's not as large of an effort during the actual timeframe of that solicitation." [#30]
- The woman owner of a professional services firm stated, "I suppose the main thing if the RFPs are... The person filling out the RFP doesn't understand what they're doing and so they're not filling the RFPs out correctly or giving the correct details. So, I guess it would be just miscommunication on expectations of what they're wanting." [#32]
- A representative from a woman-owned professional services company stated, "Most of our business occurs out of Montana because the laws governing what we do is not as stringent in other states." [#AV103]

3. MDT's and NPIAS airports' bidding and contracting processes. Interviewees shared a number of comments about MDT's and NPIAS airports' contracting and bidding processes.

Fifteen business owners shared recommendations as to how MDT, NPIAS airports, or other public agencies could improve their contract notification or bid process [#1, #11, #14, #2, #25, #28, #29, #33, #36, #6, #7, #8, #AV]. For example:

- The owner of a majority-owned construction company stated, "The airports would be better off using part of the MDT system, or having the MDT mailing list, email list." [#1]
- The owner of a majority-owned professional services company stated, "I think it [eMACS training] would be helpful, but I also think it would be even much more helpful because I've talked to a number of other people, and they've given up using eMACS. That means they've given up using the state. And so, I think that instead of having everybody use this broken wheel, they should fix the wheel and then have people. I mean, I really think that's the answer because I can't tell you the number of people that I know, private contractors, who will not do anything with the state because of that system. Well, the bid meetings are strange because if you're going to do something and you live a long distance away, there's an additional cost. And so, I would like more of the Zoom type things so that you can save the cost because putting out a bid takes time, effort, and costs. And so, you're not doing something else, you're doing that. But that has no guarantee that you're going to win the bid. For a smaller company, it's harder to do that than in a bigger company, which has a large number of people who are just in that... That's all they do day in and day out. They're not expected to go out in the field and do anything. They're just there to bid. … I lived in [city] and I had a grade schoolteacher in [city], the [city] Public School who taught my daughter and other stuff like that. But anyway, she came up to me and they were widening [the highway] south of [city] all the way to Hamilton. And so, they were going through this process and there was a whole series of wetlands up and down there. And she was going to these public meetings and was absolutely furious that they weren't doing anything about these wetlands and dealing with that sort of stuff. So, I started talking to her and she started talking to me. And so, she was essentially asking me how she could... This is going to be weird but gum up the works and make them be responsible for those wetlands. And so, I gave her some ideas that they're going to need to make sure they look at this and they got to look at that and they have to get federal oversight on this part and all this sort of stuff. The project manager for that stretch was so obstinate that not wanting to do any of that stuff, that the meetings got to where they got so bad that essentially the state came in and took the project manager out of there and brought one down from Kalispell and then it went fine." [#11]
- The owner of a majority-owned professional services company stated, "I think as far as a business, I would like to see more opportunity for private business interaction at our level with the state of Montana, whether it was taking a look at subbing out some of their testing assignments when they're in an area where they could, stuff like that. And they've been pretty slow to do that. Over my career, when I first came out of college, there was a lot of talk about the state of Montana turning a lot of their testing over to the private sector, and that really never did happen. I don't know how much work that would be. But if you look at it from a private sector perspective, always more work is good for the small businesses. I don't know what their ability to hire staff is. But if it's anything like mine, I think MDT could probably keep the same amount of staff they have. But when they're in an area like Kalispell, a locale where there are other services, they could contact them and say, 'Hey, we got projects all over the state.' If they would

contract with some of the local firms, they could put their people in areas where there aren't those services, and they could maybe not have quite the employment crunch that they have." [#14]

- A representative of a majority-owned professional services firm stated, "Like say that the MDT, what they do, they'll... You can see the scores and how things are ranked, where there's other entities where you actually don't see the scores, you can see the ranking, but you don't have any idea the scoring. Were we close to being one of the top ones or are we not, or what? And so, I think being transparent with the scores and how it was done, it would be a good thing. That would be help... 'Could you give me a little bit more information there?' So, if they send me the scores and give me some information, I'll thank them, because that helps you with better proposals the next time around. I guess, you know, seeing scores from like local government agency or that would be beneficial, you know if they could be more transparent. And it would help in the debriefs, you know, if they have five sections in their RFP and you saw that on one section your score was much lower than the rest, but you know how to sort of target the debrief questions I've seen this happen more than once where they'll have the scoring criteria in the RFP, but they actually don't even use that in their selection. So really following... If you're going to put it in there, follow it and be transparent with it, I think it would be a good thing to know." [#2]
- The owner of a woman-owned construction business stated, "Making the [MDT] website a little bit more clear to people with a little or no experience. More detailed." [#25]
- The woman owner of a DBE-certified professional services business stated, "The legals have gotten ridiculous. It's funny, because it used to be that just looking at the legals in the newspapers, you could see what's going on, but there's five pages of legals in every paper now. So, I mean, I'd just say the legals aren't as useful as they used to be, but there's lists and email lists and bulletin boards that work." [#28]
- A representative of a majority-owned professional services company stated, "I would maybe go back to what I mentioned when maybe there's this project that's not significant, maybe allowing some of the smaller firms in. The way that MDT used to do it, and I know that this is not their problem. I mean, this was not their choice to move away from it. It was the Federal Highway's choice to move away from it, but, whatever, you just ranked and then they just picked the consultant they thought was best. I mean, obviously that was wasn't perfect either, but it was a lot easier." [#29]
- The owner of a majority-owned professional services firm stated, "One of the things that I would do is to say, 'In six months or in three months, we're going to be putting out an RFP on X, get familiar with... here's what we think our needs are going to be,' and have an open period of time in which you now can talk to the decision makers, which you generally can't do if they have... once the RFP gets out, so that you can actually do your due diligence beforehand, which makes that RFP process... first of all, you can find out, 'This is really not for me, or it really is for me, I'm going to go gangbusters for it.' Then, go ahead and have an opportunity to talk to the people who are going to actually be the decision makers and the managers of the project when it gets going." [#33]
- A representative of a Native American-owned construction firm stated, "I would say put it [opportunities with MDT and the airports] more in the public eye, like on the exchange, and

maybe they do all the time, and I just haven't noticed, but I would say just, yeah, put it out there in a public area that everybody has access to." [#36]

- The owner of a majority-owned construction company stated, "The way their [MDT's] website's set up now, it's... they need to update it. It only works with Microsoft Internet Explorer, which they don't even... Microsoft Internet Explorer's still getting away from Microsoft Edge. You have to download this. If you're on any other platform, you have to download this FTP site directly to a Windows Explorer 5. It's gotten awful. I don't know why they're doing that, or what the point of it is, but... It's like they're going backwards, and everybody else is going forwards. No one else is supporting FTP sites anymore, like Google or Firefox, or even Microsoft Edge, they want you going back to Microsoft Explorer, which you can't hardly get anymore." [#6]
- A representative of a majority-owned professional services company stated, "The certified payroll thing or time sheets that is a sunken additional cost on our end. We can't charge the state for that. They can ask for it. And we don't traditionally do that. We don't like to do that because they require higher level accountants to produce that, but the state can do that. That's a federal law. I don't, you know, whether or not they implement it, that's up to them. But making sure we're not overcharging ourselves, we have fair market value and keeping our rates honest and not gouging them, they're worried about contractors doing all that. So, they take that mentality to us. But that's part of the... There's reasons why there's laws in there. Well, we can say we'll be honest all the time, but it just takes one entity to ruin that. But sometimes transparency would be the general thing there, going back, we don't know what they're thinking, when they'll need us. And it could just be that they don't know. And I understand their monies and flux too. They get windfalls of cash some years they don't and trying to plan with not knowing how much money you're going to get or receive; they always have their wish list projects. So, I do understand that, but I think they're working with what they got, and they expect them to reach out to us all the time. It would be hard for me to expect that." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "But now wouldn't it be nice if I knew the person to talk to at Fish, Wildlife, and Parks and say, 'Hey. What information can I give you about my company, so you will call me when you have another job.' And same with DNRC, tell me who I need to talk to, and I will reach out to them and tell them I exist. Because one of your questions was, how do people find out about you? This is an example where it would be wonderful for me to tell them about me. But then when you do a meet and greet though, somebody needs to take charge of these meet and greets. Because it is hard and especially for a startup business, to walk to a table where there's three and four of these people and try to get a conversation going and those three and four people not intimidate you. And you don't come off looking foolish. So wouldn't it be wonderful if somebody would start the meeting and say, I don't know, for instance, the people that are at the table have the most communication skills that anybody in the country has. And they draw you in and they say, 'Hey, this is what our company does. This is what we traditionally look for.' They just talk to you. They let you know about them and then how can I help them? That's the key. I'm in business to make their life easier. But I don't know quite how to make their life easier if they don't talk to me." [#8]
- A representative from a majority-owned construction company stated, "We have had some difficulties working with MDT with award of design build and/or GCCM." [#AV279]
- A representative from a majority-owned construction company stated, "Would like more input on highway projects, before, they go out to bid." [#AV11]

F. Marketplace Conditions

Part F summarizes business owners' and managers' perceptions of Montana's marketplace. It focuses on the following four topics:

1. Current marketplace conditions;
2. COVID-19 relief programs;
3. Past marketplace conditions; and
4. Keys to business success.

1. Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic.

Four interviewees described the effects of COVID-19 on the marketplace and their firms as negative, describing a decline in sales, slower payment, difficulty obtaining supplies, and general anxiety about future ventures [#AV]. For example:

- A representative from a majority-owned professional services company stated, "Business has been tough that last couple of years in Montana. Tax structure and business conditions have made it difficult. Environmental rules make it very difficult to operate in Montana. I have had some terrible experiences with workers comp and state." [#AV245]
- A representative from a majority-owned construction company stated, "It's been tough for us in the last few years. The market in Western Montana is booming but we aren't experiencing that in East Montana, so we have to travel out to find work." [#AV267]
- A representative from a majority-owned professional services company stated, "It's certainly slower in Montana, we have a lot more work out of state. It seems like it is difficult to be considered for jobs in state once a prime or sub has been chosen previously." [#AV269]
- A representative from a majority-owned professional services company stated, "Being located in Montana is a huge disadvantage we are remote for shipping not viewed as a technical location and the logistic of getting raw materials in and out. I don't feel there is a coordinated effort to help get business from out of state." [#AV280]

Three interviewees shared that COVID-19 negatively affected their firm, but things have started to improve [#14, #22, #27]. For example:

- The owner of a majority-owned professional services company stated, "There is quite a bit of increase here in the valley and at the federal level. There's a lot of Federal Highway contracts that have been bid this winter. Not a lot of them has been awarded that I've been part of trying to get work for, but there seems to be more work now than what there was for sure in 2020 when we had the COVID crisis and stuff. 2021 relaxed a little bit." [#14]
- A representative of a Native American-owned SBE-certified professional services firm stated, "COVID-19 threw us all kind of into a weird fog. And so, as we've come out of COVID-19 and the government started moving more like they used to, we're bidding on contracts that range from the same thing that we currently perform… We were in the federal game, and we were in

security services. And so, when the government started shutting down offices, sending people home, working from home, then our services to manage access in and out of federal facilities basically went away with the stroke of a pen, right. Almost overnight. And so, we had to cut staff [at our other location] in half. With really not, 'We'll hire you back next month.' It was we 'We have to let you go. And we have no idea if we'll ever do it again because of the new, or the existing rules at that time.' So, we went from making from being a million-dollar revenue company to $200,000 almost in a month. So, it had a huge effect on us, and it continues to have a little bit of effect on us monetarily. We're getting back. We're almost back to full staff on all of our contracts." [#22]

- A representative of a majority-owned professional services company stated, "It was somewhat. Early on, there were some projects that were going to go forward and then they decided not to. But now it seems like it's come out of that, and we have lots of work and we haven't had many recently canceled because of that. And we also had to work from home for several months, and that was hard on our production, but we've overcome that too, so." [#27]

Eight interviewees noted that COVID-19 has had little to no effect on their business [#1, #15, #28, #29, #3, #32, #5, #6]. For example:

- The owner of a majority-owned construction company stated, "I don't think we've been affected, maybe a little." [#1]
- The woman owner of a DBE-certified professional services company stated, "We had a small dip in workload, but we stayed open. There was only a week that everybody was remote and then we were back in the office because a lot of our stuff is field work and construction jobs didn't stop. So, there's a little dip with no new hires and stuff, but it came right back." [#15]
- The woman owner of a DBE-certified professional services business stated, "Just that everybody's schedules got all scrambled for projects. That's all." [#28]
- A representative of a majority-owned professional services company stated, "I would say we have not been affected very much at all. We, initially, were affected, due to the work at home part, but work wise, we've maintained through it, and probably, actually, at this point, might be benefiting a little bit because of the infrastructure and resulting economic stimulus that's been going out." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "Really COVID didn't change me at all. The only thing it did is it forced me to move out of the office and into home." [#3]
- The woman owner of a professional services firm stated, "Ours, personally no. I mean, we did drop in sales in 2020 but we were able to keep our doors open the whole time. And then just some of what we do is in some ways essential stuff, print material, stuff like that. So, we weren't hit as hard as most." [#32]
- A representative of a majority-owned professional services firm stated, "I said, some other areas have dropped off because of COVID, but we were lucky enough last year to land a couple of contracts that we've been able to take those people and put them on, so our business has stayed about the same." [#5]

- The owner of a majority-owned construction company stated, "We weren't sure what it would do, if it actually got construction down or not, but it seemed like at least in our business, the contracts kept going anyway, and the work kept... it was determined it was essential, so we got to keep working." [#6]

Eleven interviewees noted that COVID-19 benefited their business through new ventures, increased work, or the ability to learn new skills [#10, #13, #4, #7, #AV]. For example:

- The Black American woman co-owner of a construction company stated, "We grew more than we ever have, but I think that's because we approached it with the right mindset too, though. You know what I mean? We're lucky with what we do. We're on site by ourselves. We took it seriously. A lot of people in this state don't prefer to do that. We lived in Bozeman, and it's just when COVID happened, people started flocking here. We were able to pick up a lot of work pretty fast just because a lot of those out of state people weren't looking for people that were saying it wasn't something real. They were looking for somebody that would actually wear a mask around them if they asked them to and things like that. And because of that, we were able to, I think, really kind of excel through it, actually. I mean, that's probably our most growthful [sic] period since COVID happened, actually." [#10]
- The owner of a majority-owned professional services firm stated, "We had more work than we could possibly get done. And fewer people. Fewer people to do the work and more work than we could do. So, the phone just rang off the hook as COVID set in, because people were leaving urban centers and moving out to small town America, and we saw that directly." [#13]
- A representative of a DBE-certified construction company stated, "I think there's a lot of contracts out right now available for bid. And so there seems to be more money available right now for infrastructure and road construction. Most of our work by nature is socially distanced and it's all outdoors. So, and because we were deemed an essential business, right from the start, we didn't really have to slow down too much." [#4]
- A representative of a majority-owned professional services company stated, "The only thing that affected us was manpower. People being sick or quarantined, going through that process over and over again. But generally speaking, we were essential workers, and we had some large federal projects that kept chugging along through there at the base and at the airport. That is our main market and that kept us going through there, but I ... even on the private side or commercial side, excuse me, it was ... I think 2020 is one of our better years to be honest with you." [#7]
- A representative from a construction company stated, "There is plenty of work out there for the past few years." [#AV221]
- A representative from a majority-owned professional services company stated, "It's been awesome because people have been coming to Montana because of COVID, so there has been a lot of business the last two years." [#AV234]
- A representative from a majority-owned construction company stated, "Just in general, I would say recently with the pandemic and everything, the freight industry has had a reverse effect as it had on most people in our area, we've actually seemed to be busier. We haven't had any trouble making payroll…" [#AV294]

- A representative from a woman-owned construction company stated, "We are doing good, and it is pretty busy. But it does get kind of tough sometimes." [#AV28]
- A representative from a majority-owned construction company stated, "I have more work than I know that to do with; I say no a lot." [#AV46]
- A representative from a majority-owned construction company stated, "Construction industry in general is still riding a big wave. We've been really successful the last couple years. I think to turn around at some point." [#AV52]
- A representative from a majority-owned professional services company stated, "So much work out there. I can't keep up with it all." [#AV62]

2. COVID-19 relief programs. Interviewees shared their experiences applying for and receiving programs to reduce the impact of COVID-19 on their businesses. Most firms noted that they received some form of financial support through federal or state programs. Other firms described the type of support that would be most beneficial to their type of business during this time.

Nineteen interviewees mentioned their experiences applying for and/or obtaining COVID relief programs [#13, #14, #15, #16, #17, #18, #2, #22, #24, #25, #27, #29, #30, #32, #33, #3, #4, #6, #8]. For example:

- The owner of a majority-owned professional services firm stated, "We did. We took advantage of the Paycheck and then we also got a small business grant to even be able to do what we're doing right now. We got this web cam and this monitor and this laptop and a bunch of masks. And I don't know, we got about $8,000 from that grant. All of our Board of County Commissioners and planning board meetings are all virtual. So, we needed to come up with a way to be able to perform those virtual meetings. And a lot of our clients are rural folks that potentially don't have fast enough internet to even do this kind of stuff. So, then they would come in and we would sit in this room that we'd all have masks on. We'd be able to do these Board of County Commissioners' hearings and planning meetings and stuff like that. That was a huge help to be able to buy this equipment." [#13]
- The owner of a majority-owned professional services company stated, "I was part of the PPP funding." [#14]
- The woman owner of a DBE-certified professional services company stated, "Just the PPP." [#15]
- The Native American owner of a DBE-certified construction company stated, "Yes, we did. Really helped us out there, last year." [#16]
- The woman owner of a DBE-certified construction firm stated, "No, absolutely not. To me, it's just like doing payroll too and you see all that new stuff on there. It's like, oh good grief. I don't even want to think about starting some of that. So yeah, no, I try not to take advantage of any of that kind of stuff." [#17]
- The owner of a majority-owned construction firm stated, "It did have some effect on our business. We had to shut one of our projects down for a week because most particularly our management team came down with COVID. And so, we did not feel that we had enough leadership to keep things running. We did receive a pay protection loan that was forgiven, and that was good for us. So obviously, when we had some COVID-type things, we could almost even

go against company policy and pay that person to be at home because I could justify it because we received this payday protection money. So ultimately, it did not affect us much. It didn't really affect us on the revenue side because, ultimately, we kept working. Obviously, we work in the wastewater industry, so some of the protections that we had to start doing, we did a little differently, so there were some changes there." [#18]

- A representative of a majority-owned professional services firm stated, "We did, yeah." [#2]
- A representative of a Native American-owned SBE-certified professional services firm stated, "We did get two rounds of the PPP funding." [#22]
- The woman owner of a majority-owned construction firm stated, "We got some help from SBA." [#24]
- The owner of a woman-owned construction business stated, "I did do one. Oh, I forgot what it was called. They had a $10,000 grant and a $5,000 grant. I did do that. There was also an EIDL that didn't go through. And it was because of the way the people that did my taxes, the accountant didn't put ... It was some letter, is what they said, in a certain box. And because it wasn't there, I wasn't going to be able to qualify because they couldn't process that I suppose, but that's it." [#25]
- A representative of a majority-owned professional services company stated, "There were some that we were able to apply for and receive early on in the COVID, but right now I don't know of any." [#27]
- A representative of a majority-owned professional services company stated, "We were aware of the PPL Loans, and we did get a PPL Loan. I don't know ... We have not, basically, done anything with it because we're not sure if we have to pay that back or not, which would be a huge expenditure, and we're too cautious to really use it." [#29]
- A representative of a majority-owned professional services firm stated, "I was aware of the PPP loans from the federal government, and that'd be the main ones. And I believe that there were some additional paycheck protection programs that maybe some through the state, and then it's not a direct effect to small businesses in general, but the additional unemployment assistance as well too, I think would've helped keep some individuals in the state that maybe had lost their job during the pandemic." [#30]
- The woman owner of a professional services firm stated, "We were aware of them we just chose not to take... We just felt we didn't need them, so we didn't take advantage of any of them." [#32]
- The owner of a majority-owned professional services firm stated, "We knew about the PPP program and the EIDL funds." [#33]
- The Native American woman owner of a DBE-certified professional services firm stated, "Well, we did get a grant, which was really helpful. Because it did help me set up, it's interesting though. Because I got, I'm also a farmer. I've been farming since the early '70s. That's really where I got, I did not get any grants for [my company], or the construction company. I got a grant for my farm. For me, a small business, really none of that helped me. But because I've been farming for 60 years, I was automatically approved, because I am a farmer. I didn't have to do a ton of paperwork to apply for it, because I'm with the government on the FSA. It was a two page whatever, and I immediately got it. But I didn't find that for [my other company]. They didn't

give me anything. As a small business, I really didn't get anything. … When COVID came I didn't have any more employees. So, I didn't do any of the paycheck whatever." [#3]

- A representative of a DBE-certified construction company stated, "We applied and received to the PPP grant both years. The first one was a royal pain because it was, it came out so quickly. There wasn't a whole lot of guidance involved. And so, we, we had some hiccups trying to get things applied for. And then of course with our bank, everybody was applying. And so, it was the lead time was really bad. It took, I think about three months to get our grant approval back on the back end. When we applied for forgiveness. This year it was completely different. It was a whole lot easier to navigate. And we had our forgiveness approval back about three weeks after we sent it in this year. So, it was a whole lot nicer experience the second time around. I think everybody kind of knew what to expect and that made a big difference. We opted not to do the tax portion because it was going to create too much of a headache for us on the 941s and such. So, we just didn't, we just handled our 941s as we normally had. I don't know that there was anything else. I mean, the PPP was really nice, especially since we got it during our slow season. So, it was very helpful to be able to cover payrolls for our salaried employees during the, our slow point of the season and then have payrolls available for when our guys started back to work the first few weeks until we started getting paid for the jobs we were doing." [#4]
- The owner of a majority-owned construction company stated, "We did take advantage of the PPP loan on the first go around, just because we didn't know anything, what was going to happen. I think we were all in the same boat there, not knowing what would happen there." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I didn't do the loans, [but] I did the PPP or the PPL, whatever that was for the payroll protection. A friend of mine told me about it, so the information didn't come across my desk [from the government]." [#8]

Four interviewees did not apply for or were not aware of COVID relief programs [#1, #21, #23, #30]. For example:

- The owner of a majority-owned construction company stated, "We're one of the stupidest construction firms in Montana because we didn't apply for assistance." [#1]
- A representative of a DBE-certified professional services firm stated, "We did not [apply for assistance]." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "I don't believe that I qualify for them. There was one grant that I had wanted to go for. It was a marketing grant for $5,000 or up to $5,000 for women businesses that would've been really great just to build up the website a little bit. But I didn't qualify because I hadn't been incorporated for two years." [#23]
- A representative of a majority-owned professional services firm stated, "I'm not aware if we did or not." [#30]

Three interviewees shared suggestions on the most beneficial types of assistance their firms could receive to reduce the effect of COVID-19 [#21, #22, #25]. For example:

- A representative of a DBE-certified professional services firm stated, "I think there needs to be more funding for small businesses in general. And I'm not like a restaurant, like we're not a

service, we're not delivering like building a bridge or selling a hot dog. But I feel like the small businesses really took a hit because we're already working in the margins anyway. And I know there was some funding that came down to support small businesses, but didn't come to us, so we weren't eligible for it, we didn't apply for it. It didn't fit within what we do. So, I think there needs to be a specific line of funding for small businesses, for women-owned businesses, for minority-owned businesses and they are not competing. I think it needs to be almost like a cooperative agreement where it's like, 'Here's the funding, you do the work, we'll give you the money,' and we're not competing against all of the people in the world for the limited funds available." [#21]

- A representative of a Native American-owned SBE-certified professional services firm stated, "I don't know if another round of PPP loan's going to be useful. The reality is the government's starting to shake back out for us." [#22]
- The owner of a woman-owned construction business stated, "I would think either grants or loans. I haven't really been able to access a heck of a lot. And that would be mostly because if I can get, like said before, the supply chain is very obviously breaking down, especially in the construction industry." [#25]

3. Past marketplace conditions. Interviewees offered thoughts on the pre-pandemic marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the Montana marketplace that they have observed over time.

Ten interviewees described the pre-pandemic marketplace as increasingly competitive [#12, #2, #21, #26, #29, #30, #AV]. For example:

- The owner of a majority-owned construction company stated, "And then on the gravel end of it, that's a whole another cake between jumping through government hoops with MSHA [Mine Safety and Health Administration] and air quality and EQ that is extensive. And then there's a lot of competition in the gravel world. And we have looked at a few of the road jobs and stuff but they tend to be really huge and complicated in trying to get in on the main area of it. And about the time we decided to write it off, then demand for gravel around here got pretty high and people were wanting the crushed products. Now, last year we rented a rock crusher and this year we're looking to do the same. And we're also looking for avenues to get back into crushing equipment and trying to purchase that. At the same time, we are trying to keep an eye on the logging market, and we'd do that if there's a decent size job to go to. Often times the jobs are so small that transporting in and out eat up majority of the funds." [#12]
- A representative of a DBE-certified professional services firm stated, "I think the other thing is there's more competition in the small business world. In Montana, I know that's the case, like there's a lot of other people and companies that do what we do or are similar. And so, there's more people kind of going out on their own and starting small businesses, so that changes the competition and really the landscape of like, 'Well, how do we do our business? What do we bid on?' And those kinds of things." [#21]
- The owner of a majority-owned construction firm stated, "There's 35 sign companies in Billings, ma'am. There's not that many sign companies in the entire state of Mississippi and Alabama, where I came from. I lived in a town of a quarter of a million people. They don't even have a town that big here in Montana. There were seven sign companies in that town. In Billings, you've

got 35 sign companies in a town of 75,000 people. It is saturated with people. Most of them probably are not very good at what they do. I lived there for a year, I looked at the stuff. That's all I heard was how well some of them were doing, 'Oh, we're doing pretty well.' 'Well, I'm glad you're doing well. How do you get into your business, sir?' I even offered to go to work for some of them. They didn't want to talk to me. Maybe I knew too much, maybe I'm better than they are. That was one case, for sure. I've realized I knew more about the sign business than anybody in their whole place there. So, maybe they're getting a job, somebody's getting it. They're buying stuff from out of state. Why should they buy stuff from out of state, when they can get it here in state?" [#26]

- A representative of a majority-owned professional services company stated, "We've seen it in the recent past, is it impacts to the market of larger firms coming in to compete against the smaller firms of Montana. I think it's gotten worse in the last few years because these larger firms' employees are working at home or can work at home, and so they are able to compete with us here and open up the marketplace to some of the larger firms. We very much struggle to compete with that. it is very competitive. Yeah, in this market anyway. In Montana, it's very competitive. You really do have to be careful of salaries and keeping them competitively low, I guess, I would say. Everything that goes out into the market has multiple, multiple responders. This is across the boards, airports, water waste, water, highways, all of them, and so all of us really have to perform almost flawlessly to maintain against such a tight market." [#29]
- A representative of a majority-owned professional services firm stated, "I think the economy in general has gotten stronger, which in particular makes it harder to find people to hire. There's a lot more variety of job opportunities for candidates, for employment to find and to try to find a job. And so, I think the labor market is very competitive and that's not just because of COVID." [#30]
- A representative from a majority-owned professional services company stated, "Overall I am satisfied. The market is more competitive with more consulting firms, but I don't think that is a bad thing. The market is decent right now for this type of business. Projects we have bid on for MDT require online submittal so sometimes it is hard to tell what is expected when a solicitation comes out." [#AV205]
- A representative from a majority-owned professional services company stated, "Just that competition is always stiff for work, but that's normal." [#AV276]
- A representative from a majority-owned construction company stated, "Montana has about a million HVAC companies." [#AV50]
- A representative from a woman-owned construction company stated, "[There is] competition from other suppliers." [#AV72]

Thirty-four interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses [#1, #14, #15, #16, #4, #5, #7, #AV, #FG2]. For example:

- The owner of a majority-owned construction company stated, "The gross dollars might be the same for the state of Montana, but the work changes from year to year. So, we can let a lot of bridge work, it means that the reconstruction work we do and the paving work we do might go down for a given year." [#1]

- The owner of a majority-owned professional services company stated, "[You] would think under the present conditions in Montana, especially in Northwest Montana, if you were a contractor and you could actually get staff and materials and equipment, I would think you would have a fairly good time or easy time of starting business compared to say other parts of the state." [#14]
- The woman owner of a DBE-certified professional services company stated, "It's been growing. Bozeman area's growing a lot." [#15]
- The Native American owner of a DBE-certified construction company stated, "We've been doing very well, and actually, had four really consecutive years, really good years. The bottom line was one of the best in all my career, too. 2017 was one of the best ones. We didn't seem to be affected too much the last few years, or anything like that. It was basically just last year was that pandemic situation. But, other than that, it's been very stable for us." [#16]
- A representative of a DBE-certified construction company stated, "We've been growing. Yeah, the last couple years have been couple of our best years since I've been here." [#4]
- A representative of a majority-owned professional services firm stated, "I think there's been, because we work in several states. It seems like more advertisements out. More need for consultant services in Montana and Idaho, which has helped. There are more projects to chase. I think it's probably part of the stimulus funds. I think it might be staffing changes, political. There seems to be a little bit more projects out there than there has been in the past." [#5]
- A representative of a majority-owned professional services company stated, "We've added a couple of new ... our geotechnical side have been about the same, but we've added a few more materials testing technicians for ... to help with ... we have seen over the last couple years, some larger federal jobs come down the pipe where we needed help or field services or lab stuff." [#7]
- A representative from a Native American woman-owned professional services company stated, "I think Gov. Gianforte has done the best that he can so far making this a business-friendly state and also a good state for workers and employees. I'm trying to retire." [#AV200]
- A representative from a woman-owned professional services company stated, "We are in the area of Bozeman, and it is growing wildly so there is a lot of work. Well, we have worked a lot with them in the past. In the last five years we feel that we get beat out on the contracts. They have their own companies they like and that is on the design side." [#AV204]
- A representative from a Black American-owned professional services company stated, "Montana is a very equitable place to start a business." [#AV217]
- A representative from a majority-owned construction company stated, "It seems the market is strong. Billings and Bozeman are good areas of business. Materials are a bit of a struggle at times. I haven't myself and I have not attempted to try and work for MDT projects." [#AV219]
- A representative from a majority-owned professional services company stated, "So far the climate has been good for this line of work. Montana has been a good place of business." [#AV242]
- A representative from a majority-owned construction company stated, "Tons of it [work] out there. New businesses springing up weekly." [#AV246]
- A representative from a majority-owned construction company stated, "It's fluid—the demand is strong—everyone wants to live in Montana now." [#AV256]

- A representative from a majority-owned professional services company stated, "There is plenty of work in Montana." [#AV258]
- A representative from a majority-owned professional services company stated, "My work has been steady. Last year was exceptional year. This year will be a pass over." [#AV264]
- A representative from a majority-owned construction company stated, "Our business is very much growing, we've had back-to-back growth records 3 years in a row." [#AV288]
- A representative from a majority-owned professional services company stated, "The conditions have benefited my business. The housing markets have been on the rise. It is up now but it will drop again. The housing market affects me directly." [#AV301]
- A representative from a majority-owned construction company stated, "Right now Montana is really booming. There are really lots of opportunities. I have no complaints." [#AV304]
- A representative from a majority-owned construction company stated, "We are all busy and this area is full of work. We never turn down work. We have our main clients as well." [#AV307]
- A representative from a majority-owned professional services company stated, "Right now it is busy across the board. Market is very good." [#AV326]
- A representative from a majority-owned professional services company stated, "It is crazy now in Montana. Lot more people moving into our state and some of the recovery money for engineering companies have created a lot of demand which is a good thing. It is a lot more involved with government contracts. A lot of paperwork." [#AV350]
- A representative from a majority-owned construction company stated, "The economy is good and I'm short on labor." [#AV351]
- A representative from a majority-owned professional services company stated, "The market in Montana is really on a move for adding infrastructure at this time. We're hoping we can be part of helping grow the necessary infrastructure for the area." [#AV362]
- A representative from a majority-owned construction company stated, "A lot work right now." [#AV25]
- A representative from a majority-owned construction company stated, "Pretty easy to get work right now." [#AV26]
- A representative from a Hispanic American-owned construction company stated, "Montana is booming and there are all kinds of opportunities." [#AV39]
- A representative from a majority-owned professional services company stated, "Montana is an interesting market, the economy is vibrant, and we are happy that we are here. Montana continues to grow and prosper; we are bullish on the state." [#AV74]
- A representative from a majority-owned construction company stated, "Right now is a good time to start a business in Bozeman, it is easy to get rolling, compared to other states." [#AV86]
- A representative from a majority-owned construction company stated, "The work is out there." [#AV93]
- A representative from a focus group consisting of prime contractors stated, "And in fact, I would say Montana's probably, I think a smaller company would be more apt to survive in this

environment as opposed to Colorado or something like that, where you get dominated by big construction firms that come through and they establish themselves, because you got to think of operating budget of Colorado's Department of Transportation, has got to be enormous compared to what we do. And where MDT excels is, we get a lot of not just bridge, but a lot of little projects, especially out in Eastern Montana. We have 400 timber structures out in Eastern Montana, and I would happen chance Colorado doesn't even come close to stuff like that. And little companies can come in, actually projects are just too small for us, for example, there's a little 50-foot bridge out in Eastern Montana that's coming up, that is just too small for us. So, I think it allows little companies to potentially come in and survive in this market to be able to go just do a little tiny structure with minimal amount of equipment and crew sizes, and to potentially succeed in the state where I think you might have trouble in some of the large markets." [#FG2]

Four interviewees observed that pre-pandemic marketplace conditions were in decline [#AV]. For example:

- A representative from a majority-owned professional services company stated, "Business has been tough that last couple of years in Montana. Tax structure and business conditions have made it difficult. Environmental rules make it very difficult to operate in Montana. I have had some terrible experiences with workers comp and state." [#AV245]

- A representative from a majority-owned construction company stated, "It's been tough for us in the last few years. The market in Western Montana is booming but we aren't experiencing that in East Montana, so we have to travel out to find work." [#AV267]

- A representative from a majority-owned professional services company stated, "It's certainly slower in Montana, we have a lot more work out of state. It seems like it is difficult to be considered for jobs in sate once a prime or sub has been chosen previously." [#AV269]

- A representative from a majority-owned professional services company stated, "Being located in Montana is a huge disadvantage we are remote for shipping not viewed as a technical location and the logistic of getting raw materials in and out. I don't feel there is a coordinated effort to help get business from out of state." [#AV280]

4. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Montana marketplace, in their respective industries, and in general [#1, #11, #13, #14, #15, #2, #21, #22, #23, #24, #25, #27, #28, #30, #32, #33, #3, #35, #36, #4, #8, #AV]. For example:

- The owner of a majority-owned construction company stated, "I think to be successful for a DBE firm, they have to have the resources behind them and the employees behind them to do work on schedule and have a lot of flexibility because if they're working for multiple contractors or we've pulled in a lot of different directions have to be the low bidder. But what I'm saying is, you have to be a businessperson before you can be a contractor. And if they can't get a businessperson, they're never going to survive. So that's why I'm saying if the state of Montana decided... And I'm sure they can't do it, but we got this guy, we think he's got a lot of business

acumen. I think he could really work good in this industry, and then give him some of the tools he needs, they could survive, but DBEs are a dime a dozen." [#1]

- The owner of a majority-owned professional services company stated, "You have to do great work. You have to meet the needs of the clients, not what you think they need, what they need, and you have to have a good reputation. It takes a long time to build a good reputation. It only takes a short period of time to lose it. And so, you need to have those kinds of things. Then you need the skills and the knowledge base of the areas that you're working in so that you have a heads up. And before you can go out as to what some of the problems are, and you have to be able to also do adaptive management, which is just because it's written down on paper this way, you get out there and you may find mother nature through a curve ball at you. It's raining and all sorts of other things. You got to deal with outdoors act stuff, inaccessibility, and those kinds of things." [#11]
- The owner of a majority-owned professional services firm stated, "I updated my website. I got current on all the things that basically people see. So, I worked really hard on creating an online presence in multiple different platforms. After that, I guess, I would say I just tried to find talented people. And the trick, I think, is to find people that can do the things that I was already doing but do them better than me. So pretty much everyone I've hired is better than me at something. And outside of that planning and then staffing bit, for me, it's been re-investing all of the money back into the company." [#13]
- The owner of a majority-owned professional services company stated, "When I started our firm, I was familiar with the area and had a fairly deep pool of contractors and other people that I had worked with. So, I was a known entity in the area. It was different for me than, say, if I just picked up and decided I was going to move my operation to Bozeman, where I didn't have a whole lot of background in the area or background with a contractor. So, I think familiarity and being established in the area as an engineer definitely helped me with what I do." [#14]
- The woman owner of a DBE-certified professional services company stated, "You need to have skilled employees and you need to know the regulations and the requirements in the area, in the counties and state and cities. You need to market your firm and have a feel for types of projects that are out there, development, or discuss with cities on what kind of infrastructure projects they might be looking at, things like that." [#15]
- A representative of a majority-owned professional services firm stated, "I think it's also the relationships and, you know, building that, you know, reputation with the client. I think also really in the engineering field anymore, you need to be a little bit ahead of the curve or a little bit innovative, just because that obviously helps you sell yourself to the client, you know, that we're maybe doing things that other folks aren't." [#2]
- A representative of a DBE-certified professional services firm stated, "I think to be competitive you have to have the trust of the communities and the organizations you serve, so you have to have a really good reputation, a really solid reputation of like, 'This firm was going to do it and deliver no matter what.' I think that's probably the biggest thing. I think being really flexible, we work mainly with tribes and communities that are not your regular... It's a different type of working environment, there's different conditions. So just we're really aware of those and we're really flexible and in tune to those. So, I think that really helps us be successful and it would help other firms be successful." [#21]

- A representative of a Native American-owned SBE-certified professional services firm stated, "I'd say there's two factors to this. One is past performance. I always say, 'You know where the...' That's the wrong... 'You know where the landmines are.' Right? 'So, you know where the risk is.' I think that's one of the big ones. And then, I'm going to stick to this one for the rest of my life. It's not what you know, it's who you know." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "It takes a white man. Sounds like so stereotypically, DBE or female to say, but that is what it feels like. I even feel like if I had a husband from Montana who was networking with me, even though he had nothing to do with the business, I think I would have more government business." [#23]
- The woman owner of a majority-owned construction firm stated, "[It takes] good employees." [#24]
- The owner of a woman-owned construction business stated, "Marketing. That's a big one. And also, government contracts and things like that would be ... I've tried to kind of tap into that, but I really haven't been very good at that. Getting anything like that going. So, I would imagine that would be a good one." [#25]
- A representative of a majority-owned professional services company stated, "I think just having at least a couple of people that are very qualified and work hard and understand the business, so you don't get yourself into trouble. I guess that's the biggest thing I think for us. You can have several employees to do a lot of the work, but you need to have a good solid core one or two or three people that can review everything and make sure you're going down the right path all the time. I think that's the most important." [#27]
- The woman owner of a DBE-certified professional services business stated, "You need to be flexible, and issues like distance or schedule have to be invisible. You just have to satisfy the client." [#28]
- A representative of a majority-owned professional services firm stated, "I think it's people, I think it's the ability to perform high quality work and have high quality people, and provide the best value, which is a combination of quality and people to MDT in this case." [#30]
- The woman owner of a professional services firm stated, "Price. With the internet, it all comes down to price. Who's the cheapest." [#32]
- The owner of a majority-owned professional services firm stated, "I think you have to do some self-promotion. Look, here's the thing is we live in a world in which there was a quality revolution. If you don't have a certain level of quality, don't bother to compete. You need to have baseline quality, you have to have a strong differentiator, and then the third thing is you have to build relationships with the people you want to do business with. This goes back to with the state of Montana. If you have a relationship, you're in better shape than if you don't, but if you don't have a relationship, it's hard to form one. It's kind of like, you can't get a job if you're unemployed. Those are some of the key things, relationships, differentiation, self-promotion, and quality." [#33]
- The Native American woman owner of a DBE-certified professional services stated, "The reason that I am still in business, and I say this right now is, if it were easy on the reservation to do, I would not have a business. But it's not easy. People from other big companies come, and they say, 'We have done work all over the world. We've been on lots of reservations. We know exactly

what to do.' I say, 'This is the Blackfeet, and it's different. All reservations are different. If you go and start, and then you come back to ask me to help you, because only the hard guys are left, then I have to charge you double, because you already screwed everything up.' Since I've been doing this for so long, I can say that. That's just my personal opinion. When you're young, and I'm not young, but young to the business, it's hard for you. You can't really make those kinds of stands. You either have to fall in, and do it like everybody tells you, or whatever. But if you've been in the business for 40 years, then you can just say, 'Well, I'm not doing it that way, so I don't need you.' That's the difference between my two companies. When I was, I mean I've been there longer than most people that even work at the BIA office, and the tribal, because they're all young. I'm [#] years old. In that respect, I am, you might say, the big boy, so to speak. So, they can't tell me what to do, because I know better than most, what has to be done. That's just the difference. That's why I still do [company], I'm sure. Anyway, I'm ready for more questions now. You have heard it all." [#3]

- A representative of a majority-owned professional services firm stated, "I would say price and quality of product [are keys to success]." [#35]
- A representative of a Native American-owned construction firm stated, "We're a union contractor and so being able to compete with non-union is huge." [#36]
- A representative of a DBE-certified construction company stated, "I think you have to find what segment of the market you're interested in. We found a bit of a niche that we're really comfortable in, and we've been able to be very successful at where we dip our toe into the smaller mom and pop paving companies that go around that come in, do work, and then leave. But we're below the big, big guys that the Riversides and the Knife Rivers and the big dogs and the, in the area that so we find kind of found a little niche in between. I think you have to find something you've got to have good people. We have most of our crews are very experienced, which I think for the construction industry is highly unusual. I think you have to; you have to be reasonable with your bids when you're bidding. Our two estimators are very good at what they do and are very experienced and seasoned. So, they're realistic about what the costs are and realistic about what the market will withstand when they're putting margins together and things of that nature." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "Getting the bid. If you don't get the bid, you don't get the job. I feel very confident in our employees because we are family owned and we take pride in what we do. So of course, I know that's going to follow next. So, if we get the bid, I know we're going to do a quality job in the timeframe that's allotted, if not earlier, but it's sometimes just being aware that these jobs are there and then of course being awarded the bid." [#8]
- A representative from a woman-owned professional services company stated, "There are so many people establishing their business or trying to grow it. If an agency or new business can specialize, they are in a much better position. The specialization can be business to business. Specialization can be even a nonprofit." [#AV22]

G. Potential Barriers

Business owners and managers discussed a variety of barriers to business development. Section G presents their comments and highlights the most frequently mentioned barriers and challenges first:

1. Financing;
2. Bonding;
3. Insurance;
4. Contract awards;
5. Personnel and labor;
6. Unions;
7. Inventory, equipment, and other materials and supplies;
8. Prequalification;
9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by prime contractors or customers;
16. Approval of work;
17. Payment issues;
18. Contract size;
19. Bookkeeping, estimating, and other technical skills; and
20. Other comments.

1. Financing. Fifteen interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses [#12, #17, #18, #21, #22, #24, #25, #3, #32, #4, #6, #8, #9, #AV]. For example:

- The owner of a majority-owned construction company stated, "We have logging and gravel. We have logged primarily on private property because it's really hard to get into the mid-market because you have to have so much bonding and so much money and insurance to get into it." [#12]
- The woman owner of a DBE-certified construction firm stated, "And my husband's been very good about you don't go buying something unless you got the money for it, or you've got the job to pay for it. So, we, right now, I mean, for most of the time, we usually have no debt at all. And

that helps. Then you can make decisions, then you cannot have to work if you don't want to, because everything's paid off and it's not costing you money when it's just sitting there." [#17]

- The owner of a majority-owned construction firm stated, "We have a longstanding relationship with a local bank where decisions are made locally. Financing is not usually a restriction in the market for us, but we're a longstanding business. Being a new business, it would be all about your relationship with that institution." [#18]
- A representative of a DBE-certified professional services firm stated, "Yeah, that's a barrier. Probably establishing credit like early on. Our business, I think we don't really have... I think we had a company truck, so that gave us some credit, but because we don't have a lot of bills going out or liabilities, like we don't have credit. So, if we wanted to get a loan, I think it'd be really hard for us to do that, like a big loan." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "I think that's always the question, right? Tribes always struggle with that because of assets. Everything being in trust. Then banks, there's no... What do you want to say? They don't want to come to Tribal Court, one. Two, they don't want to... There's nothing they can go after in case you fail on a payment. So, I think that's always a challenge for Tribal organizations. I think it's a huge problem for Tribal small businesses that are new. Because one, you got the Tribal piece, right? That's the government piece. Two, you got the small business, so you don't have a lot of assets to put up against something. And three, you don't have a lot of past performance to be able to say: 'We can do this, and this is how we do.' So, banks are not as willing to take that risk. Again, it's a risk analysis. Everything in this line of work is a risk analysis. And it's almost a three-strike analysis right there. … I've said this for a hundred years. It would be awesome to inject some of that education into the colleges, right? So that... Because you're pumping all these finance guys and these banking guys out of Montana State, Stanford, name it. Right? But none of them have a clue how Tribal Government and its effects on finance are, what things mean. So, I think there's an educational component to it. I think there's a part where every bank almost... Especially if you're in a place where you've got a density of Native businesses at whatever level, right? Because a Native business is a startup [in comparison] to a mature company. I think there almost should be a branch of the bank. If you're interested in doing work with Indian Country, hire people that understand Indian Country. Don't hire somebody from Stanford whose only interaction with Native people is they went to a casino. … Risk assessment would be more streamlined. Understanding of what they're getting into on both sides would be more streamlined. I don't know how many times I've sat in meetings where I've had a guy who grew up in L.A. tell me what Indians need. And I'm like, 'Mm-mm (negative), that's not your role. That's not your job. And you don't know what you're talking about.' So, I think those are a couple things that would be smart, especially with our Indian businesses, casinos, whatever federal contracting companies." [#22]
- The woman owner of a majority-owned construction firm stated, "[Financing is] very difficult on a new business." [#24]
- The owner of a woman-owned construction business stated, "Yes [financing is a barrier]." [#25]
- The Native American woman owner of a DBE-certified professional services firm stated, "The financial part is very difficult to get money for say operating expenses you might say, because that's what you pretty much need." [#3]

- The woman owner of a professional services firm stated, “With us and what we've found in the past, we've done several RFPs and quotes and it all comes down to the final thing is, we're a small company. We can't compete price wise. We can't get our price low enough. Most of those quotes that we give, we can't compete against larger companies. So smaller companies, that's where we have a hard time is we don't have the volume to be able to get our products lower, to be able to quote it at a lower price. So that's where some small companies like us really struggle, is the bottom-line price.” [#32]
- A representative of a DBE-certified construction company stated, “I would imagine as a new company, it could be because there's a ton of competition in our industry already. So, a new company coming in looking to get financing or to get some backing, I could see that being a barrier because of this, the amount of competition, just the sheer numbers of other paving contractors in the state is a natural barrier to others trying to get into this industry.” [#4]
- The owner of a majority-owned construction company stated, “All four of us had another job. I think the barriers of getting these new DBEs is kind of tough because some of the rules to be a DBE, it's got to be your main focus, which I think it is, but people also need to make a living. It's very hard for someone that, I think, with the financing thing and that, they need to be able to show that you can pay the money back, and for a brand-new business, you don't make much money for the first few years. When they disallow someone because they have another job, especially in Montana, you can work most of the winter and try to make money, and still run your construction business because it's all summer work. You kind of need another job to be able to get through those first couple years or you can't afford to, you just can't afford to keep going. You've got to live, too.” [#6]
- The owner of a WBE- and DBE-certified construction company stated, “I know that in 17 years we've had our ups and downs and I know that people don't want to, lenders don't want to help you when you're down and they can't help you enough when you're up. And it's a situation and a sad story, but I've lived through both. And so, you got to try to find your bank that will help you in both scenarios when you're up and when you're down.” [#8]
- The owner of a majority-owned construction company stated, “Well, I haven't pursued it all that much, be honest with you. I have talked to my banker down there in Frenchtown, Montana, and he says, ‘You want to get a small business loan, you got to go through a bank that handles small business loans.’ Which... I do have a good reputation with this gentleman, so I think I might not have an issue. I'm not for sure. I haven't pursued it.” [#9]
- A representative from a woman-owned construction company stated, “Capital intensive to start a business. We have had no difficulties. We make sure our products meet specifications. We review specification in advance.” [#AV211]
- A representative from a majority-owned construction company stated, “Encountered difficulties specifically around licensing, equipment, and our assets.” [#AV272]

2. Bonding. Public agencies in Montana typically require firms working as prime contractors on construction projects to provide bid, payment, or performance bonds. Securing bonding was difficult for some businesses and fourteen interviewees discussed their perspectives on bonding [#1, #10, #12, #16, #17, #18, #22, #3, #4, #6, #8, #AV, #FG2]. For example:

- The owner of a majority-owned construction company stated, "Bond and capabilities, to be able to get bonded. Otherwise, we're stuck holding the bag and that's happened a few times. if I look at what it takes to run a construction company. The most important person in our life, isn't our bank, it's our bonding company. [Our company] requires virtually a hundred percent bonds and [the same from a] subcontractor. We make very few exceptions to that. So, in order to get bonding, you basically have to have enough net worth to cover the value of the projects you're bidding because bonding companies don't want to lose money. So, I don't know how the MDT can help DBEs in that regard, but I know that from my perspective, the biggest risk we have within a new contractor is can they complete their work, and do they have bonding? Can be timing issues. And then of course they're only limited to how much work they can have on hand or bond at one time." [#1]
- The Black American woman co-owner of a construction company stated, "It's everything on it set up. So how long they hold your bond for, how much do you have to bond? It used to be before '08, anybody could get a million-dollar bond. Well, the requirements to get big bonds now have changed. So, unless you're independently wealthy, there's no way for a smaller company to come up and be able to compete with that. Even if you say something like a small DOT job, like a million-dollar job, and if you look at it and the breakdown on it, from 200,000 to a million, 1,000,005, there's a group of six or seven companies. And then you get up to the bigger ones and it's all... Yeah, there's the one-offs that'll take a job here and there. But other than that, it's all Riverside, SK... I used to work for him, but we got to a point where we could only bond a million dollars. So, you either, you try to get a job early in the year that's close to that as you can. But if that's all you can bond and you're only doing state work like that, they don't release your bond anytime soon after the job. So, then you're at the mercy of when the state decides to release your bond so you can go get another job. It's one of those, it is so, I hate that term, but one percenter kind of stuff. Because most of those big construction companies, they own giant chunks of land that they could just bond off of limitlessly. But I mean, when I used to estimate for a company, our bonding agent could tell us. He would never say unless we were the low one, and he wouldn't tell us by how much or anything. He would just be like, 'Oh, don't worry about it. You guys got it.' And he was right every time. So that tells you how small of a family of companies it is bidding that. Any time, and I don't care who it is, I don't care if you're the best people in the world, if you have a tight-knit community where everybody's successful and making money, you don't really tend to want to see outsiders come in. It's just not really how that works usually. I would bid DOT jobs tomorrow if there was any way we could bond. I have $400,000 in the bank right now. I couldn't get a million-dollar bond though. And it's just, that's the way that insurance is right now, too. We could probably bond, because we have that much in the bank, a half million. So, if we went and bonded a half million, that would tie up all of our bonding capabilities. And even if that job only took three months, the state's going to hold that for a year, I think, something like that. So, it's just, why? There's nowhere to grow from there. You know? There's no reason why if your retainer can be released and given back to you, why your bond can't also be released. You still have to warranty it. That could be a completely separate thing I would be very interested to know the percentage of times that any state job has ever gone to the bond,

that they've ever actually taken a bond. Because every contractor knows that you don't allow that to happen because you'll never get another bond, right? So, people go bankrupt making sure that never happens. So, to me, making the requirement for entry into bidding those jobs something that is... Like I said, I don't know the numbers. You guys should have access to it with this study, I would think. I would be interested to know what the percentage of those jobs ever go to the bond is. So, if you're taking something that the probability of it ever happening is like 1% and you're saying that that is the main requirement for you to be able to do this job, it doesn't seem like it's a weighted system to me that way. You know?" [#10]

- The owner of a majority-owned construction company stated, "We have logging and gravel. We have logged primarily on private property because it's really hard to get into the mid-market because you have to have so much bonding and so much money and insurance to get into it. The state requires us to have bonding on our gravel pits for recovery on our own property in case we bankrupt or walk away from the project. And it's based on high wall acreage, how much work it would take to reclaim it. And we've got old gravel pits. We live on a ranch out here, west of Kalispell and we've reclaimed gravel pits in the past and turned them into pasture with cattle and horses and we've still got to follow all their rules and stuff. But the bonding has gone up and trying to get bonding is very difficult. And the amount of collateral you have to have for bonding." [#12]
- The Native American owner of a DBE-certified construction company stated, "Bonding was a big thing for years, trying to get that. But now we've really got a good track record with our surety company, so we don't have much problem with bonding at all. Bonding was probably the key to us really getting over the hump to be able to really be able to go out and bid on things that we really were capable of completing. It was really difficult. Primary reason was, was being tribally owned company that the surety agencies didn't feel they had any legal foothold for us doing work, especially on our own reservation. Finally, a good agent that really got behind us, and helped us out that way. Once we got that security, we really begin to be very successful and bid on, like I said, the work we wanted to, as a prime contractor, instead of having to bid under a prime contractor. They [the agent] were the ones that actually informed me why it was so difficult for me to get a bond. They were really upfront and open with me on it." [#16]
- The woman owner of a DBE-certified construction firm stated, "But our state project, we haven't done one for ages because I'm sorry, but I don't like all the hoops you got to jump through on that. And bonding and insurance and oh, one job we helped somebody with, and they did, is it Bacon Davis or Davis Bacon Act or whatever wages talk about tidly fart details you had to keep track of. It's just ridiculous, just time consuming and it doesn't get the work done. Yeah, a couple times. I mean, it's not that big of a deal, but it's still another monkey wrench into things. And I understand the perks of it for some, but yeah. It's just something we haven't had to, most of the time nobody's required it anyway, so we've been all right with that." [#17]
- The owner of a majority-owned construction firm stated, "Occasionally we'll want to bid on a project that is maybe a little larger than what our normal one is. I think my bonding cap right now is about 5 million. I wanted to take a swing at a job that was about nine, and the bond company kept me from that." [#18]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Bonding is a big one. It boils back to the Tribal piece, right? The trust lands. What assets are you putting up against that bond? And for us as Tribes, there are very few bonding... Commercial...

Construction bonding type companies that understand that. And we have to put up so much collateral for smaller bonds that it is a tough value call. That's a huge challenge." [#22]

- The Native American woman owner of a DBE-certified professional services stated, "Double major barrier. I just couldn't, I never did accomplish getting bonding. It was more, but you had to have it, because most of my big equipment wasn't paid off. I did have a loan on everything, which was, I had huge loan payments. So yeah, there was just all of those things, that added up to ... If you couldn't get the good part of the contract, like the prime or whatever, then it was just too hard to make all the payments that you had, like the insurance, and having to have bonding. Having to have all of that stuff, that was a cost. … I did not ever accomplish to get my bonding. Now that probably could be more my fault than the world's fault, I guess. But it was out of my... I don't want to say my comprehension, but my ability to see what they needed." [#3]
- A representative of a DBE-certified construction company stated, "Bonding could be a barrier. I mean, I know it's been a barrier for us in the past. We had a couple of down years, and the bonding was certainly a barrier as far as getting larger jobs. We've kind of gotten beyond that now. And we, to a point where we can go out and bond a job pretty easily. Again, we've been in business for 30 odd years now. And so, we've built relationships with the bank, with the bonding company." [#4]
- The owner of a majority-owned construction company stated, "[Bonding] was definitely a problem when we first started. [You have to] show you could make a couple dollars and show you had the money to... you had the capacity and actually supplied the credit from the banks they would require, that were harder to get until... until you do some work, it's hard to get that stuff." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Bonding goes hand in hand with whatever problem is going on in your company. So doing that bad time when our company was almost upside down because we didn't get paid for, I don't know, a $300,000 contract. We paid two suppliers for their mix. My financials did not look good. And so of course bonding doesn't want even bond you. So, it's almost like, it's a catch-22. You're already being kicked because you don't have any money, because you had to pay all these suppliers and then you're still trying to bid jobs, but you need bonding, but they don't want to bond you. So again, bonding companies are a lot like your lenders. They love you when you're up, but they don't want to take the risk when you're down. You're pretty much beg and plead, and you try to put your guarantee on it. You know that you're going to do it. You take smaller jobs, you bid on smaller jobs and then you just hope for the best. I know we switched bonding companies early on because of it, because they just, and I think the first bonding company we outgrew quickly, but the second one I chose to leave just because they weren't, you have to have your lender, you have to have your attorney, you have to have your CPA and you have to have your insurance company. And you're all a team and you have to have those people in your corner. And I didn't feel that insurance company was in my corner. So, I went to another." [#8]
- A representative from a Black American woman-owned professional services company stated, "DOT has not caught how the market flex, that has changed quite a bit, more people are moving here to Montana it set up for the 'Ole boys club,' all men's club, same people making decisions. Impossible for small companies to break in. DOT holds our bond for so long, impossible to step in. The same companies get 90% or 15 of the same companies get the work of their, that's why we (smaller companies) don't look at them it is not fair." [#AV216]

- A representative from a Black American woman-owned professional services company stated, "There is a lot of other work to where I don't even have to take the risk of trying to get DOT jobs, even though I would like to do them. But the bond for a DOT job is held for a year and keeps a small company from doing more jobs in a year. I came up in the business doing DOT jobs with other people. The reason a lot of companies don't bid is that it seems set up for them to not have people bid. The jobs all seem to go to the same 10 or 15 companies. If you look at the $250k to $700k jobs." [#AV337]
- A representative from a focus group consisting of prime contractors stated, "That's very good point bonding is a big deal, especially for a lot of these smaller guys, just the act of trying to get a bond, their bond costs, that's a lot of money that they're putting on top of their bids just to be able to do that. So, to be able to come in with a smaller project, it makes it hell a lot more palatable for them to take on these projects. But I understand too MDT can't go out and have 400 separate little individual projects to cover these little structures too. So, there's just got to be maybe a little give and take on that. Have some big bundles associated with maybe a couple smaller ones. I don't know the right way to do it." [#FG2]

3. Insurance. Twenty-two business owners and managers discussed their perspectives on insurance [#1, #10, #12, #13, #14, #15, #16, #17, #18, #2, #21, #22, #24, #3, #31, #4, #5, #6, #8, #9, #AV, #FG1]. For example:

- The owner of a majority-owned construction company stated, "The insurance requirements that we put on our subcontractors is the same requirement the state of Montana puts on us. I've never been in their shoes. So, I couldn't tell you really if they've had trouble getting access to those markets, but again, I don't know why they would because insurance companies are, they sell insurance, but they're also there to collect premiums. It all comes down to having the right capital behind themselves to pay for that premium upfront. So, these insurance companies, they'll generally charge about 25% upfront and schedule it for over 10 months. So, you got to have the capital, the resources to be that upfront premium." [#1]
- The Black American woman owner of a construction company stated, "It all goes with the bond. That all goes with your bonding on it. You know? Because I mean, it's the same company you're getting one through to the other. And that's the thing. In Montana, and I know this from working with these companies, paying financial bonds, I don't know, they could tell you who's going to win a bid before the State of Montana can because they've seen everybody's bids first for the bond. I'm not saying they screw around with that. … I like working with them. They're a really good company. But the thing is, is that's how limited your insurance options and bonding options are in this state. You know? So, you have one company who is the most expensive insurance company in the state that you can go through. And if they don't approve you for your bonding, then that's it because there's not a lot of other companies. Especially with what we do with the excavation side of it, they're pretty much the only ones. They have a corner on that market." [#10]
- The owner of a majority-owned construction company stated, "We have logging and gravel. We have logged primarily on private property because it's really hard to get into the mid-market because you have to have so much bonding and so much money and insurance to get into it. And then yes as far as equipment and I mean like just getting parts is an issue and the cost of parts has gone up, the cost of oil has gone up, the cost of fuel has gone up the cost of food, the cost of

insurance. Yeah, that's the other thing our insurance agent said to me last fall that they would write our policy going forward for this year. But then we're going to have to find a different policy for the gravel industry because the company that had been working with us said we've got much going on in the gravel end of it and they're not going to carry us next year. And—yeah, and two years ago she was going to drop us on the spot because she looked at our webpage and we had on there that we've built road and driveways and pads and stuff. And she's like, 'If you do all that, we can't cover you.' And at that time, we were primarily just logging. We weren't even working the gravel end of it until last summer when we rented the machine. They're big enough, usually they can cover it. That's the problem with the small, if you don't grow big and huge, then you don't have enough resources to cover that. … The logging part of it's pretty simple. It's a general liability. In order for us to work, we've got to have like three and a half million dollars liability to go in the woods, in case we start a forest fire, or we do damage to some property or something like that. But the gravel industry, then it's more, they want cover more of comp, more people- MSHA [Mine Safety and Health Administration] gets into play. Yeah, MSHA requires a certain amount and it's just way more." [#12]

- The owner of a majority-owned professional services firm stated, "We got a big contract with DNRC and right at the very last minute when we're trying to get all the paperwork and the contract signed and everything, we gave them our proof of insurance and they said, the company that you have insuring your work has a B+ rating or something, and you can't have a contract. And so, we had to switch insurance companies just in order to get the contract that we had already won. So, it cost us several thousand dollars just to get the requirements that we'd already won the contract. And then all of a sudden, we had to switch insurance companies? Yeah, that was a drag." [#13]
- The owner of a majority-owned professional services company stated, "Errors and omissions insurance. So, basically it covers us in case we make a mistake, or we don't see something that we should have done. And that's not been very difficult to obtain either. It can be expensive. And if you're a company that winds up with a bunch of claims, it can get extremely expensive. And at some point, they could pull your E&O insurance is what is called. I think one of the complaints we get is that we get audited every year on our worker's compensation, I think it is. Every year, we get audited and it's just part of what you do." [#14]
- The woman owner of a DBE-certified professional services company stated, "Insurance requirements, yes. Those are going up every year, seems like, but we have been able to get professional liability and general insurance here through our local insurance company." [#15]
- The Native American owner of a DBE-certified construction company stated, "We never had much problems with that, but it seemed like we had paid an awful lot to get it. And talking to some friends that aren't a disadvantaged business, or tribally owned, seemed like their rates were a little bit better than ours." [#16]
- The woman owner of a DBE-certified construction firm stated, "But our state project, we haven't done one for ages because I'm sorry, but I don't like all the hoops you got to jump through on that. And bonding and insurance and oh, one job we helped somebody with, and they did, is it Bacon Davis or Davis Bacon Act or whatever wages talk about tidly fart details you had to keep track of. It's just ridiculous, just time consuming and it doesn't get the work done." [#17]
- The owner of a majority-owned construction firm stated, "Now that also depends on how well you run your entity because I have heard contractors that have had to switch insurance

companies because they have too many auto claims. I have heard of contractors getting dropped because they have too many auto claims. So, if you don't have a safety culture and you have too many auto claims, insurance could be a big barrier to entry barrier to you. Again, that's an even a less barrier for us. We were a State Fund tier one contractor, which is about as good as you can get. We had some minor injuries that have taken us out of tier one. We're tier two, but I mean, we're still pretty dang good as far as safety. I mean, again, you can run a company however you want, but little things like safety culture, if you don't have it, it will become a barrier to the industry for you." [#18]

- A representative of a majority-owned professional services firm stated, "We don't have any issues with getting the insurance required meeting those requirements, but I have worked with some other smaller engineer, like subcontractors, type things that they've had a little bit more difficult to getting some of the same coverage that we have, but we've always just worked with them and made it work. And so, knowing that it's not as easy sometimes for certain requirements. We work with them, I guess we have our requirements for our subcontractors for what they need to carry. Sometimes I've had say, 'I can't. I can't get that type of coverage, because how small I am.' So, we've worked on [our rules] to allow a smaller coverage, as long as it's covered based on the line of work that they're doing. We have kind of a set amount that we put for our subs, but sometimes they're only doing a $2,000, $5,000 project or something, so we'll make it so they can work." [#2]
- A representative of a DBE-certified professional services firm stated, "That's a huge issue and it's a huge cost. It's totally crazy. We pay about like $3,600 per year for a million-dollar liability insurance policy, but some of our clients and they haven't been in... Well, we have had some issues in Montana too, but they want us not just to have that, they want us to have workman's comp, vehicle insurance for our employees. Like all of these different insurance requirements that are really hard to meet as a small business because it's so much money and it's not funded. And so there needs to be some sort of reduced rate or flexibility in those requirements. So, we aren't able to do some of the work that requires those higher levels of insurance because we simply can't afford it." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "I think the one problem we do run into is the premiums. And that's... It's that old 90/10 rule that we grew up with, right? 90% of your costs come from 10% of your population. And there are folks that don't take care of themselves that are on the pool, that then use that insurance nonstop. And then the premium will go up because of the risk. Because that risk assessment or that risk valuation gets skewed to the negative, so they got to make the money back. Whereas those of us that try to take care of each other or ourselves, and preventative care... Then we're kind of stuck paying for those that don't. And that's... I think that's society as a whole. But for us too, we get that. And then, I always wonder about what a broker or insurance agent thinks, 'Oh. See I can get these guys. They're not smart enough. I can get them for even another 5%.' As far as other requirements, I mean sometimes we've had contracts where they'll say you have to have six million dollars E&O of insurance or E&O insurance errors and omissions and you're oh, why the contracts have $200,000 contract. Where do I get six million? And so, there's always these crazy things. And again, what things like that tell me is that somebody in our field who has $6 million in insurance help write the contract because they see that they've limited it. So, all the rest of us that don't have six million can't get it. And they can say, well, we do. They've already worked it out." [#22]

- The woman owner of a majority-owned construction firm stated, “Insurance is incredibly difficult to get and it's very, very expensive when you do get it.” [#24]
- The Native American woman owner of a DBE-certified professional services firm stated, “I can't say I have any trouble getting insurance, but my insurance was a couple hundred thousand a year. It was unreal what my insurance for the commercial, my commercial insurance was. Out of this world. … Insurance requirements are unreal, because if your equipment is not paid off, you have to have maximum insurance on them. For my trucking, my insurance was $150,000, I think, a year. It was more, but you had to have it, because most of my big equipment wasn't paid off. I did have a loan on everything, which was, I had huge loan payments. So yeah, there was just all of those things, that added up to ... If you couldn't get the good part of the contract, like the prime or whatever, then it was just too hard to make all the payments that you had, like the insurance, and having to have bonding. Having to have all of that stuff, that was a cost.” [#3]
- The owner of a WBE- and DBE-certified professional services company stated, “It’s always more challenging, even from the workers' compensation standpoint, we don't get the best rates. You have to figure it out how to manage it.” [#31]
- A representative of a DBE-certified construction company stated, “Just like taxes, your insurance is going to go up. I could imagine getting insurance could be a potential barrier, again, because of the nature of the work. Especially like the work comp insurance is not going to be cheap because you're dealing within a highly or more dangerous work environment than someone who works in the office because we're out on the road, we're dealing with the traffic, we're dealing with safety issues constantly. We've been, again, been fortunate in our relationship with our insurer that we're able to get a decent rate, but it continues to change year in and year out.” [#4]
- A representative of a majority-owned professional services firm stated, “I suppose licensure and insurance might be a challenge for some of them.” [#5]
- The owner of a majority-owned construction company stated, “There again, the bigger we got, the easier it was. When you're just starting, it was tough, and really expensive. But we're in one of those industries too, it's not like it's a... We're in a danger, we're traffic control, so I think ours is probably harder than most to get. But it was an obstacle to begin with.” [#6]
- The owner of a WBE- and DBE-certified construction company stated, “Same scenario because that whole problem with that mix, it went into to where our bonds were attached. And so, then your insurance company, all your premiums are highered [sic]. They sometimes look at you as a risk company. It was a disaster. But again, now that you show them financials that, well, you're good, oh, they want to just bid, the heck out of you. But then at the same time, I think sometimes when you're up, they want to give you everything and they want every single bell and whistle to put on your policy. And it's like, no, I don't need that bell and whistle. So, one, they won't take you if they think you're risky when you're up, they'll try to add everything to it, to just make your premiums higher we will just pick our policy apart. And my binders three inches thick and I will go through it, and I call them out and insurance agents do not like that. They want you to be quiet and then if you need them for anything like a hailstorm or any type of claim, they truly believe if they ignore you, you'll go away. But yeah, so insurance companies are, they're fickle. Like I said, if you're good and things look good, they'll take you willingly, otherwise they'll kind of shy away.” [#8]

- The owner of a majority-owned construction company stated, "I've been with the same insurance company for years and I'm sure that they can... If they can't handle what I need to do, they'll probably guide me in the right directions. I've been with Farmers Insurance for many, many years, over 20 years. I've been with Farmers, like I say, both of our houses are insured through Farmers, and our vehicles and everything else, so I'm sure if I have any issues, they can guide me in the right direction. I mean, I'm putting a horse in front of the cart saying that, but I seem to have pretty good luck. I just stick with the same people all the time. I don't jump around, try to do competitive shopping to find the cheapest insurance rate or something. I figure if you stick with somebody, that they're going to try to guide you in the right direction." [#9]
- A representative from a majority-owned professional services company stated, "Business has been tough that last couple of years in Montana. Tax structure and business conditions have made it difficult. Environmental rules make it very difficult to operate in Montana. I have had some terrible experiences with workers comp and state." [#AV245]
- A representative of a DBE- and MBE-certified professional services company stated, "When all of this changed, at least in Washington State, I mean, you had to be part of a trust that actually was ... You had to be in a trust that really represented the business that you did. We were through the BIAW, which was based on construction and engineering. And every year, honest to God, I had to take care of everything. And I had to buy insurance. And for three years, I didn't even shop because I did not have time, honestly. Then when I'm making offers to people and they're turning me down because they got a better offer because insurance is better, people are looking at the insurance packages before they're even looking at an offer letter. I mean, this is the stuff. And it's like, okay. I said to the owner, I'm like, 'We got to do something better.' I went out and shopped and I found somebody who shopped for me. We found a plan that was at least as compatible as what we had for 20% less money. We cover the employees 100% for medical, dental, vision. But I had people that saved $250 to $300 a month covering their spouse and children. And that's a significant savings." [#FG1]

4. Contract awards. Twelve business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms [#15, #2, #22, #25, #26, #29, #33, #7, #AV, #FG2,]. For example:

- The woman owner of a DBE-certified professional services company stated, "It favors large businesses that they're used to doing work with because when you do a project for them, they have a ranking system so when you get done with the project, you get a ranking of how you did on that project. So, if you do projects over and over, you get rankings that are in their system. If you have never worked with them before, then we have to go solicit letters of recommendation, like three letters of recommendation, because they say they've never worked with us before. And so, it definitely favors the people... If you went and looked at firms that they work with, it's a same group of firms over and over. They have a ranking every year. And so, we were in their system and doing well. I thought we were doing well. And we were a DBE firm. And I think that's one of the reasons they were selecting us. And then when those regulations changed where they had to pick three and then they ranked the three, we just never got anything anymore. And so, we have no history or ranking since 2016. I guess I would like to look at more of how they rank the firms, as far as the firms that do business with them get higher rankings because they're familiar with them, which is... I guess it's not a bad thing. It's just that a new company that comes in has a harder time getting in and getting ranked because they don't have experiences." [#15]

- A representative of a majority-owned professional services firm stated, "I think I've probably only had one experience with them that I didn't feel was fully fair. But at that point, when I determined that it probably wasn't fair, it was already too late. The contract is already signed with the other firms, so it was more just, 'Whoops. Well, make sure we fix that next time.' And so, I don't... I guess, as far as being satisfied with it, probably not because it was too late when you actually have the chance to find out that it wasn't a fair... because a lot of times, like their... say debriefs, when you could learn a little bit more how the selection process went, it's already, contract's been awarded at that point. we'll do it from [time to time] just to see what we can do better for the next time. I said it's only happened one time where I felt during the debriefs that that probably was not a fair process, but it's a pretty rare occurrence" [#2]
- A representative of a Native American-owned SBE-certified professional services firm stated, "We're looking at these RFPs and they talk about either what category they're going to compete in, whether it's a small business set aside, or a woman-owned, or a HUBZone or pick one whatever it might be. I think those are limiting factors, but again, I don't have a problem with that because I work in a limited access field. I'm a tribal 8(a) so that limits for everybody else too. And so, I'm not against that. I'm just saying that isn't an honest limiting factor as far as awards and stuff, a lot of times... For us every time we lose an award, we have the ability, and we do this, we ask for a de-brief where the contract officer will either send you an email telling you fell short whether it was pricing or your technical capabilities or whatever were lacking so that you can improve it and get better the next time. So that's always useful to me but a lot of times it kind of goes into the great abyss and you have no idea. We've been on projects that we're going to have an award in 30 days, 90, 120 days later, there's still nothing. And so, you spend time and effort to get there and then the government decides that whatever, because sometimes we don't have a clue and you waste, you spend all that money with no return and no understanding, because even a loss times is useful. The loss can tell you how to get better and what you did wrong. Whereas if it just goes into the great abyss and nobody ever gets back to you, then you're like, well, not sure how to take this or if the money was well spent or not." [#22]
- The owner of a woman-owned construction business stated, "Yes [factors public agencies award on have been a barrier]." [#25]
- The owner of a majority-owned construction firm stated, "I see all of that [factors public agencies award on] as a barrier." [#26]
- A representative of a majority-owned professional services company stated, "We have helped contractors try to compete for that, and because past experience in it is of a scoring criterion, the contractors, the Montana contractors we've tried to assist, have been unsuccessful because they can't compete with the larger out-of-state firms that have that experience. So, when ... it's not ... Let's see, the fact that they've successfully worked with MDT for so many years is not counting as much as just simply having the experience in that one particular aspect. The same thing we have, we've tried to open a bridge group in our company, and we cannot get through MDT's ... scoring to start it, and this is a person we hired from MDT. Obviously, [they] know what they're doing, and we can't get in. So, it's very, very difficult to come into MDT when you don't have a history. If MDT would include that in their scoring. So, I would rather say it's two different problems. One would be the large, large, large firms, they can come in because they have such incredible experience elsewhere. Really, the small firms trying to come in, they don't have nationwide experience, they don't have 50 spectacular bridges to their resume, but they're good,

solid firms, but they can't break in. So, I would say, really, this is only just the smaller firms that have this issue. If there was some sort of program to help them gain experience, gain some training, that would have to be considered in the scoring, then, when they proposed on projects." [#29]

- The owner of a majority-owned professional services firm stated, "If you place too much of a premium on price, you're often getting actually a lower result and wasting money, to be quite honest with you, because you're not necessarily getting the best bang for the buck because you're basically forcing people to give up quality in return for a lower price. I think that the state could improve their acquisition process when it comes to buying advertising and marketing services. I think a lot of the criteria and the point system... By the way, going back to the state, I have sat in on some of the situations where people have been evaluating RFPs in which you can look at them, but you can't participate, here's a few things that I actually saw. I'm going to give you some examples from the Department of Transportation, which I'm sure they'll love, where they asked for three references, so most of the agencies that were competing for this business provided three references and one provided five. What the people who were doing the evaluations said, 'Well, this company gave five references and everybody else gave three, and we're going to mark them down because they didn't give as much as this other person.' Well, then the people met the criteria of three. If you wanted more and said, 'We're going to give more points for that, or we'll penalize you if somebody gives more and you didn't, please let us know,' but they didn't do that. They didn't stick with their own criteria. That was one case. You know something? Think about this, you're going to buy, let's say, $50,000 or $100,000 or a million dollars' worth of ads. I got the cheapest ads at the cheapest price... we're going to do 20% of the scoring on price, or 25%. You ratchet down the hourly for the people doing the work, and then you have to get the production costs down, and then you want to squeeze up bonus prices, and what you're getting is lower quality work that doesn't necessarily get the job. If you paid more, had fewer ads, maybe spent more money on quality people, you might get much better results with... you have 10% fewer spots, but those 90% spots that you had left did a better job for you, for example. Well, the way they set up scoring is a mechanical process, and you can get a high score in the wrong agency. Who you have evaluating things matters because their criteria and their understanding might not, again, give you the idea if this is the right agency. I'm not sure that a point system is the best way to go. I suppose, in some ways it guards against getting a bad choice, but on the other cases, it militates for getting a bad choice. The check on that is having the marketing people and the senior executives who are responsible for the outcome to basically talk to the agencies and interact with them to see, 'Are these guys the guys that are going to have the right chemistry and understand the project well enough and have the whatever it is that is necessary to get the job done?' The point system basically rules out intangibles." [#33]
- A representative of a majority-owned professional services company stated, "Seemed like they always on these big fancy jobs. They usually hire out a state contractor. It goes back to the qualification-based thing because not a lot of... They always seem to give it to out of state people and because we don't have the experience, but if you don't ever win it, how do you get the experience? So, there's that chicken and the egg thing. It's an age-old debate, but I was actually on the end of that frustration factor for the first time. … Maybe a little more transparency. They never really tell us why and maybe it's proprietary too. There's probably reasons they can't, but doesn't seem like there's much feedback for how you take second, how could we do better? What would've given us... What could we have done better? I just find it hard to believe a local

entity with the expertise we brought to the table, an out of stater could do better. And usually those big contractors, they just throw money at it. We got all these fancy toys, and you got a guy for this, you got a guy for that." [#7]

- A representative from a majority-owned professional services company stated, "There is definitely a bias in favor of the big companies. We are a small company who has very qualified workers but because we don't have government jobs on our resume, we are getting overlooked for government jobs." [#AV303]
- A representative from a majority-owned professional services company stated, "Hard to get contracts with them. We were in bridges. One of their main criteria is your current workload with MDT. If you don't have one going you cannot establish one." [#AV336]
- A representative from a majority-owned construction company stated, "They need to take into consideration past performance when awarding contracts." [#AV367]
- A representative from a focus group consisting of prime contractors stated, "Most of the alternate delivery projects that have been let in the state have gone to out of state contractors… For a CMGC project, so we have two different alternate delivery methods in the state. So CMGC is one and then Design Builds is the other. We spent months putting together proposal for some timber structures out east of Lewistown, Montana. So central part of the state. It involves a lot of technical writing, a lot of meetings, interview, just a lot of work. And [a large national company] comes in with their team of technical writers and amazing interviewees, and they just come and snag it right up from underneath our feet. And obviously everything's based on the writing, your writing and your interview, so cost isn't really taking an account on any of that. And I guess that's supposed to come out through their CMGC process, involving ICE and stuff like that. But we know that there's no way [this large national company] can compete with us on price. We just know, because we go up against them, hard bid and we beat them every time. And so those are tough pills to swallow. It really is, I've spent so much time in Eastern Montana, driven over those structures, probably 100 or more time to have somebody come in that's probably never been there was difficult to say at the least. It's hard for the local contracting association to support those delivery methods, if they're just going to keep giving it to out of state companies and a real issue that we saw, and this is no secret. And we talked about it at our convention here recently, is it put so much into previous experience that there's just no way that any of these MDT or sorry, Montana companies can get a project because we don't have the experience because they won't give it to us. So little bit of a double-edged sword there. And so, we talk with them about if you really want to get an MDT contractor, judge us on our writing, judge us on our interview. Don't judge us on what our previous experience is because we know we can build these bridges and you know we can build these bridges. And so, there's some talks internally with regards to that. The CMGC process, you dump months and months into it when we're working on other projects and whatnot, same with right now with this design build, we're spending a lot of time, a lot of meetings, with a lot of discussion. I guess this one, we actually really do think we stand a chance, but you're one of three firms right now that have been shortlisted and two firms are going to go home. They're going to dump months and months and months of work into this, probably no reward. So, in my mind, not very attractive in some regards. I mean, we go out, we can hard bid a job, we can spend a couple weeks working on a bid and either you get it, or you don't, you move on with life. And I don't know, I understand why they do it, I have a little bit of a bad taste in my mouth from that Lewistown CMGC, it was a tough

one. My guess is there's probably pressure from the federal government too, to work on different delivery methods. Do I think it saves the taxpayer's money? I don't, I don't believe it does at all. In fact, you can't tell me that [large national company is] going to come into the state, they're not bidding against anybody, they're bidding against ICE. I don't know if you don't know what ICE is, they're an independent estimating... So independent cost estimators. That's all they're bidding against. And if you're within 10% of the ICE's bid, I guess it's not even disputed, they just move it right through. And so, I just don't see where the value is. And it takes a lot of time. So, with the CMGC, I don't believe they're going to start work on those bridges until 2023. And this was stuff we were doing maybe 9, 10 months ago. So, there's maybe two to three years before work actually starts out there. I just don't see the benefit. The design build though, I do see the benefit, the first of all, they're shortlisting to down to three firms that they feel could put together a good proposal. We're having to think of innovations and cost is a big one and we're working through all that. And then we're going to give out probably 30% plans, I think we bid off of those. We get decent pricing, they judge us on our proposal, our plans, our price. And then we go to work a pretty quick turnaround on plans. And so, I can see where that benefits the taxpayers because you're getting a contractor out there working on your bridges right away and with a good proposal and good pricing. If MDT designs a bridge, we're doing a structure right now out of Belt, it was stamped in 2010 and we're just going to work on it now. So, you can see there's quite a bit of time involved from the inception of a project when we actually build it just on the bid bill. So, these design builds, I can see you can get them out there and get them done quickly. You take all that bureaucracy that happens in the middle and throw it away and just get something done. That's probably a really long answer to a short question." [#FG2]

5. Personnel and labor. One hundred and two business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #10, #11, #12, #13, #14, #15, #16, #17, #18, #21, #22, #24, #25, #27, #29, #3, #30, #31, #32, #33, #35, #36, #4, #5, #6, #7, #8, #AV, #FG1, #FG2]. For example:

- The owner of a majority-owned construction company stated, "The biggest impediment to our business is hiring people. Yeah, that was an issue before COVID. Well, out of our, say 235 employees. There's probably only 30 to 40 those that are full time employees. Everyone else that works for [our company] is seasonal. So, we have in our management positions, I would say we're all full and able to fill all those positions. The seasonal employees are more difficult because everything we do requires our employees to travel, and people aren't inclined to travel as much as they used to be. Whether they're in Billings or Missoula or wherever, if it's outside their home—one hour driving distance. It's very difficult to find people with the rights skills. I think any employee you get, more than likely you're going to have to do some level of training. I would say we bid across the state because we've got a pretty large core crew of people that come back every year. It's going to limit the amount of work we can bid or do in the future. If we can either learn to hire people more effectively or retain people more effectively, we're going to have to limit the amount of work we do." [#1]
- The Black American woman co-owner of a construction company stated, "I think that we have, but the way we choose to look at that is everybody's playing with a pretty equal playing field there. I like my chances a lot more in competing with different companies for jobs and employees and stuff like that if it's just coming down to how we treat those employees and simple things like that because I know that we're quite a ways better on that." [#10]

- The owner of a majority-owned professional services company stated, “That's become a harder problem now, just because it's a labor shortage.” [#11]
- The owner of a majority-owned construction company stated, “Yeah, we definitely can't find workers. There's a lot easier jobs than what we do, and we get them trained and they find something else and go away and it gets pretty frustrating trying to employ steady. Because every time you just get one trained to get things moving good, then they find an easier job with less hours, and less hard work is the main concern of what we've run into. The other aspect of work is that you have down times because of the weather, for a month or more at times and it makes it hard to keep employees on account of that. The same thing with the gravel industry as far as winter comes and you really don't have that thing get froze up and mother nature takes its course on all of that. And then you have an employee that finds another apple to pick, and you might lose that person. It's like, you almost have to have somebody on staff and pay them, look at this, if I don't have time.” [#12]
- The owner of a majority-owned professional services firm stated, “It's impossible. I've gotten lucky a few times, but overall, I mean, I still [have] an ad out. I've had an ad out for almost a year for a civil engineer. Can't find somebody. Nobody wants to move here because the housing is so expensive now and I can't pay someone enough to be able to make it. My team is all out there in one room and the collaboration and learning from each other and the constant dialogue that's going on out there, I don't see how someone working remotely would fit into that very well. And then my professional engineer ended up leaving. His wife got into law school in California. So, they left and moved to California. So, I didn't have a PE on my payroll. I'm still looking for one. You just can't find one there's, there's none to be had, it seems, unless I steal them from somebody.” [#13]
- The owner of a majority-owned professional services company stated, “My business is pretty constant based off of my ability to hire staff. If I had the ability to hire more staff, I could expand my business. As businesses coming to grips with that, it doesn't matter who I talked to, we are all in the same boat. We're having difficulty hiring staff now. And it seems to be getting a little bit better. But over the last couple three years, it's been quite difficult to hire people. Mostly field workers, but I've tried to hire engineers or engineering backed graduates from Havre. So, that's part of Montana State and part of U of M out of Butte. So, that's Montana Tech, and got absolutely zero inquiries about full-time positions, which I found very strange that you couldn't even get anybody to even send you an email about potential employment. So, I'm not sure what's going on at the college level, if there were people who didn't graduate on time or there's so many offers out there for young college graduates that they all are seeking employment in their most desired locations around the country or exactly what's going on. But it's been difficult. And then, that carries through to local field staff, too. We've seen an increase in what labor rates are, and we've come to grips with that and had to pay more or offer better benefits or more benefits to people that generally would have been seasonal or entry level positions. It just has impacted business quite a bit. They are [mostly seasonal]. I usually will have enough work that I'll keep a few of them through the winter. But a lot of the seasonal type people, they like to take the winters off. And so, I haven't in the past had a whole lot of difficulty finding people who were happy with seasonal work. They tended to be a little bit older or really young, right out of high school, or a little bit older and getting towards the end of their careers or had already semiretired and were just looking for seasonal type of work, some former military, and other folks like that who really didn't need a full-time job. And so, we've always, over the years, been

able to find a group of people who fit our need. We post it online now. We used to do in paper. I don't even know if we get a response in paper. But we used to do paper, but we do online. We've tried a variety of online services. I've also hired people through some of the local staffing agencies where they just came to work with us on a contract basis. And I've had mixed results with that. It's a little more expensive upfront, but I don't have quite some of the other labor expenses that you might associate with a regular employee. But they seemed to be a little more particular. And if my projects wind up in night work or something like that, those folks are not so interested and work in some of the strange hours that we'll get during like a payday season." [#14]

- The woman owner of a DBE-certified professional services company stated, "We've been trying. Yes, we have new employees and then we could use a couple more, but they're hard to find." [#15]
- The Native American owner of a DBE-certified construction company stated, "We really got shortened because of the pandemic. We had some problems there with employees not wanting to work and stuff, but full-time, we had 12 last year. Right now, because we're still kind of on our slow season, we have the six, and that's primarily what we hold year-round, in the last few years. But we'll go up in the season, depending on the workload, we'll go anywhere from 12 to 24 people. We got hit with this pandemic thing, and we really had to cut back on our workload, because of the employees. We just couldn't get the people. We had the ability to do the work, but just not the people to perform the work for us. When we did try to hire new people, we always tried to find the best we could, as far as experience, and we didn't have to take them through a training program. I know our S and K here has a heavy construction school, and we've tried to utilize them, too, but they're not quite experienced enough. But we've hired a few of them. Truck drivers that came out of there, we were really successful that way, but the heavy equipment operators, we struggle with it." [#16]
- The woman owner of a DBE-certified construction firm stated, "But for our type of work, the only thing that's really affected us is the fact that you can't find decent help. Sometimes you can find help, but they don't know anything. Nobody knows how to run equipment or anything like that. And then there's too, some of them could care less about even learning, so. Attitude of the workers is stink … Honestly, I just don't want to be involved in anything that you have to sign up for, even if you get reimbursed for, and just, I don't know. When we come to training, like for CDLs, we usually let them try to teach them ourselves and it's like get the manual, learn that yourself. And then we let them practice on our own trucks and stuff and take the test with our trucks. So, saves $4,000 or so instead of going to school, right? Well, various, yeah, Job Service, word of mouth. We went with Indeed this one time, and we had tons of stuff and then we thought, oh, let's just put an ad in the local paper. We did that. And even in the Whitehall paper of all places and this one guy, we have a fantastic employee, he was in Whitehall Applebee's looking at the paper. It's like, okay, that's works for us. So, yeah. You never know. God provides, put it that way. We've had some people that have... in fact, I remember talking to somebody with that at one time that had gone through the problem, and it's not bad. They were okay. But yeah, I keep forgetting about something like that." [#17]
- The owner of a majority-owned construction firm stated, "Most of them now are year-round, but some are seasonal. During the busy season, we will add as many as we can, but in recent years there's just no one to add. I'll tell you right now that hiring staff will change how I will do

business. We're in a rural area, so we don't see an influx of people, and it used to be money the motivating factor to bring labor into the workforce. These younger generations, that money doesn't motivate them. And it seems like it's a never-ending cycle of training. You get somebody trained up, and then they just decide that this is not what they want to do. And so, they exit. So, I mean, we're probably just going to focus on what our most profitable projects are and stick to that. And quite frankly, it's not MDT work. Yeah, we do a mix. So, we do a mix on the job. We only do classroom once a year, but we've started to participate in a specific safety app, and we're pretty happy with those results." [#18]

- A representative of a DBE-certified professional services firm stated, "That's hard. We have our core team of people who've been doing this a while but getting interns or more community level associates engaged and retained has been hard. So, finding people locally that want to work, doing a research and evaluation in the communities we serve, that's really difficult. And that's like a pipeline issue of like kids coming up the pipeline, they're not introduced to research early, thinking about all the STEM fields and all that. So that's a major barrier. If you look at like the gender gap in research and evaluation, the pay, like there's lots of issues that are contributing to that." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "For us, the COVID was a huge factor in that. People didn't want to work, right? They're getting paid to sit at home. We do a lot of ... On-the-job training, OJT. And so, we haven't had that huge of a problem. Finding people who again, want to work was a challenge. And then, we have some kind of niche businesses. Like the stuff we do for access control kind of is a little niche-y. So, it's not like everybody and their brother can do it." [#22]
- The woman owner of a majority-owned construction firm stated, "[Hiring people]'s the biggest issue that we have right there." [#24]
- The owner of a woman-owned construction business stated, "Yes [personnel is a barrier]." [#25]
- A representative of a majority-owned professional services company stated, "That's a difficulty right now, for sure. It's hard to find people that are qualified to do that type of work because there's so much work out there right now, I believe. So, I think that is a big barrier right now. We struggle with that a lot and just trying to figure out the best way. We've tried lots of different advertisements, LinkedIn and whatever all those other ones are that you can advertise for. And we get some applicants, but we haven't been overly successful. We've maybe hired one person from that. We've also tried a recruiter and we didn't have any success with that either. Most of our success has been just with letting people we know, letting them know that we're looking for people and looking for good people and what we're trying to find. And then just by word of mouth, we end up getting a call out of the blue just by doing that. And so, it's mostly just on relationships and letting people we know, know that we're looking, so that's where we've had most of our success." [#27]
- A representative of a majority-owned professional services company stated, "Absolutely. I mean, this has been very, very difficult. Probably the most significant problem that we face. It's not new. This has probably been an issue for the last five or more years. Finding employees has been very difficult. There's probably just simply not enough engineers in the marketplace right now, or even coming into the marketplace." [#29]

- The Native American woman owner of a DBE-certified professional services firm stated, "Finding good employees is very hard. And I'm very meticulous about my employees. They have to have good integrity. They have to be consistent. They have to come to work when they're supposed to come to work. And you don't find a lot of people that are that way. But once you get them and you train them, I've trained I can't tell you how many young people I've trained for [my company]. And they're great, but this isn't where you really want to live your whole life. …In the construction company, that was for sure big. That's a hard thing. Even, for instance, in the construction company it's hard, because you're not only training them, but you are spending major money with big equipment, and putting trainees in with them, and trying to get them up to snuff on how to do the job. They're not consistent. They don't come to work or ... That's a real hard area in the construction. In the other company, I have trained so many girls, I can't even tell you. They're trainable, but they move on. They get married, they have children, they move, they whatever. But that, the land consulting is easier to handle, because you can have some core people that are really good at it. They're just two different worlds." [#3]
- A representative of a majority-owned professional services firm stated, "I think the economy in general has gotten stronger, which in particular makes it harder to find people to hire. There's a lot more variety of job opportunities for candidates, for employment to find and to try to find a job. And so, I think the labor market is very competitive and that's not just because of COVID." [#30]
- The owner of a WBE- and DBE-certified professional services company stated, "I would like to be also visible for these kinds of contracts where especially now with the workforce shortage, when we have employees available, we can provide them on the contract if that's required or we can provide that help." [#31]
- The woman owner of a professional services firm stated, "That is a problem, just right now we haven't... Or at one point we had eight employees and competitively wise, since we are such a small business, we couldn't compete as far as wages and insurance benefits. So just because of our size we couldn't compete so several of our employees left with companies offering higher pay and more benefits. So that is, for smaller companies, that is an obstacle, just the pay and the benefits for employees. The other one is finding qualified, just people who do want to work." [#32]
- The owner of a majority-owned professional services firm stated, "Finding personnel now is far more competitive than it used to be, by that I also mean finding good personnel. In Bozeman and in some other cities in Montana, it's expensive to live, and so if we hire somebody and they can't afford to live here, we have a problem. We try to get out of state when we can, in terms of doing business because we can charge more. But when you're in Montana, there's a disparity between what we can charge and afford to pay people, and the cost of living now, particularly when it comes to housing, and so that's a barrier." [#33]
- A representative of a majority-owned professional services firm stated, "We're all dealing with that [labor shortages] right now." [#35]
- A representative of a Native American-owned construction firm stated, "That's tough, finding labor." [#36]
- A representative of a DBE-certified construction company stated, "Just the labor market's been extremely tight, but in speaking with other HR professionals, that's a pretty much nationwide,

seems to be a nationwide situation is that the labor market is extremely tight right now. I think you have to find something you've got to have good people. We have most of our crews are very experienced, which I think for the construction industry is highly unusual. We've been able to retain our employees. I have, or the company has several employees who have been with the company for 10 plus years so that creates a nice continuity. They know what to expect from the person next to them… Hiring employees is definitely a barrier. I mean that's, and everyone in this area is dealing with that, especially your skilled laborers. So, your truck drivers, your equipment operator, your supervisory staff, those positions are extremely difficult to fill. Truck drivers have been a problem for several years, but it seems now that some of the others have become more and more difficult of late, but even the unskilled laborers have now become difficult to hire in the last year or two. I think the bigger issue is that we don't have enough people that are wanting to go into those skilled trades. You know, we're not seeing as many kids coming out of high school that are wanting to be in the construction industry or wanting to be truck drivers or, you know? I think we're starting to see a kind of a downturn on that. The other thing too is where we are geographically. We're very close to the oil fields. And so, a lot of the skilled laborers go to the oil fields, especially when they are booming, because the oil companies can pay tremendous amounts that small businesses simply... We simply can't afford some of the wages that the oil... We can't compete with the oil company wages. And if you're, especially a young 21-, 22-year-old, you've got a couple of years of truck driving under your belt, you're single, and the oil company is going to offer you $100,000 a year to come over there and live in a work camp, we can't compete with that. And that's just a barrier that none of us can really do much about." [#4]

- A representative of a majority-owned professional services firm stated, "Staff turnover has been a challenge, but trying to find some people with those specific software skills and things. The consultant industry, what I've noticed watching people hop around in the last 10 years, since I've been in the consulting business, there's not a lot of them that stay at the home firm. They're firm swapping, moving around. The other firms are not bashful of just calling up someone at your place and hiring them. I trained three people at the last place I was at. Literally, our partners hired them away. Since I've been here, I generally get three to four offers a year to go to another firm. They'll just flat call me up. The last guy that did that, I said, 'No, I'm not interested. Not at all, but why don't you come work for us.' Never heard back. No, I can say the industry is very competitive. I'm seeing, at least this generation, they're just not as loyal as others. They aren't afraid to hop around, go somewhere else and then want to come back. I had a construction contract that we're managing, and I had it all staffed out in February. The lady I was bringing out of Lewiston, Idaho to head up to construction inspection was poached from us by another firm, and she accepted that without saying, 'Hey, can we match the offer?' Because our company, they kind of look at raises in April, and this was in December. She had got her PE license, which generally we give them a bump up. That was coming in April, and these other guys beat us to it. Another month, and she left, another left. I wound up hiring people straight out of college and training them. Career fairs looking for people, we set up booths for that." [#5]
- The owner of a majority-owned construction company stated, "Our people that are coming, we have this... we haven't had any turnover hardly, so that's been good. It is a little harder to find people that want to make it a career right now. We've had pretty good luck with college kids the last few years, but people that want to make it a career, we're not finding a whole bunch of new ones. We have the ones we've had for a long time, at least." [#6]

- A representative of a majority-owned professional services company stated, "The manpower would've been our main hold up on a lot of stuff. I would say that the biggest burden would be the limitation of qualified or interested individuals in this realm. A lot of the people we hire, a lot of our technicians are high school, we're not looking for college degrees for what we're doing. Just people willing to work. We do employ a lot of engineers too when those jobs are opening. So, we have certain requirements for that. The educated kids are a lot easier to find in my opinion, it's the more doers, the lower waged people out doing the doing. And then our services are so specialized that we basically have to train everybody from the ground up, so that does take time. That would be, I don't know a burden, but it is just like any job. But if we see anybody with past experiences, we're pretty excited because we know that they know what they're getting into and they've had some previous training of some sort, so that does help and that can go for any job, but ours is very specialized, so. We're just talking about that. Trying to go to some job fairs and stuff like that. Trying to find... Going back to the burdensome question to find, trying to get kids go to a high school or get college kids that want to come in to be a technical engineer or a materials engineer, just try to expand and it's such a niche that we don't promote ourselves locally. We don't go to these public areas. We're not trying… We seem to be okay with the way things are running, but we wanted to, that's an obvious improvement from our business model." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Trying to find somebody is so tough. It is because when my husband was alive, we were trying to find, because at that time our kids were in college and so it was just basically him and I, and we were looking for a third person and oh my goodness, it was like pulling teeth and a lot of jobs that we have is prevailing wage. And so, they're making a good wage and we would have guys show up and if they show up at eight o'clock, oh, you just consider yourself lucky. And then we hardly ever take a lunch break, but this one day that this new guy was on, we took a lunch break, he never came back after lunch. So, it is phenomenal. And then you hire, the guys will, when you interview them, they'll tell you that, oh, they can do this, this, this, this, this, and this. And then they are so underqualified. And after my husband died, we thought maybe we should hire a person to take his place in estimating and supervising. And two different men wanting almost between 3 and $4,000 a month cleared, left us high and dry. We actually tried, well, like I said, when we were trying to find that supervisor and that to take that place, it's impossible. It's impossible to find good help." [#8]
- A representative from a Native American woman-owned construction company stated, "My only other thought is they need to enforce DBE program. All states have one, but Montana does not enforce it. So why have one if it's not enforced. Recently the last couple of years they tried to work with people. We have a labor and supply shortage. Right now, I have two paver machines one has been waiting for a part for a month. I cannot get the part in. It is the main equipment for paving." [#AV206]
- A representative from a woman-owned construction company stated, "It's hard to find good people that know how to work and want to work. A lot of companies seem to get so safety-minded that they just can't seem to get anything done. Sometimes the regulations and the paperwork, all the safety stuff you have to go through anymore." [#AV207]
- A representative from a majority-owned construction company stated, "Lack of labor. There are not enough employees to do the work available." [#AV210]

- A representative from a majority-owned professional services company stated, "[One barrier is the] lack of available employees." [#AV214]
- A representative from a majority-owned construction company stated, "Finding work is pretty easy, but as far as getting someone to come work, it is very difficult because of demographics." [#AV215]
- A representative from a majority-owned construction company stated, "We have way more work than we can do, we need employees." [#AV223]
- A representative from a majority-owned construction company stated, "Primarily I can't find any employees. It is really hard to find good workers these days. I have always had a positive experience working with the State of Montana. I have worked with the City of Missoula and several aspects of the DOJ for the State of Montana." [#AV224]
- A representative from a woman-owned construction company stated, "The Department of Transportation fired us last year because my fertilizer guy ruined a yard because we just couldn't find qualified people to perform the jobs in the last few years." [#AV227]
- A representative from a woman-owned construction company stated, "Can't find employees—hard to find qualified ones." [#AV228]
- A representative from a woman-owned construction company stated, "It's tough to find good help and keep the morale high." [#AV229]
- A representative from a majority-owned construction company stated, "It's hard to hire right now due to lack of qualified applicants." [#AV233]
- A representative from a majority-owned professional services company stated, "The hardest part is finding people that want to work so that we can pull more jobs in." [#AV237]
- A representative from a majority-owned professional services company stated, "I have trouble getting employees. We've recently expanded and gone from 7 - 8 employees up to 17 in the last year. I could probably use 20 but it's more difficult to find qualified people willing to work than it was prior to COVID." [#AV239]
- A representative from a majority-owned professional services company stated, "Getting qualified people. Manpower - we turn away a fair amount of work. We don't pursue some projects because we don't have the capacity." [#AV247]
- A representative from a majority-owned construction company stated, "Right now there is not enough workers & too much work." [#AV248]
- A representative from a majority-owned construction company stated, "The only thing I will say they is there is a shortage of landscape contractors. I think because the market is high right now and it's hard for people to move into this location." [#AV250]
- A representative from a majority-owned construction company stated, "It has made it more difficult due to COVID. It is more difficult to get workers this year. We are at 1/3 of our regular workforce." [#AV251]
- A representative from a majority-owned construction company stated, "Can't find anybody that wants to work. To employ, got on Indeed and they either won't return our calls or don't show up to work. Getting harder and harder. Everyone is saying the same thing." [#AV255]

- A representative from a majority-owned construction company stated, "The biggest concern is a shortage of qualified workers." [#AV261]
- A representative from a majority-owned professional services company stated, "We could use some employees." [#AV262]
- A representative from a majority-owned professional services company stated, "The labor market is very tight. Finding new help is very difficult." [#AV266]
- A representative from a majority-owned professional services company stated, "Labor shortage [is a big barrier for us]." [#AV271]
- A representative from a majority-owned construction company stated, "A labor shortage due to the extended unemployment checks for COVID. We can't find laborers and we have to pay laborers wages that are ridiculous." [#AV285]
- A representative from a majority-owned professional services company stated, "The availability of employees who want to work [is a big barrier]." [#AV287]
- A representative from a majority-owned construction company stated, "The work is the easy part, and the employees are the hard part." [#AV296]
- A representative from a majority-owned construction company stated, "Finding the right employees has been the biggest issue in the last decade." [#AV306]
- A representative from a majority-owned professional services company stated, "The hardest thing right now is getting people. It's hard to expand because you can't get people. We certainly don't like your audited overhead rates." [#AV308]
- A representative from a majority-owned construction company stated, "[It is] hard to get people/workers and material. MDT is difficult to work with, very restrictive." [#AV318]
- A representative from a majority-owned construction company stated, "[There is a] lack of labor due to high cost of living." [#AV320]
- A representative from a woman-owned professional services company stated, "Overall, labor shortage is making it difficult. Cost of goods and fuel is driving up our costs." [#AV324]
- A representative from a majority-owned construction company stated, "You can't get workers and supplies are hard to get and we can't control the price. Most companies won't give you a definite price because they don't know, because their suppliers aren't telling them, and they don't know when it's coming. What we've experienced so far is alright." [#AV332]
- A representative from a woman-owned construction company stated, "Need more employees." [#AV333]
- A representative from a majority-owned construction company stated, "Struggling to found enough labor force." [#AV334]
- A representative from a majority-owned construction company stated, "It is favorable to start right now if you can find the materials and labor." [#AV335]
- A representative from a majority-owned construction company stated, "Based on where we are located, the hardest thing is getting labor, employees in general. It has to do with the cost of living." [#AV343]

- A representative from a majority-owned professional services company stated, "Looking for another employee that has been the main challenge." [#AV348]
- A representative from a majority-owned construction company stated, "There's too much work and not enough people right now. It is tough getting people to work." [#AV349]
- A representative from a majority-owned construction company stated, "The economy is good and I'm short on labor." [#AV351]
- A representative from a majority-owned construction company stated, "It's just really hard to get employees right now." [#AV353]
- A representative from a majority-owned construction company stated, "It's easy to obtain work but impossible to obtain employees." [#AV356]
- A representative from a majority-owned professional services company stated, "It is extremely difficult to find entry level technicians, all material testing we do we can't find anybody." [#AV358]
- A representative from a woman-owned construction company stated, "Obtaining work is not difficult at all; obtaining good employees is difficult. Labor is a big choking point for businesses out here right now." [#AV361]
- A representative from a woman-owned construction company stated, "We need helpers. We can't hire people anymore. They've got it too easy on low-income people because since they can draw welfare they don't want to work." [#AV363]
- A representative from a majority-owned construction company stated, "Being able to hire [is a challenge]." [#AV4]
- A representative from a majority-owned construction company stated, "Employees are the hardest to get right now." [#AV10]
- A representative from a majority-owned construction company stated, "Supply chain issues. Labor is difficult to come by in the Bozeman and Gallatin Valley areas." [#AV17]
- A representative from a majority-owned construction company stated, "Getting enough workers [is a challenge]." [#AV21]
- A representative from a majority-owned construction company stated, "Need more employees." [#AV24]
- A representative from a majority-owned construction company stated, "We have plenty of work. There's a labor shortage. Qualified labor is hard to find." [#AV29]
- A representative from a majority-owned construction company stated, "It is just a long process with all the paperwork. The hardest thing is obtaining more workforce or people. Starting a business is fairly easy if you have the people." [#AV31]
- A representative from a majority-owned construction company stated, "If I could find help, I could grow as big as I wanted. Having trouble finding employees because there is a lack of housing." [#AV33]

- A representative from a Native American-owned construction company stated, "It is difficult. Montana has probably the lowest unemployment rate in the US. In the construction field, there is no labor." [#AV34]
- A representative from a majority-owned construction company stated, "[There is a] shortage of qualified workers." [#AV37]
- A representative from a majority-owned professional services company stated, "Workers is the hardest thing. They want skilled wages for unskilled work." [#AV42]
- A representative from a majority-owned professional services company stated, "Staffing, finding employees is our number one issue for us." [#AV47]
- A representative from a majority-owned construction company stated, "We are having a difficult time hiring employees who want to work." [AV51]
- A representative from a majority-owned construction company stated, "Shortage of help and labor [are both barriers]." [#AV55]
- A representative from a majority-owned professional services company stated, "Graphics designers there a lot of them but not enough work, vinyl installers, they put graphics on vehicles and signs, and cannot get 1 hired. No one has experience willing to work under $25-30, which is more than what small business can handle." [#AV58]
- A representative from a majority-owned construction company stated, "We need good employees." [#AV61]
- A representative from a majority-owned construction company stated, "Finding labor is challenging." [#AV63]
- A representative from a majority-owned construction company stated, "Hard to find workers." [#AV67]
- A representative from a majority-owned construction company stated, "There is a labor shortage." [#AV69]
- A representative from a woman-owned construction company stated, "Employee shortage, material shortage." [#AV70]
- A representative from a majority-owned construction company stated, "[There is a] lack of employees." [#AV85]
- A representative from a majority-owned construction company stated, "Just can't find employees." [#AV87]
- A representative from a majority-owned construction company stated, "It's probably finding talented help." [#AV88]
- A representative from a majority-owned construction company stated, "Finding help, and supply chains [are barriers]." [#AV92]
- A representative from a majority-owned construction company stated, "Employee shortage [is a barrier]." [#AV94]
- A representative from a majority-owned construction company stated, "More people need to work." [#AV98]

- A representative from a majority-owned construction company stated, “Finding qualified drivers [is a challenge].” [#AV100]
- A representative from a majority-owned construction company stated, “We have been busy, [and it’s] hard to get help because of COVID.” [#AV101]
- A representative from a woman-owned construction company stated, “Nobody wants to work. Everyone is getting paid to sit on their ass and no one wants to help me.” [#AV110]
- A representative of a DBE- and MBE-certified professional services company stated, “Honestly in this day and age that we live, I would have to say that our biggest barrier is finding qualified people, because how can you grow if you can't find qualified people? Qualified people, you cannot find them. I mean, it's just so hard. We've stepped back and maybe take this approach where we can have this many people and we can do this much work and we can make this much profit, and maybe we won't grow. Maybe we're not in a place to grow right now. Well, the disadvantages are as yeah, as a smaller firm, you can't offer the insurance package like the big companies. I mean, we try to be innovative.” [#FG1]
- A representative from a focus group consisting of prime contractors stated, “Labor shortage, it's a very real concern of ours right now we could take on a lot of work but trying to find qualified help has been very difficult to say the least. In fact, I think this can be public information. I don't know. I know there's a petition going around state of Montana to do a blanket across the board, $6 increase to the Davis-Bacon wage scale to try to attract more people to come to work right now. So that's one thing that I've noticed, even since I started working in '99, the wages haven't changed much in 20 years or 22 or 23 years. There's been small changes across the board and realize that we're a federal aid state, so we're beholden to the Davis-Bacon wage scale. And so, Davis-Bacon wages come out and this is what we use, but there haven’t been major increases to that. And so, it's very hard and so we're actually finding ourselves having to obviously sweeten the pot a little bit, I guess, is for lack of better words, to try to attract people, paying maybe a little bit more sub or just paying above Davis-Bacon wage scale to try to attract people to come to work for us. And when I started in the office in '08, our main superintendents had pickup trucks and that was about it. But the wages were still good enough to still attract people, even with their own vehicles and drive to project sites and do that work. But there hasn't been a major increase. And so obviously inflation's definitely occurred over the last 13, 14 years, and it's becoming harder for people to justify. Let's say they're making $21 an hour as a laborer, at 21.97 an hour as a laborer, plus their fringe package. They drive somewhere maybe 100 or 200 miles away, they're paying for their own gas, they're paying for a hotel room. At the end they come home, at the end of the day that 21.97 is now maybe $10 and they could probably make more money working in town. And so that's been extremely difficult, and bridges is one of those things that's rarely done in a major metropolitan area. And trying to get people to go there is very difficult. And so, wage increase is going to be important, especially when towns like Bozeman, I was down there a few weeks ago, there was a new bar lounge and they were advertising 23 to $30 an hour for a cook. And Bozeman, if you guys aren't aware of it, is just one of the fastest growing cities in US right now. And the median house price is like over 800,000, something last time I heard. So, if we have work in that immediate area, how difficult do you think it's going to be for us to get a laborer to come out for $21 an hour to work out in the field and the sun and hard labor? It's difficult. We're struggling with it and just like everybody else. So, if that petition goes through and works and we're able to get a wage increase, I think that's

going to alleviate a lot of our problems that help out a little bit. Especially when you're competing with that, those kinds of wages and realize that that's their base salary, they have fringe package on top, that's paid into their unions. But still, that's the money they have to live on, even though that money's paid into their union, it doesn't mean much to them at that time. Obviously when they retire someday and their health and welfare benefits are nice, but it doesn't mean much to a 20-year-old kid. They want that money in their pocket." [#FG2]

6. Working with unions and being a union or non-union employer. Four business owners and managers described their challenges with unions, or with being a union or non-union employer [#3, #6, #8, #AV]. Their comments are as follows:

- The owner of a majority-owned construction company stated, "That's gotten harder. They don't, to be honest with you, they don't... You used to be able to call them up and say, 'I need three guys for this,' and now they can't provide you anybody, so it's... We have to find our own. They've been zero help the last three or four years. I think they're all broke. Our poor guys are getting... the pensions gone awful, it's really decreased over the last five years. They used to have a pretty good pension system, and now they get hardly any of the money we put in goes to their pension, I mean a very small percentage. I don't think they're as big a draw as they used to be. All our work is Davis-Bacon work, anyway. Now that the union's taken... they've raised the dues, they've raised the monthly fees, the pension's gotten worse. It's kind of a... as far as being an owner, our unfunded liability, even though we're paying what we're directed to pay, has gotten terrible. I just don't think they have... I think they're broke and they're short staffed too, so they don't go recruit. No one's signing up, it's tough all around. I don't know how you overcome it, but I think what they did as a setup, it's almost like social security system, where they planned on a whole bunch of new members paying for the old members, and there's just no new members. They can't afford to pay how many people they promised what to pay. I only see it getting worse, to be honest with you, unless the government or someone stepped in and helped out, because they just don't have enough money. Our unfunded liabilities are going up a bunch every year. It's something we've always paid everything we were owed, but every penny we pay, we've paid everything we're doing, the unfunded liability just keeps getting bigger and bigger, so as a company, we owe that money, if we have to ever sell, it's just kind of really hurt us. It's hurt our employees. They're not very happy with it either because their pensions are getting cut so hard, and they're dues are going up so much. Competitors that aren't union in this thing, they're not paying 75 bucks a month in dues, and $1.35 an hour for working dues. They're getting all that money they're paying in. They're only getting... We're paying in actually more than what's required by the Davis-Bacon, because they're trying to do a catch-up thing for the unions, so we're paying an extra .55 an hour on top of that that really... it's really not doing them any good." [#6]
- A representative from a woman-owned construction company stated, "Difficulty: … prevailing wage jobs, got to have certified payroll, therefore a lot of extra overhead, [it's] not equitable in union contracts." [#AV14]

7. Inventory, equipment, and other materials and supplies. Thirty-eight business owners and managers expressed challenges with obtaining inventory or other materials and supplies [#1, #10, #11, #12, #13, #14, #15, #17, #18, #22, #24, #25, #4, #5, #6, #7, #8, #9, #AV, #FG2]. For example:

- The owner of a majority-owned construction company stated, "Well, it probably is now with the pandemic, definitely material issues. I think that any new business, somebody starting as a DBE, like you say, it's all about management and capitalization. They have to have the resources behind them to be able to buy the equipment or get people to trust that they can rent equipment. There's lots of rental equipment available these days. There's more rental equipment available today than there was 10 years ago, more rental firms out there." [#1]
- The Black American woman co-owner of a construction company stated, "I know with the supply chain thing, that obviously sucks and it's horrible, but once again, everybody's... It doesn't really matter who you are anymore. You're dealing with the same things. The job we're on now, we just got some piping for it that we ordered in October. It used to that would happen and people didn't really care. Now it seems to be kind of built into most jobs where it's almost an expected thing. What we've started doing is just on our materials, like on this job even, just we want to... just getting that money up front for the materials so we can order those, get them on the way and then have something built into it for storage and for all of that, just to make sure. It seems like at first people were pretty reluctant to do something like that. But after everybody's, I think, coming to grips with this is a reality for a little bit right now. And I don't know. I'm sitting here right now and pumping water from around $700,000 worth of wood that they bought last winter for this hotel. Because it had gone up so much, so fast, that eventually the owners had decided it was just going to be cheaper to pay for it and store it and protect if you have an established gravel pit, you don't have to pay the people working in that pit Davis-Bacon wages. You can pay them regular wages. So how is somebody supposed to compete with that? That company already owns the rights to it so they're not going to be able to buy gravel from them. Or if they will sell it to them, it's going to be at such a high rate, they can't beat them on the bid. If they go and start their own pit, they have to pay somebody twice the wages to start that pit as they have to dig gravel out of a pit that's already there." [#10]
- The owner of a majority-owned professional services company stated, "Somewhat. And we've just had to make sure that we can... If you wanted it tomorrow, you should have ordered it six months ago. That's what we try to stay ahead of stuff like that. … There's a lot of stuff that there's not a lot of really different supplies that we need in our normal work. Sometimes we're doing restoration work. We may need to get some extra supplies, either fencing, that kind of stuff. That sometimes just takes a little bit of time to make sure you get it. But most of our work involves what is called intellectual knowledge." [#11]
- The owner of a majority-owned construction company stated, "As far as equipment and I mean like just getting parts is an issue and the cost of parts has gone up, the cost of oil has gone up, the cost of fuel has gone up the cost of food, the cost of insurance." [#12]
- The owner of a majority-owned professional services firm stated, "We really got lucky. We did buy some new survey equipment and I just spoke with one of the sales reps and he says, there's no way we could get you that equipment that you were able to get. We wouldn't be able to get it now. So, we got stuff before all the supply chain stuff really stopped a lot of people. … Like I said about investing in new equipment, any work we would try to get with MDT would be survey

related and that they would not allow. They would not contract with companies that weren't using the same brand of GPS equipment that MDT uses. I don't even know if that's legal, but they would say, well, we are running Trimble. So, the only way we can check your work is if you use Trimble and then send us your job files that are all Trimble proprietary formats, you have to have Trimble software to view it. So, this company owned by a descendant from Switzerland was, of course, really into Swiss equipment and had all like a GPS equipment and MDT wouldn't even... There was no point in me pursuing MDT work because they weren't going to go with me anyway. I didn't have the right equipment. So, it's equipment that does all the same thing, it's just not the right brand. We only just now acquired, we traded in all our [old] equipment and got all Trimble stuff. So, we should be all geared up now to try to go after MDT work. But it was $100,000 investment. So, it's not cheap to switch systems. I bought three licenses from Autodesk through a reseller located in Boise. He had reached out and I thought, yeah, I think we should buy three licenses. We were working on an old license that was starting to become obsolete. So, we bought three licenses and that cost $26,000. And that was just for a three-year subscription. So, we didn't own the software. We're just really renting the software, right? So, the reseller told me, initially, I had asked for three network licenses. So, if you have a network license, then if you have eight people, only three people at a time can be using the software, the licenses live on your network, and then check it out, basically to work in that software. So, they said, yeah, no, we don't do network licenses anymore. I mean, they've been doing network licenses for decades. So, all of a sudden, there's no more network licenses. It's only per person. So, there are three username and passwords that they give me. And then I have to administer those between my people that some know how to use AutoCAD, some are just trying to learn. I had some turnover through COVID. I had three people leave. So, I had to hire new people. So, through that time, these username and passwords were getting passed around between my few people. A number that's in flux. At one point, it was just me and two other people in the last three years. So anyway, the reseller told me, they don't allow concurrent use. So, meaning, they don't allow two people to be signed into the same username and password at a given moment. Well, nothing could be further from the truth. The software did not manage itself and its own licensing. So, it allowed people to be inadvertently signed into the same username and password at a given time. So, we shrugged and thought, okay, well, they're not, the software. I mean, even my Netflix account, if my wife is watching a movie upstairs and I turn on Netflix downstairs, it says, 'Someone else is using your account. You can't watch Netflix.' Right? Well, the software didn't do that, even though it costs tens of thousands of dollars. Right? So instead, about a year into this, I get an email from Autodesk that says, 'You've overused our product, and since we don't charge for overuse, we just demand that you spend $26,000 again on our software.' And I'm, okay, so this is a really advanced game of I have got you. Like, you caught us. We were using the same username and password. So, the whole thing went to legal escalation. And I was just like, why would anyone do business with you if this is how you play? Well, the fact of the matter is there's no other product. So, I had to hire my attorney to take care of the whole thing. I still haven't gotten that invoice, no telling how much that cost, but he saved me like 11 grand. And I ended up writing a check for $20,000 in addition licenses that basically, they said, you have to buy. So now I'm into this $46,000 for software that only lasts for three years. I mean, it's like the great big, huge company comes down on a little company at the time five people and they're just squeezing us. So, I would say that's been a major incident in the last five years that I'm glad I had been saving money because I'd be in bad shape if I hadn't maintained basically pay myself not very much and just keep a nest egg going for a buffer for a rainy day when something bad

happens. So, if something bad happened and I just told everybody, this was just a few weeks ago that this all came down and I walked in and I said, okay, we got six licenses now. There's only six of us that are full time. And probably, only three of us that know how to use AutoCAD. And so, I told everybody, I said, 'Look, we're going to make lemonade out of lemons and everybody's going to learn how to use AutoCAD.'" [#13]

- The owner of a majority-owned professional services company stated, "We're more of a service-based company than a producer. We don't produce anything other than provide testing, but it spills over into our projects they're experiencing supply chain issues and being able to get their materials and so it goes over into our business as well. But as a direct impact other than higher fuel prices and things like that, we don't experience it quite as much as say a general contractor would." [#14]
- The woman owner of a DBE-certified professional services company stated, "One thing I'll mention with MDT that was always a hurdle is that they would only allow firms that use a certain CAD program called MicroStation. And a lot of small firms in the private sector use AutoCAD instead of MicroStation. And so, to be able to work with MDT you had to buy MicroStation in addition to CAD. And so that was very expensive. So, the new Consultant Design guy that came in early 2000s, he made it so that small firms like us could design without using MicroStation as long as our final product looked like what they're used to, same kind of fonts, same tech sizes, same arrows, that kind of thing. So that was very helpful because then we didn't have to purchase MicroStation. And now in the last year, MDT has decided they're going to switch to AutoCAD, which is going to be very helpful for small firms, I think." [#15]
- The woman owner of a DBE-certified construction firm stated, "Supply chain… Getting parts sometimes because things are slower. That is one issue. Yeah. And the price of freight anymore. It's just ridiculous." [#17]
- The owner of a majority-owned construction firm stated, "So obviously, materials it's becoming a real problem supply chain way." [#18]
- A representative of a Native American-owned SBE-certified professional services firm stated, "The private sector... We're building houses in Billings. Right now, we all know that the markets in the West are... The housing markets are nuts. And so, those things are going really well but there were the challenges also. Materials are a shortage. All those things, and the cost of everything going up, fuel. Excuse me. Building materials, everything else. That affects all of us. And so, I think that even affects the contracts. Because when you got an allocation to do a project a year ago or two years ago, it is not the same cost to get it done as it was two years ago. Things have changed. And I think that's where we're getting stuck as... The price of everything's going up so fast. And I'm not sold that it needs to, but shareholders got to make their profit. So do the large companies. And so, us small businesses kind of get left holding the cards." [#22]
- The woman owner of a majority-owned construction firm stated, "The cost of material has skyrocketed. The cost of fuel has skyrocketed. So, whenever fuel skyrockets or increases and whenever materials increase, it makes it difficult on a business such as ours, because we count so much on the material and on the fuel to travel." [#24]
- The owner of a woman-owned construction business stated, "Things have gone up considerably and then they're not as available. And so, I've been trying to buy things when I can and then

basically be able to have them on hand or in the process of being ordered before someone buys that kind of service or goods." [#25]

- A representative of a DBE-certified construction company stated, "Currently, yes, we've had trouble getting inventory. Part of our business is we also produce—we also manufacture a sealant for roadways at an offsite plant. And part of that is a small retail shop that sells pavement maintenance, equipment and inventory, and things of that nature. And we had a lot of trouble at the beginning of the year getting inventory for the retail shop. Materials, we've been able to get pretty consistently. We work with the two plants, hot plants here in town, and so we've been able to get those pre-material[s] pretty easily. But I know we waited three or four months for striping paint for our retail store. We ordered it in April, I think it arrived in July. And I've talked to other distributors about things, and they'd said, 'I can't even get you inventory until the end of the year or in the next year, even.' The people I've talked to said it could stretch into next year, so I don't foresee it getting any better. I'd like to hope that it gets better before next spring when we reopen the plant, because our plant will be closing here at the end of the week. And I'd like to hope that before we open it back up at the end of the day for next year, that we can get what we need, but hard to say." [#4]
- A representative of a majority-owned professional services firm stated, "It isn't like you can just take a laptop to go home and work there. There's software licensing. The software that MDT requires for design costs us $17,000 a seat. $5000 a seat yearly maintenance. That's a very expensive software for us. The pavement design software is the same thing. It's a very expensive ... They require you to run it. Their survey requirements. There's a software they use that's a very expensive survey software. For all of those, because we're a small firm and we can't really afford that tens of thousands of dollars and a license and that, for these fees for something we're going to use once or twice a year. We write our own program. We run something or other. We figure a workaround because of that expense. The startup to do MDT work, all that, like the survey software, survey equipment that they require. They say, 'Hey, we run this program.' Well, that's great. Maybe you already have it or it's not that. For someone starting out, to put $3-4000 into electronic equipment and software licenses, that's a lot of money to try and get back. Barriers that I saw looking at that. I just looked at the total cost. I didn't dive down into it, but to set up a draftsman to work in MicroStation, between getting the MicroStation, their inroads and all these other licenses, 17,000 dollars a seat. Then a yearly maintenance fee on top of that. The survey software we just went through with that they have these digital levels they want us to use the equipment is pretty expensive. It's $5,000 a year to have the software and maintain it. It's for something we're going to do twice a year. There's an outfit we can rent the equipment, rent the software. It's not the most efficient way to do things, but no, it's just things like that. Just the cost." [#5]
- The owner of a majority-owned construction company stated, "There was paint issues, and some of the resin to make some of our traffic control devices has been a little harder to get, guardrails a little further out. We're still getting it, and we're not getting... at least in our industry, they've honored pricing anyway, where I've heard in some, they haven't honored pricing. At least they've honored our pricing that they quoted us for guardrail materials and everything like that." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I think we were seven years into our business, and we bought faulty asphalt, and we laid it and we didn't get [the

correct] densities. And so, we had to pull out the bad asphalt and then the plan was to repave it. And the contractor, the general contractor pulled the contract. So not only did we not get a penny from that job, we had to pay two suppliers for the product. we almost went under. It takes quite a few years to recover from that. … They didn't cover it at all. So, because you have to have, oh, there's a name for it. Our insurance didn't cover that. And, say you're a home builder and you purchase the lumber package, and they deliver it. And then a tornado comes through. You can have coverage for that. But it's pretty hard when the product is down. We did hire an attorney and go after it, but nothing was recovered from that either. There was an agreement, and it was a mutual agreement, but no monetary value was recovered. It was a lesson learned to us. And what we learned from it is we do not want to be subcontractors. We want to be general contractors and that's what we are. Because we will not take advantage of our subcontractors, like other GCs take advantage of their subcontractors." [#8]

- The owner of a majority-owned construction company stated, "I was wanting to do forestry work. I'm just going to explain to you, and I found out my equipment I own is not big enough for their requirements, so I'm looking to purchase bigger equipment in the future here. Have you tried to go out and price equipment? Price of equipment has jumped up about 18%. And I've learned from past experience, I bought a piece of used equipment and... Yeah, guy lied to me about it. It only had 200 and some hours on it, but he abused it so bad. It was covered up, but it cost me over 10 grand to get it fixed, and I thought... That's why I shy away from trying to buy used equipment. I'd rather bite the bullet and buy new equipment, but right at the present moment, it's very tough to find. I mean, you got to get on a waiting list. I talked to a friend of mine that sells equipment, and he said that waiting list is out over a year and a half right now to get new equipment. That's why I want to wait to get signed up with the Small Business Administration and see what kind of loan I get, then start putting some bids in for some equipment, new equipment. I just bought a cargo trailer for hauling, an enclosed cargo trailer. All right. For example, having it custom built, and actually it's being built in Twin Falls, Idaho. It's closest place around I could find to build me one. And they said possibly I could get it in 12 weeks, but if I'd have bought this trailer two years ago for COVID, it would have been about $5,000 cheaper. It's just because of materials, getting materials to and from, from the distributor to the manufacturer and everything, and just escalating price. The increase of commodity, the increase of transportation and everything, the fuel and so forth. I would've been quite a bit of money ahead. Fuel's gone up almost double. Diesel fuel has gone up almost double, so that there is a big markup right there you have. That is a big expense in the dirt work business. It's diesel fuel, maintenance. A lot of maintenance. Working in the dirt can eat equipment up if you're not careful. And when I found out my equipment, even though I have... I'll give you an example. I got the next to the biggest skidster that you can buy. I'm sitting there reading some notes I had taken, and the next size bigger is... Only difference in my machine and the machine that is the biggest at that time, it's made 10 years ago, is six horsepower. But according to them, that's not big enough, so it's like, 'Wow.' And then I have a five-ton excavator. Well, you need a 20-ton excavator." [#9]
- A representative from a Native American woman-owned construction company stated, "We have a labor and supply shortage. Right now, I have two paver machines one has been waiting for a part for a month. I cannot get the part in. It is the main equipment for paving." [#AV206]
- A representative from a majority-owned construction company stated, "Challenging in Eastern Montana. We see the same supply issues everyone is going through like availability of materials,

long lead times, price increases. I am not aware of any as I am not familiar with our history there." [#AV218]

- A representative from a majority-owned construction company stated, "It seems the market is strong. Billings and Bozeman are good areas of business. Materials are a bit of a struggle at times." [#AV219]
- A representative from a majority-owned construction company stated, "I would say that material is one thing that is getting hard to come by." [#AV241]
- A representative from a majority-owned construction company stated, "It's hard to get people/workers and material." [#AV318]
- A representative from a majority-owned construction company stated, "Right now it's hard to get parts for repairs on equipment or finding equipment at all." [#AV322]
- A representative from a majority-owned construction company stated, "You can't get workers and supplies are hard to get and we can't control the price. Most companies won't give you a definite price because they don't know, because their suppliers aren't telling them, and they don't know when it's coming." [#AV332]
- A representative from a majority-owned construction company stated, "It is favorable to start right now if you can find the materials and labor." [#AV335]
- A representative from a majority-owned construction company stated, "Supply chain issues. Labor is difficult to come by in the Bozeman and Gallatin Valley areas." [#AV17]
- A representative from a majority-owned construction company stated, "Products are getting out of hand price-wise. Everything has doubled or tripled over the past three years. Fuel costs are crazy right now." [#AV27]
- A representative from a majority-owned construction company stated, "It's hard to get new business because there are 20 people in my field, and I don't have enough revenue to buy better equipment to compete with the big boys." [#AV38]
- A representative from a majority-owned construction company stated, "Problems with supply chain, materials aren't [available]." [#AV41]
- A representative from a woman-owned construction company stated, "Employee shortage, material shortage [both are problems]." [#AV70]
- A representative from a majority-owned construction company stated, "[We've had] supply chain issues and material costs." [#AV78]
- A representative from a majority-owned construction company stated, "I think that we can obtain work. The biggest problem is receiving building materials needed to do the work. That's the biggest problem we've found in the past two years." [#AV80]
- A representative from a majority-owned construction company stated, "Getting materials and products to do the jobs. Getting equipment like dozers and trucks. Parts, tires. Liners, pipes, fittings valves. The lead time is tremendous. You are supposed to do jobs you've been awarded, but often can't start without materials." [#AV81]
- A representative from a majority-owned construction company stated, "Finding help, and supply chains [are two big issues]." [#AV92]

- A representative from a focus group consisting of prime contractors stated, "For instance, if you wanted to buy a new loader right now, you're looking at minimum nine months out. We tried to buy a new crane, we were on a waiting list for one specific crane in Texas, we were one of seven contractors waiting for it. And each crane around the United States right now, that's how hard it is. It is a brutal market. And it's not, 'What's your best offer? What's your best price? What can you do for me?' It's the opposite, they want the best offer from the contractor. And so, there's bidding wars for equipment right now, trying to get that stuff. But materials are a big deal. We bid a job down by [city]. Gosh, I want to say it was in end of October and we're not going to get structural steel until June of this year. So, I mean, structural steel, nine months out, trying to find pipe pile and all this stuff, big lead times. And it goes all the way back up to New Core, so we're all beholden to the Buy America provision, which I'm not saying I disagree with or agree with, this is what the rules are in the United States, especially to work on a federal job. We have to buy materials that are made in America, and then there are melted and manufactured in America. So, it goes all the way back up to the plant. So, you got New Core Steel, which is one of the biggest, if there's delays from them, it trickles down to everything. So, if they can't get the steel melted and plate made to go to the manufacturing plants for them to weld everything together and build beams, then for them to get trucked up to Montana to be installed and then obviously trucking. If you're not aware of a trucking is a huge issue in the United States right now, trucking prices have increased and trying to find people to actually move material is extremely difficult. So, you got a lot of variables that go into getting that steel on our job site. And I don't know when it's ever going to end, they're back ordered so bad, in my opinion, it's going to take years and years for them to finally catch up. And I don't know how you relieve that because right now they're injecting billions of dollars into the highway bills so that all these states are getting millions and millions of dollars. And I think Montana's going to see specifically a 20% increase for the next five years of the MDT highway budget. We're going to be building more with less, in essence, less equipment, less guys, less materials. It'll be very interesting to see how these next five years play out." [#FG2]

8. Prequalification. Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Sixteen business owners and managers discussed the benefits and challenges associated with pre-qualification [#1, #13, #14, #16, #2, #23, #26, #27, #28, #29, #3, #30, #33, #4, #5, #8]. Their comments included:

- The owner of a majority-owned construction company stated, "I think the statement pre-qualification process for bidding. [Prequalification] that you're bidding and if you have the resources to bid it. You know what I mean? As it is right now, anybody can bid any type of work without having any knowledge of it. Wyoming has a pre-qualification process where you're allowed to bid certain jobs. You're not given a bid envelope until you submit, and they accept knowing what work you have on hand, and what's your maximum capacity is. The State of Montana has nothing. It makes it harder. With the state not having a pre-qual process, you don't know who's going to be out there and whether or not they actually know what they're doing or what the work is. So, it's dangerous thing. I mean, we could go out there with it, put a bid together with the correct number that we feel comfortable with and can get the job done with, and we could lose the job to somebody who doesn't know what they're doing. Just threw a number out there, is way low, and then now we don't get the work or any anticipated profit from

it, and the state's going to be out money because they're out. That guy's going to not finish the job or go broke or go [bankrupt] and they're going to be costing more to get it done. There's more liability, more risk. As a subcontractor in Wyoming, you can probably give a price to anybody you want. As a prime contractor, you can't get a bid envelope until you've been qualified. And I know the State of Montana has run into cases where they've accepted bids from the low bidder, which is a new firm and the firm's gone broke. … Sometimes the state and federal government have the best intentions. And I don't remember the specifics of it, but we bid that MATOC [Multiple area task order contract] project in the park. We were second place bidder, and the low bidder on a $32 million project was a guy from California who was a small business. And the biggest job he had done prior to that was less than $3 million. So Federal Highways had this MATOC, which they pre-qualified all these contractors, but they had a small business set aside which they put two small businesses in there. So Federal Highways, this guy bid it, and I'm not sure how he got a bond, but the bond company ultimately paid the price. He bid a job so much over his head that he didn't know how to manage it, but ultimately, they broke a small business because of what a program they were trying to implement." [#1]

- The owner of a majority-owned professional services firm stated, "But they go about acquiring contractors a little differently, I think, than MDT. DNRC releases an RFQ, so a request for qualifications. And that can be good and bad. Right? So, if you haven't done any work, similar to what they're asking you to do, how do you break into that market even if you've staffed up and gotten equipment and everything else? If you haven't done the work before, how are you going to convince them you? The thing about that whole request for qualifications thing is it's, they ask you how many person hours do you think it will take to do this job? So, they don't ask about a price, they ask about person hours. So, it's a really tricky way of testing the waters on what different consultants may end up fitting for that project. When I was first looking at it, I just thought, okay, well, this is how they weed out half of the competing consultants. And then so after you do the RFQ they score you with a number of points. And so, they take the top two consultants and then they say, okay, how much you think this is going to cost." [#13]
- The owner of a majority-owned professional services company stated, "Federal Highway work is very technical, it's very challenging. There are only certain contractors who will do that kind of work. And in fact, some of the work that we do is what's called a MATOC list. So, they only will accept bids for Federal Highway work from four or five contractors that have work history with Federal Highway projects, doing Federal Highway type contracts with the requirements for that construction. And you become part of a team. … Inside Yellowstone National Park, those are a little different. They're generally not open to open contract bidding. They're more quality-based selection by the Federal Highway Administration. So, I'm not actually part of the MATOC list. And I don't know exactly what the MATOC list... what the acronym stands for. But we put in with contractors who are on that list. So, for the Yellowstone National Park system and Glacier Park, there are only four or five companies who are pre-selected to be allowed to bid on that Federal Highway work. And so, because we provide a special service inside that type of work, we get contacted by contractors that do that kind of work. And a lot of engineering firms, they won't do that work. It can be tough. It can be tough on your people. It can be highly stressful. We're not at home. I'll be gone six, seven months out of the year. And I'll come home maybe once or twice a week or a month rather, and just be home for a couple of days. So, it's tough work, it's pretty demanding, and it's stressful." [#14]

- The Native American owner of a DBE-certified construction company stated, "You fill out their application about what type of work that you're interested in, and what type you're experienced in, and then they'll ask for past projects, et cetera. It was a little difficult, at first. The big thing that was difficult, if some projects come up that was a little slightly off of what you normally do, you had to kind of prove yourself that you could do it by your history, a little bit. And digging that stuff up sometimes is a little difficult, because if it's new, how can you have any experience on it, without actually getting it to perform, and get your experience?" [#16]
- A representative of a majority-owned professional services firm stated, "I would say that certainly for smaller firms and for newer firms, the prequalification method is a lot harder to break into [than] for the firms that have been working with MDT for a long time. And it seems to be even the larger firms, you know, there's really no issue going after it as far as the time commitment and the money commitments. I know even some larger firms that have tried to break into the prequalification that have had a hard time just without that past experience working with say the MDT. And so, they have had some issues breaking in because of that. It's the past experience working with them. And so, that can definitely be a barrier for certain large and small firms, really. I wouldn't say just small. Just kind of proving yourself is the tough part. If MDT hasn't had past experience working with you, they're a little bit more hesitant, I guess, to rank you higher than the firms that they've been with for decades. Now working your way up to being one of the top projects to get selected, that is a lot. That is more difficult, really. So, I know one state agency that we've tried to be pre-qualified with, we're always being pre-qualified, but we can never work our way up because you can't work your way up unless you have passive grants with them. And so, that's a challenge is to figure out how do you get that? Most of them when they get pre-qualified, even if they don't say they're ranked, from what I found, they really are. So, they may not say they're 1, 2, 3, 4, 5, but I guess I'm not aware of any that really don't actually... They really probably rank you. I mean these agencies and local governments and whatnot, I mean, they like to work with people that know their way of business, they know how to operate in it. And I think the more, again, obviously the more you work with them, the more you build those relationships and experience that, you know, really puts you a little bit higher on your list of pre-quals." [#2]
- The owner of a WBE- and DBE-certified professional services company stated, "I think as long as they're flexible with what meets that criteria. When they're like show that you have experience doing a $10 million project, that would be difficult. But show that you have experience doing aviation design, that feels reasonable. If I was running an airport project, I'd want to make sure that who I'm hiring has been on a team before that's done- Or maybe someone else has done a $2 million commercial building, but they've never done an airport before. And so, I don't know. I think as long as it's flexible enough or the wording is showing the most applicable experience that you have to this project, which will be a $2 million airport design, then I can interpret it for myself and say, okay, well my most applicable experience is this or that, whatever it is. So, I think it's important to have prerequisites because that actually helps me filter what I am going in it for and where I have the best chance. So that's fine. I just think as long as the language is such that it's accessible to people." [#23]
- The owner of a majority-owned construction firm stated, "I just don't understand how are you going to do something like that? How are you going to prove to somebody that you've never even met before, that you know what you're doing? You have to have something, a webpage or something that actually proves to them that you actually have a real business, that you actually

can do this stuff, you have pictures of the work that you've done, you have a list of stuff on SAM. You have a sheet with SAM that describes what you do, the companies that you've done work for, this and that, and all of that information is there for them to look at. So, I mean, what else do they need to see? I mean, what else do you have to prove to them? Here's a guy that's been in business for a hundred years. A hundred years, man. I know everything about this business. I know more than most of my competitors that have a lot more work. It doesn't seem to be about that, though. I don't know what it's about, to tell you the truth anymore. I bid below cost on jobs just to see if I would get them, nothing, and when you bid below cost on a job and you don't get it, something's wrong here, man. I just ran a little experiment to see if you can get anything." [#26]

- A representative of a majority-owned professional services company stated, "A little bit, I guess, with MDT specifically, I think we're not as... We can't show experience on a lot of that because we're new and it's kind of difficult for us to get into that type of work. We've done a little bit of work with MDT kind of indirectly, but for us so far, it's been hard to bridge that gap because there's a lot of other companies that have already done a lot of work with MDT and can show that experience. To me, it seems like you've got to kind of have a niche that others maybe don't have, to try to find a specific thing that other companies can't show, even though they've worked with MDT forever. Based on conversations with them and just my understanding of it, it seems like that's how you would have to approach that. I guess it would be nice if there were some projects, maybe even if there were smaller ones with MDT that weighed a little bit less on previous work with MDT to where it might give some of the newer, smaller companies, a shot at some of those projects. I understand there's complex projects that it's absolutely necessary to have a very experienced... Somebody that's worked with MDT forever, but maybe there are some types of projects or smaller projects or whatever that maybe they could open it up a little bit to firms without experience just to get them in the door a little bit to get them a chance to work with MDT. I guess I don't really see the need for it typically. You can read the RFQ, the request for qualifications, the request for proposal, and it pretty much outlines what the entity is looking for. So, to me, it seems like that would get flushed out in that process and so pre-qualification wouldn't be necessary." [#27]
- The woman owner of a DBE-certified professional services business stated, "It's great because it extremely limits the amount of time you have to put into marketing and proposal filling. I like the pre-qual list. The agencies where it's a brand-new thing each time that's then we need a large prime to carry the weight, because we can't put that time into stuff that doesn't pay. Too much overhead. … The pre-qual list is great. We were trying to do the GSA schedule to do a similar thing and just horribly failed at ever making it work. It was too big a hurdle, whereas the MDT pre-qual list is easy." [#28]
- A representative of a majority-owned professional services company stated, "It's a big effort. The marketing ... How do I put it? Again, same thing, we're talking little, tiny firms of 10 people competing with firms of 1,000 people who have dedicated marketing groups, that's always a disparity. That's always going to be a problem when you're ... you're judging a company more on their marketing ability than their engineering ability. The second thing is that we do the two-year qualifications, but then, when we actually come around ... they come back around to do term contracts and other work, then we have to do it again ... which is a cost. I mean, for a smaller firm, it's a big cost. So that would be better if you could combine it or pull maybe the term contracts from the evaluation, that two-year evaluation period, instead of making people to

do that again. I don't know that there's an understanding of how much cost this has, because we hired an ex-MDT employee and he's like, 'Oh, we thought you guys just copy paste everything.' Like, 'No, we take tons of hours, and we think through every one of these,' and so that would help for the, again, smaller firms. I don't think that's a significant cost to a big firm." [#29]

- The Native American woman owner of a DBE-certified professional services firm stated, "You know, I have to say that because I have a person in MDT that actually when she came to MDT and became the right of way director or whatever, the right of way person is. She's right under the director, the guy. So, she actually hired me, and I never could get in with MDT before that. And I tried for years. Probably 20 years, because let's say she worked there for almost 30 years for the highway department now. So, showed me how to do all the paperwork to get the prequalification. Because I already have the... I had everything; I just didn't know how to present it. And she was very instrumental in helping me get all that done. Otherwise, I probably would never have got a highway job." [#3]
- A representative of a majority-owned professional services firm stated, "I have not seen any barriers because they spell out their requirements fairly clearly of what either your firm or your people need to be qualified in order to perform the work. I think it allows an opportunity for the owner to have an understanding of how many firms are available that could perform that work for them or specific work for them. And it also allows the owner, the ability to inform those firms when future work is coming out, that might meet those pre-qualifications." [#30]
- The owner of a majority-owned professional services firm stated, "It depends on how they decide qualified is and what criteria they use. I have seen, for example, in my business, we have more regional business multi-state than in-state doing the whole state, but some people will say, 'Well, we want just the state of Montana, and we don't care that you did Montana, Idaho, Wyoming, Oregon, and Washington.' Or it doesn't seem equate. If people have good criteria that enables you to demonstrate that you can meet the minimum standard of what they consider acceptable, then I think it's fine. If it's, essentially, not done well, then it basically gets rid of a bunch of good customers, or potentially good service providers that you wouldn't want to do. Let me tell you, just because you haven't done anything for the state before or done anything with the federal government before doesn't mean you're not really good at doing X, Y, Z. Do you want to rule those guys out? If you're thinking about minorities and so on and so forth, or women-owned or guys who are coming out of the military, unless you're giving them... if you're essentially not recognizing these guys might have real skills, but they may not meet your criteria, is there a question with your criteria? I think is a pretty good idea in the sense that they have a bunch of agencies they know they can do the work, they know that they're in a certain price range, they know that you can call them up and... if you're in Bozeman, you can do all of Southwest Montana, you can go out to Billings, but maybe you can't go up to the Glacier Park area or the Flathead or something. Having somebody handy that you can call on really quickly might be really advantageous when you have a cumbersome process, and that you know that you're going to have stuff up there. I can see when you have circumstances where it's good to have a bench, or a bunch of people that you know that you can go to right away and send something out to. If it's either qualified or specialized work, it might be an okay idea." [#33]
- A representative of a DBE-certified construction company stated, "We pre-qualify in North Dakota and Wyoming because we're an out-of-state vendor. It's time consuming, especially the Wyoming one. It takes me a couple of days to put everything together, but Montana, I don't,

again, work in state vendors so... We do the bulletin board material, but that's about all we have to is I make sure that bulletin board material's up to date every year. It [can] be a problem if you're new to it." [#4]

- A representative of a majority-owned professional services firm stated, "If a firm hasn't done any work with MDT before, that is a barrier. Because if they haven't done any work for them, they're going to be at the bottom of the list and they're never going to get shortlisted. That one, I see that process as a barrier for startup. It's kind of interesting." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "We used to work for BNSF, the railroad, not work for them, but we were, we had done that. We kind of vetted with them if you will. And then there was a list and then they would contact you. And then our... the guy that really liked us, quit BNSF, and moved to Bozeman, so we kind of lost that in. But, no, that would be... that would be really nice to be able to be a part of that. … I would love to be able to have these companies... somebody tell me, 'Hey, you need to go to this part... place and get pre-qualified.' I'm going to do whatever I got to do, because that's how I got into 8(a), I mean, it took three years to get into this program, so I'm not afraid to do the paperwork to get in, but I don't know what exists out there. I don't know how to do it, I guess. Well, the prequalification I think could work for any organization, but I don't know if some of these startups would be able to qualify though. So, that might not work for startups, because they do want so much in bonding and stuff like that. Whereas a startup company might not be able to have that." [#8]

9. Experience and expertise. Interviewees noted that gaining the required experience and expertise to be competitive in the public sector can present a barrier for small, disadvantaged businesses. Experience is often compared to the requirements for prequalification [#1, #2, #23, #24, #3, #30, #35]. For example:

- The owner of a majority-owned construction company stated, "You can see when you got a new subcontractor that isn't familiar with the industry. Either they'll have a whole bunch of conditions that are kind of really unrelated to the work or they'll have no conditions where they should be specifying something. If you look at our traffic control quotes that we get from [small companies], and the people in Billings, I can't think of their name. They know what conditions they need to put their quote. And it's because of familiarity with the spec book. We call sometimes the Bible. The state could do training along those lines. It'd have to be specific to the type of work they're doing, whether it's traffic control or fencing or paint or whatever it is. But what we love to see is quotes with no conditions, but no subcontractors should give us a quote with no conditions. If they give us a quote that doesn't have the right conditions... If they're a fencing guys, they should say it's $1,500 per mobilization. If they don't say anything, it's like, 'Okay. You got 10 moves on this job.' So, we schedule them at our convenience. And I'm not saying that we try to throw them under the bus. There's no doubt that that's an area of just putting the quote together in the right conditions then MDT could help them with. These new businesses should look at really simple, quick projects. … A new DBE shouldn't even be putting a quote on that [a two and a half, three year-project] because they don't have the experience to understand the escalation and stuff. They should look at a project that's going to take somebody a month or two. So, they're in there quick and out of there quick, and they can establish a relationship without being buried. When we bid a job with any owner, they've got their specifications. And by virtue of bidding the job, you've kind of accepted their specifications, even if there's some level of defects, even if there's better ways of doing it. So, the familiarity with the

agency you're bidding is very important, that's why I said they should really work under somebody else first and get experience. We're working on a job right now that has two conflicting specs, and the state of Montana is wrong if we want to fight it legally, but they said you bid it, doesn't matter if the specs conflict, you bid it. And I know how'd that play out in court, but you can't go there, so you have to understand the specs when you're bidding it. I mean if you're right out of college. And you get certified as a DBE and you're a civil engineering and you think, 'I'm going to do bridge rehab work.' Well, there's this thing, the standard specifications with all the standard drawings that go with them, and the special provisions. It takes years to understand that document and what's really buried inside of it. So, if you're completely new, more than likely you're going to fail. But if you start out working for [a major construction company] on his bridge crew doing laboring or whatever, or maybe as an engineer for them and see what submittals have to go in, see what the specs are, learn those things on somebody else's dime, and then start your business. That experience you gather up front is invaluable. It cost my dad hundreds and hundreds of thousands of millions of dollars to train me. It wasn't cheap. I screwed up one job when I first came to work for him. That cost $400,000, one mistake when I was bidding. It was a job in Wyoming. But education is expensive. And most of us learned through the school of hard knocks. So, work for somebody else and learn, and then start your business." [#1]

- A representative of a majority-owned professional services firm stated, "But I'd say having past experience really is what you need to be competitive, have the resumes and have the experience of doing similar types of work, and that and being able to sell yourself well. And that's one of the big things to be able to really sell yourself to the different clients that you are the best fit for them that's the barrier, I guess, is having to experience to be able to do the work. And so, we found ways to breach that barrier. I'd say a smaller firm might have a little bit more difficulty with that if they don't have the staff, the employees on staff that can provide that experience. I know that MDT in particular, they do look at the different trainings that people have done. And so, that is something they do look at pretty closely from what I've understood from them. But that's just a part of it. I think they want to see where you use that in the real world." [#2]
- The owner of a WBE- and DBE-certified professional services company stated, "I think there's a time limitation. Like I mentioned a little bit earlier, you have to hit the return on investment. And at this point, the more I invest without any return, the more of a loss it creates. So, I would say the biggest barrier is that my time is a profitable resource for my business. So, I can't really spend it pursuing things that yield no return." [#23]
- The woman owner of a majority-owned construction firm stated, "We weren't very good at it, but it was just a work in progress. And, I guess, that's just all about education and you're either going to get it in college or you're going to get it on in the workplace. And yeah. I think we did okay with that one." [#24]
- The Native American woman owner of a DBE-certified professional services firm stated, "When you come in as a total, capable, know the ropes and know everything about something, yes, you're going to find it easier to get jobs. Then when you come in as a newbie, and you don't even know really everything, then it's a real struggle to find to get in. … When you're new to the business, a lot of that stuff is barriers to you. Because when you're new, you don't know. You don't know what you don't know. That's the whole problem. You don't know how to ask the right questions." [#3]

- A representative of a majority-owned professional services firm stated, "The RFPs are generally open, they're public solicitations. And so again, it kind of boils down to people. Making sure that they're the right people to perform the work for the client." [#30]
- A representative of a majority-owned professional services firm stated, "I guess that [experience and expertise] could be somewhat of a barrier." [#35]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Sixteen interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#1, #11, #12, #16, #18, #22, #24, #3, #4, #5, #6, #7, #9, #AV]. For example:

- The owner of a majority-owned construction company stated, "Montana's too easy. Too easy to the point where there are people who get the licenses that really aren't qualified to do the work. There should be a pre-qualification process." [#1]
- The owner of a majority-owned professional services company stated, "Yeah. You go and you register each year with the state, so that pretty straightforward and Valley County or even the city here. So those things are pretty straightforward." [#11]
- The owner of a majority-owned construction company stated, "Nope. There's just he and I, and we have our own equipment. We kind of … from the gravel portion of it because of the market, I guess you might say for one thing. Just to keep our quality permit going annually, it was an ... Somebody who's not making millions of dollars or hundreds of thousands of dollars it was a high amount of money just to keep our permit open. So, we let it expire or go away, we canceled it. So, for a long period of time then we didn't use our rock crusher. Safety training and stuff like that. And then you have to go to the Department of Natural Resources, and you get hazard reduction agreement with them that's says that you're agreeing to clean up your job after you've begun it. And then you can go in and they issue you a permit, it costs like $25 and issue you a permit. And then you can go in and log and then you do your brush piling, and you have X amount of time to go back and burn that brush. And you go back and either burn or grind the brush or do what needs to be done. And—for street training too, to be stewards of the [forest] we do through Weyerhaeuser, or we do through the state, and they have classes on SMZ training and BMP training and so on and so forth. And then once you're done, you let the DNRC know that you're done, and they will choose whether they want to go out and inspect a job. And if not, sometimes they do, sometimes they don't. And then you can file for the HRA to remain open. So, like, if it's on our home place or a place that, you know you're going to go back and do some more logging, you can say we're going to leave that open in case we want to go back. Or you can have it closed, and then they will refund your hazard reduction money that is deducted out of each sawmill check that we receive." [#12]
- The Native American owner of a DBE-certified construction company stated, "You have to get registered to do any work for the state or the BIA. You have to be registered with them prior to completing the work. But that registration is pretty simple, straightforward. And each year, you have to resubmit for it, but it's very simple." [#16]
- The owner of a majority-owned construction firm stated, "No. So, you have to have basically, business license from the Department of Labor. I think that's 35 or $50 a year. Some

municipalities will require a local business license. They can be 30 to $200 apiece. That's just kind of, one of those got to see where they're at type things." [#18]

- A representative of a Native American-owned SBE-certified professional services firm stated, "The state license is always a pain. We work in so many states. The whole taxation. The business setup stuff. State, local tax type stuff, our employees, your leave, all those kinds of things. Bereavements... Those are a pain to navigate because every state's different. And that's what states do, right? They have the right to do whatever they want to do. We still don't have everything ironed out because the state again, when they shut down, nobody's in the office. So, you've got to try and navigate sites and get what you need to. And nobody responds to you. There is terrible customer service in state like taxation and state agencies to get your stuff done. It seems like it should be a lot simpler, but the tax office of the state is different and small. And then the business licensing is different. None of them talk to each other. It seems to me like all that should be unified and Montana's no different. It's easy to get the business, but then all the other stuff you got to go somewhere else and then you got to go. It just, that there's too many steps." [#22]
- The woman owner of a majority-owned construction firm stated, "Permitting is very difficult in Cascade County. I don't think that sometimes the people that work at the county level or at the city level, regarding permits and licenses, really understand what their job is, how to help people obtain the permits and licensing." [#24]
- The Native American woman owner of a DBE-certified professional services firm stated, "Like on other reservations you would go through their TERO [Tribal Employment Rights Office], they're, you know. And I was certified in TERO on several reservations, but it just didn't work out. It's one of those things also is I didn't do well in my marketing because I went to the TERO and MDT or anybody, any prime, goes to TERO to get their jobs to fill if they don't have the people to do it [at the] Tribal Employments Office. Which if you work on a reservation you are required to use Native enrolled descendants, but they don't have to be... And when I hired—I had to go through TERO also. So, when I have a job, then I go to TERO and I tell them, 'This is how big my project is. This is what I'm doing and I'm looking for truck drivers.' So, then they would send me truck drivers. I have to prove or show that I'm not hiring somebody in a critical position of somebody that's going to make all the decisions. I'm hiring because I have the three people that I need for the... Because TERO wants people to work in all levels, which makes sense. So, everybody has to go through TERO on a reservation." [#3]
- A representative of a DBE-certified construction company stated, "I handle most of the licensing, it's not anything too cumbersome or difficult. And then, I usually electronically file, or I mean, electronically save the different licenses that we have, and the guys can just pull those for the bids. So, we try to streamline the process as much as possible, but I don't find the licensing process to be any too cumbersome as far as statewide. I mean, certain cities have different requirements, so we have to... If we're going to go work in Bozeman per se, we have to have a city license for going to work in Bozeman. But it's generally a single sheet of paper and check for X amount of dollars, and off it goes. It's not anything terribly difficult, and we'll generally only do those if we know we're going to get a job in that specific area, then we'll go ahead and license that." [#4]
- A representative of a majority-owned professional services firm stated, "I suppose licensure and insurance might be a challenge for some of them." [#5]

- The owner of a majority-owned construction company stated, “That wasn't bad either, but there again, we did have a little help along the way. The local development things help, but also there was some prime contractors that we knew, that were a little bigger, that we could ask questions to, and they kind of steered us in the right direction. I think everybody needs that a little bit, someone to help them out a little bit and kind of put them in the right direction. People don't mind helping, I think, if you ask. It's hard for someone just starting out, though, to even know who to talk to at workman's compensation. If someone could just kind of give you a lead, and a direction, it's a lot easier than trying to do all this on your own.” [#6]
- A representative of a majority-owned professional services company stated, “In order to do the work we pursue, our lab has to be accredited much like MDT, where we go through a rigorous federal accreditation cycle every two years through AMRL, which is now AASHTO resource where a federal agency we pay to do PSP samples, performance. They're basically ... they send us random samples. We are part of the proficiency sample list where they send us random stuff. We test it, submit the results and they tell us how we're doing, and we're rated on that, and if we mess something up, we have to correct that issue. We are all on board and that is a requirement of MDT in order for us to do our work, whether it's in the field or in the lab. This goes for also Military Department of Defense, or FAA, or Air Force. Any federal agencies require an accredited lab through the AMRL and CCRL process, which not many ... there are ... that's one of the unique things in Montana. There are not many testing labs and most of them aren't accredited, but it's a real niche thing, and it is really burdensome and cost expensive. It's basically our business license. … Each time you want to be accredited in a new test, you have to sink some cost in the new lab equipment or training and then get into the proficiency sample for that reason. And so, the traditional saying, ‘It takes money to make money.’ Is true in the sense, but if we're accredited in that and we're listed on AASHTO's website or Army Corps website. A lot of contractors focus on that because if we're on those websites, they know they could get the testing and just ... it's a good advertisement for us too. We're acknowledged by the Army Corps and MDT and all those guys, that we can do it. And our tests are within industry standard. It is burdensome, but it is what it is in order to be accredited and be acknowledged by the federal. To be an engineering firm, if you're going to start your own company, you would have to technically be a professional engineer. And so, there's obvious things you have to do for that. And then you have to get your business license with the state saying we practice engineering and supply them with the list of all the current professional engineers under your house, under your roof. And once again that's kind of handled by corporate, but that's my general knowledge of how we have our business license to perform engineering services. And, but each one of our... If you wanted to run a materials lab, the head person needs to be a professional engineer. That is a requirement part of the accreditation cycle.” [#7]
- The owner of a majority-owned construction company stated, “Firstly I'm working on trying to get my electrical license in Montana. … I got to step backwards and study the residential and commercial so I can take a test and be licensed in Montana. It's just like you don't just walk in and take that test, because if you flunk it, you don't pass it. You got to wait another whole year, and then you got to forfeit $240 you paid to take that test. You got to pay another $240, and you've lost a year. So, you buy a lot... There's a lot. Since they've changed the code from... I don't know if you know how the NEC works, but what it is, they re-revise it every three years. It's updated. NEC is National Electric Code Montana is still in 2017. Most of the states are already in 2020, just because it's been out over a year and two months. They've already adopted it, so I'm

studying here for 2020, and I'm trying to get a hold of them to find out the other day. It's like, 'Hey, I need to find out, when you guys are going to adopt the 2020 code?' Because I got this 2017 books and everything, but I'd rather just move forwards and get... Because there's been so many huge updates it's the electrical code in 2020." [#9]

- A representative from a majority-owned professional services company stated, "Yes, there is a thing call CBRE to comply to work at Exxon Mobil. It was a nightmare. It cost over $1000.00. The job total did not exceed $5000.00. In fact, we are part of a federal and state program, I don't know the name of it. Where we have a capability statement. In the Sheraton Hotel we attend conventions to get work for all entities." [#AV201]
- A representative from a majority-owned construction company stated, "Encountered difficulties specifically around licensing equipment and our assets." [#AV272]
- A representative from a majority-owned construction company stated, "Main difficulty in our town and district is that our planning board for permits and approvals are difficult to work with." [#AV51]

11. Learning about work or marketing. Fifteen business owners and managers discussed how learning about work is a challenge, especially for smaller firms [#13, #16, #17, #21, #23, #24, #26, #29, #3, #31, #33, #8, #9, #AV]. For example:

- The owner of a majority-owned professional services firm stated, "Years ago, we got a call, I think it was from Missoula, maybe it was Missoula City Parks, and they needed a survey and that wouldn't even have been on my radar. And so, we put in a proposal to do a survey for a future city park. We didn't get it because somebody else low balled it, but I wouldn't even have known that opportunity was out there if I hadn't gotten a phone call. Because I can't spend half my day, every day looking for new contracts that are popping up online. So, if they want to increase their talent pool, then reaching out, making a phone call only takes a couple minutes to put it on somebody's radar. Small companies don't have the resources to be combing the internet looking for contracts. But big companies, they have people dedicated to that." [#13]
- The Native American owner of a DBE-certified construction company stated, "Our local tribe does it too when they have their own projects out, they email us." [#16]
- The woman owner of a DBE-certified construction firm stated, "Well, we've been in this long enough, they just call us. We don't really have to go look for work anymore. We did at first, but it's a lot of telephone calls then. But yeah, no, like I said, thankfully everything's pretty much paid off and don't have to look for a lot of work all the time, so." [#17]
- A representative of a DBE-certified professional services firm stated, "I think that one of the barriers is that thinking about digital inequality and the digital divide, like a lot of rural Montana, Wyoming, places we work don't have access to the internet or not reliable access, so that's a big barrier when we think about marketing the work we do, even like the social media or blogs, websites, podcasts, all of that. So, I think that's unique to Montana. The cost is often like that's not funded. When you are a small business and you have a contract to develop one report, it doesn't include anything related to marketing or website development, so those all come from your bank account as a small business owner. So, it would be really nice to have funding that would support that." [#21]

- The owner of a WBE- and DBE-certified professional services company stated, "Marketing's a tough thing, right? Because there's no how to do it. There's no instruction manual for marketing. Marketing's all about understanding human psychology and showing up where people are going to find you. And with government contracting, you're not even, theoretically marketing wouldn't have a role because it's supposed to be objective. So, they shouldn't be responding to any kind of strategic influence. You know what I mean?" [#23]
- The woman owner of a majority-owned construction firm stated, "Only that it's just so expensive to do any news, any print or radio, but in today's world you can get on Facebook and that's one of the best ways to advertise, so we haven't had too many troubles that way." [#24]
- The owner of a majority-owned construction firm stated, "It's not that I don't know what I'm doing, it's not that I don't have any experience. Look at my website, you'll see some experience. I can understand me not getting big multimillion dollar jobs and this type thing, I can understand that, because I'm a small person. There's a lot of good work here in Yellowstone Park, I don't get any of that stuff. It could be just for something for two or $300 that they need, don't get any of that stuff there, nothing. So, I'm pretty much dependent on having to go out and make sales calls here, and run little ads and things like... I've never gotten any response from any ads I've ever run, none." [#26]
- A representative of a majority-owned professional services company stated, "Those large, large firms, they have marketing departments. Huge, huge marketing departments, that's all they do, and when you're talking a small firm, you're talking the same guy designing is the guy marketing." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "I did get a website. And DBE actually helped me. That was a really great thing because they hired, well I found a person that would do a website, and they paid him to do my website for me. Which was necessary. Like I said, back to that old thing where that's the last thing I wanted to do was do a website. … For instance, there was a job, this would have been several years ago. Probably 10 years ago, or whatever. It was with the BIA, so I know that should have been hiring people like me, on [my] reservation. It came and went; I didn't even know it was there. I had no idea how you would have even found out. Maybe that was when it was doing all some biz. But it was something that came on the computer, and you went in and looked at, it was a biz thing. I did not have time to go through all those. I just quit doing it, because it messed up, my whole email was full of these E-Biz, or some emails. That was, I don't know how you streamline old people to do jobs." [#3]
- The owner of a WBE- and DBE-certified professional services company stated, "We really want to get those contracts and be more visible through the goal-setting activities through the engineering firms and architectural firms on every project and we just don't know how we can become more visible. I've never found a DBE contract opportunity at all. I just don't even know how to obtain it, to be honest with you, unless you are in the DBE highway, transportation, and aviation, which we just got that last year, I believe, and so we are not a commodity within that. ACDBE just came naturally, because like I said, with WBENC when we got certified I just did DBE because it was just a natural fit and DBE program and WBENC as a representative, we worked together a lot in Montana and put together events together. It's so beneficial, but on my capability statement or in my five seconds feature communication with the customer, potential customer, I always notify my customers we are ACDBE certified. Perhaps since you are a tenant

of airport, we can provide this service to you, and I'll give you an example. Enterprise holdings, Rent-A-Car, was very excited to hear that and they wanted to work with us." [#31]

- The owner of a majority-owned professional services firm stated, "Just your own time. A lot of the times you get busy and... for example, we're rebuilding our website, but we'll rebuild your website before we'll rebuild ours." [#33]
- The owner of a WBE- and DBE-certified construction company stated, "I think that with the government, I think under 2,500, they can just pick someone. They can just call and say to do that. Companies will be calling to bid the site work on a project. And it's like, well, why don't you bid that entire project as a GC. She'll get calls from people in California. So, they're not even stepping foot in Montana and they're bidding this job. So, they're not going to do a lick of the work. And so, it's like, how did they find out about this job, and we didn't find out about this job? So, I do know things do fall through the crack somehow." [#8]
- The owner of a majority-owned construction company stated, "I even met that gentleman who is an engineer for the Lincoln County Road Department, and he told me they got some very sophisticated software. What they do is that these big companies we deal with, and he didn't say small companies, he said big companies. We upload all this software and send it to them, by PDF, I'm assuming that's how they get it. And then it shows everything in that bid, what you're bidding against. There's nothing left out in that bid or letting or whatever they call it. So anyway, I'm just sitting thinking, if you're not a big conglomerate company, you're not going to get this file from him, because he says it's real time consuming. And they only put it out to select contractors that can afford to do the bid and have the big equipment. And the message I got from this gentleman is like, 'We don't mess with small contractors. They're a waste of our time.' That's how I felt when I listened to him talk." [#9]
- A representative from a majority-owned construction company stated, "A lot of times you don't know the jobs are out there unless you know the right people. Not easy to find the jobs." [#AV18]
- A representative from a woman-owned construction company stated, "I do more private work. We don't see what jobs come through on the government side or their listings. They all get meshed in. On the government side, we don't see everything coming in, so the job is harder." [#AV102]

12. Contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Fourteen interviewees commented on personal experiences with barriers related to bidding on public sector and private sector contracts [#13, #15, #22, #23, #29, #3, #35, #4, #5, #6, #7, #9, #AV]. Their comments included:

- The owner of a majority-owned professional services firm stated, "Like I said about investing in new equipment, any work we would try to get with MDT would be survey related and that they would not allow. They would not contract with companies that weren't using the same brand of GPS equipment that MDT uses. I don't even know if that's legal, but they would say, well, we are running Trimble. So, the only way we can check your work is if you use Trimble and then send us your job files that are all Trimble proprietary formats, you have to have Trimble software to view it. So, this company owned by a descendant from Switzerland was, of course, really into

Swiss equipment and had all like a GPS equipment and MDT wouldn't even... There was no point in me pursuing MDT work because they weren't going to go with me anyway. I didn't have the right equipment. So, it's equipment that does all the same thing, it's just not the right brand. we only just now acquired, we traded in all our [old] equipment and got all Trimble stuff. So, we should be all geared up now to try to go after MDT work. But it was $100,000 investment. So, it's not cheap to switch systems." [#13]

- The woman owner of a DBE-certified professional services company stated, "The only thing that's come up is whether they can have a withholding. And when I discuss that with the DBE program, they tell me that the contractors are not allowed to withhold a percentage from their subs. And so, we've had to talk with contractors on a few jobs to just say, 'Hey, you guys aren't supposed to withhold a percentage from your subs.' Some of the contractors in their contract language say that as the project proceeds through and we are supposed to be paid as they get paid through a federal agency or entity or whoever, they're supposed to pay us for our work. And some of the contractors had clauses in there that say they withhold 5% until the end of the project. And then at the very end of the project, they will pay us that last 5%. And the DBE organization has worked with us as a DBE and said they're not allowed to withhold that 5% until the end. And so, we just work with them and say, 'Hey, I don't think you're supposed to be withholding.' And then they'll change their contract language." [#15]
- A representative of a Native American-owned SBE-certified professional services firm stated, "That is a huge challenge. And I don't care if it's native or not all small businesses run into this. And then a lot of times you do it for long enough and you can read if you know your industry, you can read a proposal and understand if somebody within your industry help write the bid because sometimes, you'll have crazy requirements. Like that make no sense to the success or failure on performing that contract but limit the pool that shallow the pool. And I think it's crazy. It's nuts. I mean the federal space is even worse because you're dealing with all kinds of different people, but I see that all the time. It's kind of the cost of doing business and there's too many rules I get it's again, risk. I would say it a hundred times, but it's a risk assessment and they're trying to limit the risk, but they also limit the people, which is part of the process for them. Instead of reading 50 proposals, then read two. So, it's a self-preservation tool, but it also makes it hard for us that are just starting and that's why I really rely on teaming. Because then a lot of times I can use that team member to fill some of those. We've seen them and we at times work in the security area like having to have security requirements to even have people on the contract. So, they have to go through a security clearance process and that's a federal process. So that's, once we clear a person and talk with a customer and they're hiring that person, then they go through security clearance with that company DHS is a prime example. We'll hire a person, we'll say, you'll make an offer letter. They'll accept it on Monday. It takes up to six, well, at least four weeks, sometimes three months for that person to get through the security clearance. And so, in that time we can't pay them because we can't bill them, but they've got that three months where they've got a job and they can't do any work. And so, we lose people all the time because the security process in the federal space is broken and it takes too long." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "So there was a bid, an RFP listed, for essentially that work, for maybe 500, 600,000 square feet, something like that. as I was filling everything out, it included a prototype space, and you often do a prototype space. Makes sense. So, the prototype would be like, okay, we're going to do 20,000 square feet and check it out and see how we like it. because they were going to do that 20,000 square foot

prototype within the space, the person who owned the bid, so the lead bidder had to have an architectural license, which we don't have because we do commercial interiors. And I do often bring in an architectural consultant for our work because that has to get fulfilled sometimes. But requiring the license on the bid actually ended up prioritizing people who don't have my specialty skillset. So, you could be a residential architectural designer and you could have filled that bid better than I did because I would then have to go out and find a small shop architect who wants to work under us for a teeny portion of this project. And the bid was worth a couple million dollars, you know? So, if I'm bringing on some older man architect who has his own business and he thinks he's part of this big hot team and I'm like, there's a ton of work here to do and your build out of this small prototype is a smaller percentage of it and you're not splitting this pie with me, it wouldn't go down very well. So not having the architectural license, it disables the ability to specify different expertise. It kind of makes it a catch all so that all of a sudden you have architects doing everything related to buildings and real estate portfolios when there are a lot of things relating to real estate portfolios that don't require an architectural license, especially commercial interior layouts and strategy. They do this thing where, when you are submitting your RFP, you have to check the box that says you will go and get the insured required for the project if selected. And there's like, if selected, do this, if selected do that. And I think it would be really helpful to say if selected, show proof of architectural licensure. Because then, rather than pre-hiring a contractor or an employee that I don't even know if I need, I can still submit on the project. And if we get picked great, I'll hire an architect, or I will subcontract a team it would be great if that could kind of work both ways. Like if you win the project, these are the licenses that you'll need to show. Because they have runners up. If I get picked and for some reason, I can't show proof of licensure to execute the tiny little prototype, then they can choose someone else. Especially for small business, well, any kind of small business, moving licensure to a must show proof of once selected, that'll reduce a huge barrier to entry." [#23]

- A representative of a majority-owned professional services company stated, "So, just from feedback I've heard from contractors, so this is secondhand, probably more than anything. MDT, by rights, has a considerable interest in finishing projects as quickly as they can during construction, and so, oftentimes, the contract days of a project are very tight. So that may or may not make a contractor go after the project, but they do definitely bid it super high, but that's got to be balanced with they don't want people out there forever causing disruption and safety issues, but that has been something that ... and we've been involved with MDT just recently on doing some contract time estimating through a sub consultant, and the MDT version of the contract time was significantly different than the contractor version. I think MDT is working on that, having some independent review by contractors, and trying to have a better understanding of what the industry thinks is an appropriate contract time. So, I feel like they're already understanding that and already addressing it." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "In the construction, I would say for sure. If you really don't know, if you're new to the business. Put it that way." [#3]
- A representative of a majority-owned professional services firm stated, "Sometimes that's a barrier. Sometimes that can be a pain, yeah." [#35]
- A representative of a DBE-certified construction company stated, "I think the biggest issue we run into is on the subcontractor agreements. They need like a total number of hours for trucking,

for example, is a good example. We have some of our own trucks, but then we will sub out to other trucking companies to haul asphalt for us to a project. And that can sometimes get to be a pain when the subcontract agreement wants the total number of hours that we're going to sub out to trucking company X when until we get on the job and we see what the requirements are or how many trucks he has available that day, it's almost impossible to tell. So, we're trying to put a number in there to satisfy the requirement when we really don't know, because they may only have two trucks available that day or those two days. So, they could only give us 20 hours of trucking a day or 40 hours total. We'll do agreements that we're going to set about a hundred hours because we thought we were going to have five trucks available each day. And sometimes you don't know that until the day of the job. Especially with the trucking is I think the biggest one. Striping is the striping, that one's pretty straightforward, but the trucking is all about availability. And we just don't know from week to week what our trucking subs are going to have available because they have other schedules that they have to keep as well. And schedules change, exactly. We have to shift a job and so now we're into another week that, well, they were going to be available this week, but we had to shift the job for whatever reason, weather, which nobody can control. And it shifted to a following week, now they've already committed to trucking. And then we're scrambling to make up those trucking hours with another company. So, then we have to quick get a sub-agreement with this company, sent off unapproved so that we can use them on that job, you know? And so, for something as fluid as trucking, that can become a bit cumbersome." [#4]

- A representative of a majority-owned professional services firm stated, "They [MDT] had a requirement out there to use a specific design software called MicroStation, which trying to find a good road. I've been looking for four years for a road designer that can operate that software. It's like finding hen's teeth. What we've had to do to land some of these contracts is partner with other firms and try and fill all those things to make us comprehensive." [#5]
- The owner of a majority-owned construction company stated, "With MDT, no, with the prime, they try to sneak some stuff in sometimes. We've gotten better at being able to review, and we have our insurance company review them. Sometimes that, even still to this day, can be an issue because they want you liable for everything, even if you're really [small]. It's like they're trying to put all that information in, which I think that would be hard for a smaller, less experienced company, right, if you were just starting out, because they could pretty much put anything on you, on there, and you want the job so bad, you're going to sign it. That's what we did when we first started. Luckily, we never got stung, but I can see it getting done pretty easily. Honestly, most of the primes now, if you go through there and scratch that off, and make them aware, 'We don't want to sign this indemnification unless it has something to do with our company,' they'll change the contract. But unless you ask... That's something we learned over 20 years, too. It wasn't learned in the first 10, I know that. And they're pretty good about it. That's probably good advice for someone starting out in these, is to have them [the insurance company, review the contracts]. That's what you're paying them for, they should review them for you. We'd never thought of that before either. There's some of that, a little bit still, even in this day. MDT stuff, they change so much that some things are starting to get hidden in other parts of the contract, where they're making it incidental to the work, and you weren't aware of it. We really have to watch that. We've been doing it for, like I said, I've been in it 20 years, and my two partners have been in longer than me, and we still miss some of that because they hide it so deep in the

contract, or in an incidental to this, incidental to that. Not big enough items where they're going to break you, but sure big enough items where it really can sting you." [#6]

- A representative of a majority-owned professional services company stated, "The one thing I would note and is, so the private sector, we use a lot of ACI and ISET certifications. MDT, we did have an issue getting the work where industry standard, our technicians are certified, but MDT acknowledges what they call the WAQTC program, which is essentially the same thing. But it's an internal federal training program that the state gives all their employees and technicians. We had to go spend money and get re-certified in the same things but under a different umbrella. So, we had to double up our training just to do MDT, even though we were private sector trained and qualified to do it. So, that would be kind of a thing that caught us off guard because we got the work and then they told us we can't do it because we're not WAQTC certified. And that was not mentioned in the bidding process. We felt that that's kind of, I don't know, unnecessary because we can go to an Army Corps accredited, but yet all our previous certs were not acknowledged by the state. So that would be one thing that caught us off guard I mean their program's good. But I would say that there's these other programs we take could be more rigorous, more challenging too. So, to say that ours wasn't as equal was... We did argue that but was not acknowledged." [#7]
- The owner of a majority-owned construction company stated, "I did find out from a gentleman that did do some bids for the forestry service, I'm using this as an example. Pretty much says one thing here, and then over here, this is what they really want, so he under bidded his job compared to what they want. He said, 'I gave them what was in the contract.' He said, 'They weren't very happy with me.' I mean, like I say, there's a little bit of interpretation, even though it's spelled out. And when I found out my equipment, even though I have... I'll give you an example. I got the next to the biggest skidster that you can buy. I'm sitting there reading some notes I had taken, and the next size bigger is... Only difference in my machine and the machine that is the biggest at that time, it's made 10 years ago, is six horsepower. But according to them, that's not big enough, so it's like, 'Wow.' And then I have a five-ton excavator. Well, you need a 20-ton excavator. There's a lot of things you have to ask. That's why I was asking you earlier about or explaining to you earlier why I want talk to the person, I want to look at the person, I want to see the paperwork, ask them questions. Okay, what happens if you want to change, or you don't like something I'm doing, or you find out y'all made a mistake and want to change something, there's a change of contract? That are the things I'm trying to clarify, and that's why I like sitting down with somebody one on one." [#9]
- A representative from a majority-owned professional services company stated, "The hardest thing right now is getting people. It's hard to expand because you can't get people. We certainly don't like your audited overhead rates." [#AV308]
- A representative from a majority-owned construction company stated, "We've done a sub for MDT before, and they have their set of dollar amounts for this or that and I don't believe they are up to par with current expenses. So, the contractor has to go back prove to MDT that they're not being dishonest." [#AV84]

13. Bid processes and criteria. Twenty-eight interviewees shared comments about the bidding process for public agency work; business owners or managers highlighted its challenges [#11, #14, #15, #17, #18, #2, #21, #22, #24, #26, #28, #32, #33, #3, #35, #36, #4, #5, #7, #8, #9, #AV, #FG1, #FG2]. For example:

- The owner of a majority-owned professional services company stated, "I find eMACS terribly, terribly, terribly difficult to deal with. And it's so entirely counterintuitive that it's hard to understand what you're doing as compared to some of the other programs, all the other programs that we've worked with. And we've actually reviewed that for them and provided that review because they've asked the same questions, like … what's wrong with it? And it's cumbersome. ... You should have someplace out there where it just gives me a summary of what the tasks are, and you have to go through a whole bunch of steps before you can get to that. Tell me where the tasks are at the front end, because then I'll decide how I go through the bidding on the other end. But you can't do that until you go through about six or seven, do you want the bid? Well, how do I know? That's the first question, do you want the bid? Well, how do I know if I want a bid if I can't see what the tasks are? In the old days they'd send you an RFP or an IFQ or IFB, they'd send it to you, and everything's laid out there and then you just figured out how to deal with it. The feds still do it that way. And so that's pretty straightforward, but it's just that the eMACS gets in your way of just finding simple answers. So eMACS is a unique system in Montana and some other states and that sort of thing, but the feds don't know anything about the other stuff." [#11]
- The owner of a majority-owned professional services company stated, "Generally, the only real requirements that we have are, they have specific requirements for the experience and qualifications of staff and so we have to go through that. As far as the business side of things, we're required to have a certain amount of insurance of certain types, whether it's automobile, general liability. And so, once you've got familiar with those projects, we carry an umbrella of insurance to cover that. And it's as simple for us as notifying our insurance carriers that we're part of a project and have them get in contact directly with the contractor we're working for. And our insurance companies will just send them whatever information they need. So, from that perspective, it's not too bad. And once you get used to doing that kind of work, it's not so complicated moving into a new contract because it stays fairly consistent on what the requirements are." [#14]
- The woman owner of a DBE-certified professional services company stated, "Typically, there's two sides of the story is if we're working with a contractor as a sub, they'll solicit bids or proposals from us for that. And that's on the construction side of things. On the other side of things for design, we have to put in proposals... Not proposals, but statements of qualifications to the consultant design side. And they have to be on their list under certain categories. So, whether it's road design or water and wastewater, they solicit qualifications every two years. You put in proposals. They rank all firms. And then from that list, if a project comes up, they solicit three firms to put in proposals and they select from three firms. It's very expensive for a small firm like ours to have put in all of these statements of qualifications. We used to have to run to Helena with multiple copies. I mean, it just was very expensive just to get on their list. And then a lot of times you were never selected anyway for projects. So, it got to be where it was just too expensive to even put in your statement of qualifications. I think they may be going to, or they're going to be going to, online where you can submit your statement of qualifications online,

electronic copies, which helps with some of the costs of printing. There's like eight divisions and we used to try for all of them and it just so expensive we've narrowed it down to one of the divisions we think that we could get the most projects from. … It seems like Obama changed some of the regulations and now they have to pick... So not only do you have to put a cumbersome qualification in on every single division you want to be on the list for, now instead of just being able to pick from the list and go to somebody and say, 'Hey, we'd like you to do this project,' now have to pick three firms from the list to do a specific proposal for that project. So, it's another costly event to have to submit proposals just to get a job from being on the list we used to get jobs a lot. Since 2016 when they have to go to a selection of three and then they look at three, we haven't got many. So, we're to the point now where we're probably not even going to submit qualifications to be on the list anymore." [#15]

- The woman owner of a DBE-certified construction firm stated, "Our state project, we haven't done one for ages because I'm sorry, but I don't like all the hoops you got to jump through on that. And bonding and insurance and oh, one job we helped somebody with, and they did, is it Bacon Davis or Davis Bacon Act or whatever wages talk about tidly fart details you had to keep track of. It's just ridiculous, just time consuming and it doesn't get the work done." [#17]
- The owner of a majority-owned construction firm stated, "I mean, I just got it by doing it, but yes, if somebody's starting a new business, I mean, and the training could be as short as a 20-minute video showing some of these lengths of how to get signed up into that state. What is it? The eMACS program... They transitioned to a digital platform. We haven't participated in that, so that's what a general contractor how they would turn their bid into MDT. I haven't done that lately, so I don't know what the process is. Last time it wasn't too bad. There was a couple of other [hoops] to jump through, but you get your bond electronically, and then you turn that in with your electronic bid, but I haven't done it." [#18]
- A representative of a majority-owned professional services firm stated, "I think it works pretty smoothly for us and we've done it enough times that we know how to get through the process. I mean, it's a lengthy process really. And so, I could see how in writing proposals costs a firm, a consultant firm money. And so, I could see how a smaller firm could... That could be a little bit more of a challenge just because of that aspect of it. Design build contracts, which is primarily where we're involved in the bidding process, you know, some recent experience would say that the RFP maybe is not as clear as it could be. And so, it does make it difficult for [a reader] to understand what the requirements are and can lead to, you know, pretty big disparity between bids, because some firms are reading into it different than others because it does leave it sort of vague. If there was going to be an improvement, it would be just to make sure that the RFPs are clear so that everybody's bidding on the same thing." [#2]
- A representative of a DBE-certified professional services firm stated, "Well, I mean at the tribal, I don't know if you want to talk about the tribal level, but like at Fort Peck, it's crazy. It's got to be posted in a newspaper for like three weeks, they've got to have a minimum of three bids, so they've got to follow like specific procurement policies, but sometimes those policies don't work because you don't get enough bidders. So, it takes a long time. The other thing we ran into is background checks. So even though we aren't working with youth or clients directly most of the time, they require us to have background checks and that can take a lot of time and it's not really necessary. I don't know if other contractors have run into that, so that's another kind of issue. I think a lot of the bids we're putting in, they'll say like, 'You can submit a paper or electronic bid,'

and I think that's really important for some teams that maybe don't use email or electronic bidding. So, I haven't really seen any issues with that yet." [#21]

- A representative of a Native American-owned SBE-certified professional services firm stated, "The amount of information that's required for it... I understand it. But boy, for small businesses, sometimes what we do for the federal government, especially... Sometimes it's a three-volume submittal that totals 105 pages of submittal. unless you have dedicated staff... It's a cost analysis. Because somebody's got to sit down and do that and then they should be doing... They could be doing something else. And so, it's that... What are you losing to do that? And small businesses don't have the ability to have... Like the Boeings of the world, they've got a hundred-person shops. That's all they do all day, every day. We don't have that luxury. Sometimes we're washing dishes and hanging rafters, and then trying to do all this other stuff. Each one is so different and I kind of mentioned it earlier there're times where we have a hundred- and five-page bid package, which I don't understand why you need that much. And some of it's I think again, the weeding process. If larger businesses or businesses that have been a little longer have the resources to be able to do that small startups that are higher risk, don't have the ability to do that. Well do it effectively I should say. And so that bidding process takes forever. Again, the bidding process starts with the identification of a project all the way through the submission of that bid, and so if, like I mentioned, the Montana bid portal to identifying is dysfunctional, then the whole process is dysfunctional because it takes you too long to get to it. And then a lot of times they'll shrink the window. So, you have a week, you have two weeks to put us a bid in and it takes you three or four days to figure out where the bid is. And so, you lose that time. Whereas if you knew the guy who's doing the contract office, I'll bet you dimes of dollars that somehow the people that they're looking at wanting to take that contract already know what it is. And half RFP in front of, those of us that are new and not unknown we're already behind the eight ball two, three days before the game, before the race even starts. The race started two days earlier for everybody else." [#22]
- The woman owner of a majority-owned construction firm stated, "It can be confusing because there's really no standard for it, but you just have to follow specifically the guidelines that they give you." [#24]
- The owner of a majority-owned construction firm stated, "These bids and things, especially the state bids and so forth, it seems to be kind of a mysterious process. Some of the stuff is very complicated online to look at and bid on. It's this and that, it's this and that. Now, here's a bid here today, here. This is a big bid here for the Department of Wildlife and Fisheries and so forth, its wayfaring signs, it could be millions of dollars. It's just hard to determine exactly what it is. You have to go down each, there's over 20 clicks on where you have read and understand this and that, 20 of them before you can even bid or look at the bid. Now, this is a barrier here. This is excessive paperwork. I'm not sure why it's necessary. I've been told that there's a lot of fraud out here in the business world, bidding on state jobs, on government, on national jobs for the US government. We have companies, they tell me that they have companies bidding on jobs that are not even in the United States. They're masquerading as a business here in the United States, this type of thing. It's all about security. They don't believe who you are, in a lot of cases. You just, 'Who is this guy? Is he really from the United States? Are these foreigners that are disguised?' It's just security. You get calls all the time, people wanting to loan you money for your business, this and that. They're getting your information through SAM, where that's coming from, so somebody's getting the information. It's constant renewals, it's this and that. Now, SAMs got a

different system now that they're going to start in April, looks terribly confusing here. It's like a mountain to climb." [#26]

- The woman owner of a DBE-certified professional services business stated, "There's always a size issue because we can't spend a ton of time, putting time into work that doesn't pay. We've talked about of small businesses not being able to have a full-time proposal prepare and just the amount of overhead it takes to do some of that stuff." [#28]
- The woman owner of a professional services firm stated, "We haven't done that in the past. Just most of the time we've just slipped away from that, just because we're so small we just know we can't compete. So, we just have kind of given up on that kind of stuff for some of that." [#32]
- The owner of a majority-owned professional services firm stated, "If [the] people who wrote our RFPs, wrote better RFPs, that's the biggest barrier. They're expensive to fill out, they're repetitive, they're designed to basically frequently, despite what they say to the contrary, pick somebody that they know or like or have worked with. It's just a bunch of things in there that are not good. But if you could get rid of the repetitive nature... people who write them often have no idea about the product they're writing about or don't have the expertise to write a good RFP, believe it or not. The guy who was the Head of the Department of Transportation at that time didn't like the process he was seeing and picked two agencies to compete. On the plus side, he wanted to see some sample creative and paid for it, $5,000, which is... sometimes people ask for creative and various other things like that with no compensation, which is a lot of work for an agency. They want to see the work before you've had a chance to look at the research and done all of the things you need to do, and sometimes judge you on uncompensated creative without some of the information that you need in order to basically do a good job. But in this case... those are barriers, you could pick those up for some of the previous questions. What he did was he took and evaluated it himself, gave the other agency one quarter of a point more than us, and took our idea and gave it to the other agency for development. Ours was 'Make a Plan,' and then it showed up, 'Plan-It' in the other one." [#33]
- The Native American woman owner of a DBE-certified professional services firm stated, "So I did the whole thing the best I could, and I sent it in. I'm thinking, 'Does it remind me it went? I wonder if it went.' So, I called the Highway Department and I said, 'I put my quote in on this, and I don't know if it sent. I can't tell. Our internet service is really poor here.' He said, 'Well, I can't look in there and tell you. But after we open the bids, I'll let you know.' I'm like, 'Okay.' When the bids came open, my new girl that just started working with me, she hadn't been working six weeks. All of her information was there, and none of mine. So out of all of the points, it was 500, I think I got 72 points. I was really upset, because they put it out there, that said, '[Business] got 70 points, and everybody else got 507.' I think the most was 500, but anyway, I was so mad. I said, 'You didn't even get any of my stuff. That's my secretary. She's worked for me for three weeks.' I don't even remember how long. But here was my only saving grace. I have been doing this for so long here, that the people that mattered knew that that was not true. But so, what would that have done to somebody other than me? It just blew them out of the water. Anyway, but that is a hard thing, I think, for companies. Especially, the thing is, I say it too to hire people for old companies, me, I've been doing it forever, but I wasn't into the internet, the way the new technology is. It's probably a lot harder for me than young people, put it that way." [#3]
- A representative of a majority-owned professional services firm stated, "It really just depends on the entity and who's funding it." [#35]

- A representative of a Native American-owned construction firm stated, "I guess a barrier in a bidding process, I don't know if this applies, but just the architectural mechanical drawings. The engineered drawings, I guess, are very tough sometimes." [#36]
- A representative of a DBE-certified construction company stated, "I think that if you're interested, you need to respond quickly so that they know you're interested and then start your bidding process. And I think everybody is a little bit different. We try to put ice on a project unless we know the area really well but as a general rule, we'll try to go down, especially on the larger job or try to put a set of eyes on it and see what potential pitfalls there could be or what, you know? I think sometimes it could be clearer. Yeah, I think sometimes it's a little muddied. You know, [the owner] will come into my office, 'What do you think they mean by this? What do you think they're asking on this?' Overall, I think it's pretty good, but sometimes the wording gets a little difficult to interpret." [#4]
- A representative of a majority-owned professional services firm stated, "Proposals aren't cheap either. That's kind of the thing. We kind of track our hours to put together proposals and that's a minimum of $13,000 to $30,000 in labor to put together for all of these projects. 13,000 to 30,000. Looking at what we would bill at. That's billable cost. 200 hours into a proposal and you might not even get it." [#5]
- A representative of a majority-owned professional services company stated, "It was a CMGC. Can't remember what that stands for, but we would be working in hand with an environmental engineering company, a contractor, and a materials lab. We'd be working as a group to do the project on behalf of limited MDT oversight. So, they'd have a project manager, but the prime contractor would be running the show essentially. Minimal oversight. And it was a big job where there's like 10 bridges along highway 200 in the Lewistown region where we had multiple inter... Well, we had one big interview, but we had a lot of pre-qualifications, a lot of flyers, a lot of submittals just from... It was purely qualification based, had nothing to do with money. So we went through that process, had an interview with the state. We ultimately took second in that process, but it was a great learning experience, but yeah, we came up like one point short." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "So right now there's tons of jobs coming across, but I have four jobs that I'm trying to bid right now. By the time I get these done, it sometimes when it leaves me a week to get those done, which depends on the size of them and then trying to get sub prices subs. If you give them a week, they're annoyed, just like I get annoyed. So, it's just a matter of I can't keep up with everything all the time. Especially during the summer still trying to bid plus we're on the job plus have to actually labor on the job." [#8]
- The owner of a majority-owned construction company stated, "This COVID stuff hit, I'm still working. I was working up to getting my over 20 years of retirement in, and I talked to PTAC in both Washington and in Montana, and they said, 'Let's just get the paperwork started, get yourself all set up, get you some CAGE codes, numbers, and everything. And let's see what we can do.' I'd been redoing a lot of reviewing, but with the Forestry Service [sic] and so forth, and I haven't bid on any jobs due to the fact that I can't walk in their office down there and talk to them. I started to bid on one for the Forestry Service, but like I said, I called down there. To reiterate, I called down there several times … I kept trying to get ahold of somebody to force [a conversation], it was impossible. It's like I say, hiding behind their phone, or no one answers. The door is locked tight as could be due to COVID. Because you want to ask questions, you want

to go look at a job site. You want to make for sure you're dotting your I's and crossing your T's, so I just said, 'Well, apparently it's not going to happen because I can't talk to a person.' I'm a type of kind of person I like to touch things, I like to see things, and I like to talk. I have questions. And I'll ask, okay, what do you expect out of this? I know you've got it written here on paper, but is this all? Is there something left behind that you guys have forgot about? That's just the way I am. I've learned that for years working in the oil patch years ago. I want to talk to that person. I want to know what he expects. I want to know what his desires are, his objections, and when he wants the job completed. Those are the things I want to do. I want to talk to that person. I don't want to do this stuff where we just, oh, look at this piece of paper and make a bid. I'm not into that game. I'm more, like I say, I'm sure when you go shopping for clothes before COVID, I bet you walked into a department store and you touched the material, you would feel it, you would try it on. So, it's the same principle." [#9]

- A representative from a majority-owned professional services company stated, "We have a hard bid, very competitive." [#AV331]
- A representative from a majority-owned professional services company stated, "Difficult process to get access to the bids and awarding process and managing paperwork is difficult. eMACS is a lot of red tape and there are many hoops you have to jump through to get into the process." [#AV43]
- A representative from a majority-owned construction company stated, "The process has been a roadblock. I don't know how to get the contracts." [#AV68]
- A representative from a majority-owned construction company stated, "The paperwork is ridiculous, and there are too many forms." [#AV104]
- A representative from a Native American-owned construction company stated, "Paperwork [is the worst part of the bid process]." [#AV106]
- A representative of a DBE- and MBE-certified professional services company stated, "I think we do a lot of alternative delivery and I think we've been very innovative. I mean, we saved WSDOT millions of dollars on a bridge with an innovative idea. We don't feel like there's anything wrong with innovation. It just needs to be safe." [#FG1]
- A representative from a focus group consisting of prime contractors stated, "Our building division mostly lives in that world and obviously, they're not called CMGC, they're called CM Risk, but very similar. And that's the world they live in and that's the new norm and maybe that's where the federal government's trying to push these state agencies to get to. But I mean, right now at this point, I don't see the value and the amount of effort that's put in just trying to get a project. At a certain point, it's just got to become so unattractive. I know our building division has to pass on a lot of work just because of the sheer amount of time that's spent up front prior to even putting any pricing out. It's just a lot of work. You have to interview all the time. You pass on more, I feel like." [#FG2]

14. Bid shopping or bid manipulation. Bid shopping refers to the practice of sharing a contractor's bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process or a bid to exclude fair and open competition and/or to unjustly profit. Twelve business owners and managers described their experiences with bid shopping and bid manipulation in the Montana marketplace [#1, #11, #15, #21, #22, #24, #26, #33, #36, #4, #5, #7]. For example:

- The owner of a majority-owned construction company stated, "Any new person who comes on the scene more than likely is going to get shopped for a while. It's kind of like what a used car salesman, or not car, that sounds bad. Truck salesman comes into our office. I have to see that guy four or five or six times before I'm even going to think about buying something from him. You're just, some guy comes out to the streets says, 'Hey, I'm the new salesman.' It's like, 'I don't care who you are. Get out of here.' And working with a new business is the same way. You got to get a certain level of familiarity before you're going to give them a contract." [#1]
- The owner of a majority-owned professional services company stated, "So we do it on our computers right here. We've done it. The bidding is... Because we've done so many contracts through the years, we know what it takes to do the work. So, we do our own bidding internally and we come up with the price and then go from there. We're very aware of those. We're also very aware of the primes that do that. And we don't work with those primes. So, you ask around and you find out certain things about certain primes and you find out that some primes just want to take advantage of you and some primes actually want to use your knowledge and experience to better the project. And that's where we... There's certain companies we would never work with. … Well unfortunately there's not a list you can look at. That the government has of crooked contractors, primes. And sometimes it's even the company itself is not the problem. It's the individual within the company that you're trying to... They're having you work on this part over here and that's done by this person and this person is the one who's causing a problem. And so when that person is replaced, all of a sudden, the problem goes away. Well, they would ask you for, can you tell us how we're going to do this work? And so, then you write out the process, you figure out how you're going to do that. You work with them on that. And then at the last moment they say, 'Well, I guess we're going to use someone else."' Well, they took your information to then go and have somebody who didn't have the knowledge to build the plan in the first place. And they said, now we got the plan so can you do it for less cost? And so that happens, for example, just to give you an example, in our work when we're doing restoration or all those kinds, we'll develop the plan and so we get the plan, and we tell them how to do it. And so, a couple times they took it and then went and got a landscaping company to do the work. Why? Because landscaping company had the blueprints because we did it." [#11]
- The woman owner of a DBE-certified professional services company stated, "I mean, we're not aware of it happening that much, but it has happened, yes." [#15]
- A representative of a DBE-certified professional services firm stated, "I mean, I don't know about bid shopping. I do know that a lot of times, like people that have that inside intel, they'll know exactly how much a client has to award for a certain project, so they create budgets that are within that, so they have that advantage. I think there are things that people do kind of behind the scenes that make them more competitive when a proposal is reviewed. So, I've definitely seen that. And sometimes we have been a part of that where we have known like, 'Okay, they have this much money, this is what we heard,' so then we're bidding accordingly." [#21]

- A representative of a Native American-owned SBE-certified professional services firm stated, "I would like to say I hope not, but I mean, we see this every day, it's the federal government. And sometimes I think the who you know can be a positive or a negative thing. I've never been on the side where somebody in the decision-making process says, 'Hey, can you do this? You know, here's the number that's coming in. Can you do it? If you can send me for thousand dollars less, you get it kind of a deal.' I'm sure it happens. I'm not dumb. I know that happens out there. And again, it's that relationship stuff is it fair? Maybe, maybe not. I mean, it's probably not fair, but I mean it's business and there's a lot of times where even within our tribal organizations where we'll do work for another division of the tribe, because it keeps the money within our own pools. And so, you could construe that as unfair too. So, it's something that happens everywhere. If you just understand it and figure out how to play in it, as long as it's not killing you, I guess it could kill you. It's a tough one." [#22]
- The woman owner of a majority-owned construction firm stated, "Only that I think there's a lot of generals out there that are counterfeit and they shop your bid around. And we've had generals call us and say, 'Hey, I've got at this bid from so and so. Will you look at it? See if you can beat it.' And we say, 'A bid is a bid, we'll give you a bid, but we don't look at other people's bids.' So that we see a lot, that the contractor goes and shops, calls somebody and says, 'Hey I have this bid. Will you beat it?' We don't think that's very ethical." [#24]
- The owner of a majority-owned construction firm stated, "[Bid shopping or manipulation] absolutely [happens]." [#26]
- The owner of a majority-owned professional services firm stated, "The guy who was the Head of the Department of Transportation at that time didn't like the process he was seeing and picked two agencies to compete. On the plus side, he wanted to see some sample creative and paid for it, $5,000, which is... sometimes people ask for creative and various other things like that with no compensation, which is a lot of work for an agency. They want to see the work before you've had a chance to look at the research and done all of the things you need to do, and sometimes judge you on uncompensated creative without some of the information that you need in order to basically do a good job. But in this case... those are barriers, you could pick those up for some of the previous questions. What he did was he took and evaluated it himself, gave the other agency one quarter of a point more than us, and took our idea and gave it to the other agency for development. Ours was 'Make a Plan,' and then it showed up, 'Plan-It' in the other one." [#33]
- A representative of a Native American-owned construction firm stated, "Yeah, it happens. It's a sad deal, but yeah, people are out there shopping your numbers. It's a bad deal. I would say bid direct to the general contractors in one. Instead of having some of, say, your plumbing contractor holding the controls contractor, maybe just have the controls contractor bid directly to the general. Everybody just bids to the general instead of holding subs under certain trades." [#36]
- A representative of a DBE-certified construction company stated, "I think that there have been situations where that has happened with us, where we've had... We've sent a quote over to somebody and they have used to bid shop. They're getting it at a lower price. I think you're putting rules in places you want, but there's enough good ol' boys left that would find a way to skirt the rule. That'd make the process so much more cumbersome, I think, if you tried to restrictive, if you tried to address that too much." [#4]

- A representative of a majority-owned professional services firm stated, "I have clients that do that, like cities. City of Helena is famous for having me write up the scope and then you tell them what you could do it for. They would take that down and share the price with another firm and say can you do this for less. Of course, they are going to say yes. I've had firsthand experience with the City of Helena doing that. We've been subbed on some other stuff and then we get asked contractors like our material testing. There's two labs in town and they will call us up and price shop basically. They are price shopping for services." [#5]
- A representative of a majority-owned professional services company stated, "One of the rules that I was taught in our industry is nothing good comes from a rebid. So anytime there's a rebid, there's always the thought of the owner or the bidder, hey, wait a minute. This was too high. Let's rebid this in three months. And coincidentally, some new guy comes in and beats that original price. I can't confirm or deny that. That's just... I mean, the owner has the ability to do that. Now to prove that that's a whole 'nother thing that I would tread carefully on, but I've always heard nothing good comes from a rebid." [#7]

15. Treatment by primes or customers. Five business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#16, #22, #28, #3, #7]. For example:

- The Native American owner of a DBE-certified construction company stated, "We tried a lot of subbing in the past, and with the Montana Department of Transportation generals, we seem to get kicked around pretty easy, that way. They weren't very profitable for us, because of that. They have a way of manipulating, and pretty much put the bad stuff onto the smaller guy. It becomes a little costly for the... So that's why we, myself, just got it in my head that I was going to be a general, and I wasn't going to bid anything unless I was a general. Some tough stories I can tell you with all the experience I have that way. Some of the generals, superintendents, et cetera. With the primes, we've had a couple of them that we would never worked for before. They put the squeeze on us a little bit, and what we thought took money away from us, and blamed us for things on the project that were not our responsibility." [#16]
- A representative of a Native American-owned SBE-certified professional services firm stated, "If there're any issues because sometimes the contracts you work on are guaranteed minimums or different things are different cutbacks or, subject to change, I guess is what I'd say. A lot of times, if you're a subcontractor to a prime who is especially the federally traded prime whose program managers and project managers are... Their bonuses are tied to profitability in a project, if they can make more money cutting you out or if the project contract so there's less work, they're not cutting theirs, they're cutting you. And so, if the money's tight, sometimes you don't get paid or get paid on time. It happens all the time. It's a risk factor that I kind of look at every time I do work with partners or subcontracts. And it's really the curse of the small business. Sometimes the large business needs us, but they have more power and more resources to fight us. And we're kind of stuck. There's nothing you can do about it. It's just kind of like, well, okay." [#22]
- The woman owner of a DBE-certified professional services business stated, "Our primes are always happy. We have had an instance where MDT was very unhappy with our work and I believe it was a lot of communication, but eventually it became very personal that one of the people at MDT just hated us. I think that they have some management difficulties at the end in

the environmental grant at MDT, and we are just hoping to outlive them. I mean, it's something that's happened recently and didn't used to be that way and hopefully it'll go away again." [#28]

- The Native American woman owner of a DBE-certified professional services stated, "Maybe a little bit there. I'm trying to think of an instance. But probably that goes back to, as a sub, knowing what you needed to make money. You put the bid in, and it's the only job in town, so to speak, and you have three trucks that you're trying to get the job for. They offer you just under break even. Then, so you have to choose, 'Do I want to buy myself a job so that my trucks are moving, and my employees have a job? Or am I losing on the back end? Or do I just want to not work?' That's a hard place for a company to be." [#3]
- A representative of a majority-owned professional services company stated, "Once again, our testing can mean money to the contractor. Money or schedule, right? Those are the two primary motivations of a contractor. And, if we're testing their work, they look at us unfavorably and sometimes if they cost them more money, whether it's our services having to retest or it's slowing their schedule down, we can be easy targets from a contractor. So, all contractors tend to be ornery or fire breathers, but we're a necessary evil in their industry, depending on the projects that they are pursuing and to be a negative fashion. But we tend to have decent working relationships. There's always heat of the moment instances where it can be bad, but in order for us to stay accredited and be true third-party testing, we have to just be honest and provide the most accurate results that we know. And we don't falter from that so we catch a lot of flak for that. We might lose some contractors because they might want more lenient testers or something." [#7]

16. Approval of the work by the prime contractor or customer. One business owner described their experiences getting approvals of the work by the prime contractor or the customer [#33]. For example:

- The owner of a majority-owned professional services firm stated, "That can a problem if there is political influence or if there is a cumbersome committee, it really depends upon their decision-making process. I saw a sign one time in a church in Wisconsin that said, 'For the Lord so loved the world he didn't send a committee.' It really depends upon, again, the skill of the people looking at it. I've seen committees that were really good because you had people who knew what they were doing. But, if you have a clumsy decision-making process in which either you have a disconnect between the boss and the people who are the marketing people, and the boss doesn't understand what's going on, or there's contending forces, you get the idea. This song really comes down frequently to do you have a reasonable process? There is no perfect one, by the way. Do you have good people making up their mind?" [#33]

17. Payment issues. Fifteen business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#11, #14, #16, #18, #2, #21, #23, #3, #33, #35, #4, #5, #6, #7, #8]. For example:

- The owner of a majority-owned professional services company stated, "What used to be a problem, and we spoke to this company about it, was how long it took for them to pay their bills, pay the invoice. And they then realized that, yes, they have to deal with their small subs in a different way. And so, they went out of their way to fix it so that they would pay us in a more timely fashion, which was great. And it didn't take much to talk to them about it. They were just...

In fact, there was two of us who were subs. I didn't mention it to them. The other sub did. And they just decided they wanted to make the change. So, I got to give that major company a big kudos for doing right. They were trying to fix it." [#11]

- The owner of a majority-owned professional services company stated, "We have [experienced delayed payment]. And even at the federal level, the Federal Highway contracts, I've had issues where they would dispute an invoice or withhold invoices, payment on invoices because they basically thought they could. And there's a fairly robust system set up inside Federal Highway, FAR clauses, to make sure that they don't do that. It still can be a problem. Those larger contracts, they only can submit for payment to the government once a month. And then, it can take four to six weeks before the contractor gets paid. And then, they have one to two weeks before they have to pay their subcontractors. So, we'll experience at the beginning of a project, sometimes a couple of months before we'll get any payment for any of the work that we've performed. Federal Acquisition Regulations, I believe, is what FAR clause is. So, there's a whole series of contract clauses that the government has set up to basically they cover everything, how to handle subcontractors, what kind of insurance people have to have, contract specifics about contamination of soils or SWPPPs, which is stormwater runoff. They cover everything. They cover how a general contractor can relate to a subcontractor and how all of that gets paid. So, a general contractor will have to have two kinds of bonds. They have to have a performance bond and then a bond to make sure that we get paid. So, they have two bonds on Federal Highway contracts. It definitely [helpful to have two bonds] is because we have no contract relationship with the government, whatsoever, as a Tier 1 subcontractor. Our contract is directly through the general contractor. So, we can't really even have conversations with the Federal Highway folks about getting paid. We have to deal directly through that relationship between us and the contractor. So, I can't call up a Federal Highway engineer and say, 'Hey, these guys aren't paying me. Could you do something?' They won't even take my call. They won't respond to an email. You can rattle the cages a little bit, but they're not going to respond directly to us. They'll respond to the contractor and say, 'Hey, I'm hearing rumors that you guys are not getting your subs paid, so you better take a hard look at that.'" [#14]
- The Native American owner of a DBE-certified construction company stated, "The other bad thing about being a subcontractor, especially with the bigger ones, is they really delay your payments, too. They'll hold you out there 60 to 90 days before you get your money, and for a small person, that makes it pretty difficult, because then you're leaning on your line of credit or whatever to operate it with. And therefore, the interest you pay in your bank for that eats your profit for what you can make on a job as a subcontractor. Because the subcontractor profit margins are not very good." [#16]
- The owner of a majority-owned construction firm stated, "Well, absolutely. I mean, all the above from payments not coming when they're supposed to, to we had one, the last project we did for MDT the general contractor didn't meet schedule requirements, and then all the problems of them not meeting their schedule was passed off onto us. So, for example, we're working on a bridge, their bridge. It was a steel bridge. The bridge erection comes in late, and then we're forced to scramble over time and face potential liquidated damages because now we can't get our earthwork done in the timely fashion that we should have." [#18]
- A representative of a majority-owned professional services firm stated, "One of the things, I guess in particular, that I have seen as an issue is for certain projects, if they're to say grant

funded or something and all the payments are held up by grants, for them just to float that money, their payment is a little bit harder for them. And so, like a lot of our contracts are paid when paid. And so, if we're not getting paid back from the, let's say the grant agency or something, it's hard... We don't push our payment to them. So that's... I think some of the smaller ones have a harder time to kind of float my bill for a little bit waiting on the payments. I would say mostly on the kind of smaller agency side is we've had trouble throughout the contract getting paid. That's one thing that's been an issue, having overrun numbers. I think the part, the early phase two of the actually getting under contract once you've won the bid or the RFP getting, under contract can sometimes be a lengthy process. And you know, there there's ways to expedite it, it seems like." [#2]

- A representative of a DBE-certified professional services firm stated, "That's a big issue right there. Timely payment for small businesses, we have contracts that have never been paid. Sometimes we'll wait up to six months to get paid, and that creates a cash flow issue. So that timely payment is a really big issue. One of the things we've started doing, like for example we have a proposal working on right now with a client who historically hasn't paid us, so we're saying like, 'We need 50% of this payment up front.' And it's not their fault, like they work in a system that's totally broken, and so we get that, but at the end of day, we have to get paid too." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "That project that I subcontracted on at MSU, not only was it unpaid for months, but also they asked me to do work beyond the existing contract and said that I could wrap it into the next contract because we were going to continue work. We basically worked through conceptual design, and we were going to move into schematic design. So, I had worked like, I don't know, I think we had an extra 20 or 30 hours on our books and I wanted to submit that as part of our bill and they said, no, because we can only pay the original quote, even though they had asked me to keep working. So just put that in your next schematic design. And then as I was preparing the proposal for schematic design, they told me that they weren't going to pursue the project any further. So, the project was shut down and I never got paid those 30 hours." [#23]
- The Native American woman owner of a DBE-certified professional services firm stated, "I have late payments for sure I haven't had any non-payments, but late. 60, 90 days. Which that was way too long for me. The only thing I can do is look at that prime and say, 'Oh yes, can't work for them.' I have one right now. A big company. And 90 days... I'm like... And when I work for someone, when I get a project, a contract, and this was MDT's project. When I sign the contract I say, 'I cannot wait 60 days. I need to be paid in 30 days or I can't work for you.' Well, from my experience is if when I send my bill to the prime contractor, if they turn around right then and send that bill to MDT, it is paid within 30 days or before. But if that prime contractor says, 'Well, I only send my bills out every month or ever whatever,' then that puts me out a month or two also. Unless you have a prime contractor that really, really wants you to work for them, then they will do what it takes. … When [state employee] got everything set up, and she realized, I'm a small company. I couldn't go 90 days. The way it works for my [company], I send my billing. Each time I complete a parcel, I send everything, so it's approvable parcel by parcel. Then I would get paid within 30 days, and that works for me. But in the beginning, they didn't do that. It was 90 days. A lot of places are 90 days. It's too long for small companies." [#3]

- The owner of a majority-owned professional services firm stated, “In the middle of the contract year that [a private company we were the subs for] had with the state, the state cut their budget, and we up financing to the tune of $30,000 a month because they simply couldn't afford to pay us for the advertising, we had a contract. Eventually they paid us all the money, but we were out $120,000, $150,000, which if you're a small agency, eats up your spare cash really pretty quickly I might add. In our business, we always know who the good payers and the not-good payers are, and we try to stay away from the not-good payers.” [#33]
- A representative of a majority-owned professional services firm stated, “Sometimes [delayed payment is an issue].” [#35]
- A representative of a DBE-certified construction company stated, “Generally, no, we had a situation this spring where we did some work for a prime and it took us an inordinate amount of time to get paid. That is not the norm. We generally don't have that issue. And we've done work with this company before and not had a problem. So, I don't know what the hiccup necessarily was in that particular instance. And it was an MDT job, but generally we get paid pretty quickly from our primes when we do MDT work. I know that we've run into payment issues at different times or change order issues. Where we got into a dispute with a prime over a change order that ended up not getting resolved favorably for us, with regard to there was a change order and it had been supposedly approved and it didn't get approved and we're not going to pay you for that particular amount of work that we did. And generally, what happens in situations like that, at least in our company, is we just, depending on the situation, but in that particular situation, we finished out the project... Well, the project was already finished before the squabble began and we've just opted not to work with that contractor in the future.” [#4]
- A representative of a majority-owned professional services firm stated, “I've subcontracted to another firm here and I have an invoice outstanding from October of last year. Am I going to jump up and down and run to be their sub again? Probably not. DBEs are kind of unorganized with their invoicing which hurts them, and I'll try and get them paid as soon as I can. I can't pay them if they don't send me the bill.” [#5]
- The owner of a majority-owned construction company stated, “Paying on time has been an issue with some of us. It always has been for me. Certain guys you work with all the time, they always pay on time, and then to be honest with you, the ones that are terrible about paying, we don't quote as much anymore.” [#6]
- A representative of a majority-owned professional services company stated, “We deal with a lot of small entities throughout the state where their money's only made during certain times of the year. So, we could do lab stuff, mixed designs in the winter where they don't have any revenue like concrete producers. So, we'll have habitual offenders, but they usually end up paying. But just depends on the contract too. There are some federal contracts who are the paid when paid and then that is the nature of those contracts. And so typically sub-consultants or subcontractors are the last ones to get paid after, so the job takes three years we could see, and a lot of our work is done up front. So, we've had some jobs where it took multiple years to get paid because of the federal payment process and the shenanigans done by the prime. So, we're usually the last ones to get paid.” [#7]
- The owner of a WBE- and DBE-certified construction company stated, “And what they'll do is they'll wait until they're three months behind and then... and we had some... just a small company that would use us. And so, the amount of money was like, I don't know, $2,000, under

$5,000 every time. And they would be three months behind and then they would call us and say, 'Well, your work…' they'd start to complain about the work. And it's like, 'Well, why didn't you tell us that the next day and we would've come out and rectified it.' And so, the first time, we kind of came to some type of agreement, and then it happened again. Exact same scenario. They waited three months, they complained about it, and I said, 'No, I'm seeing a pattern here now with you guys.' And so, what do you do though? Your only option is... because as a subcontractor, they will ask for a P&P bond from you, but you do not have their bonding insurance. So... and if I don't perform my project, they can attach my bond, but there's no recourse for me besides to sue them. I think a subcontractor should have privy to everything that the general contractor has. Including the engineer, the engineer's comp... the engineering company and the engineer in charge, their phone number. We should have the insurance companies of the general contractor. We should see proof of their P&P bond. Everything that a GC requests from a subcontractor, a subcontractor should be able to request from a GC. … We sub out, we... when we get payment, they're paid within seven days. Sometimes, we have subcontractors that, technically, we don't have to pay them until we get paid by the owner. But we will pay them before we get paid because they're smaller companies and they are working be from job to job. And so, never in my experience as subcontractor, has any general contractor paid me before they got paid by the owner, and then they... and then you're supposed to have them paid within seven days, and they don't. I had GCs traditionally pay you just cents less than what they're supposed to pay you. And so, you just write it off. But I'm thinking it's kind of like an insurance company or whatever, if they underpay every single client that they owe money to buy a few cents, pretty soon it's going to add up. And it's like I don't know what their method is or what their madness is, but that's another result of GCs. They'll underpay you just by a little bit." [#8]

18. Contract size. Eleven interviewees described the size of available contracts as challenging. [#13, #16, #23, #28, #30, #6, #8, #AV, #FG2, #PT1] For example:

- The owner of a majority-owned professional services firm stated, "At this point, the Missoula Airport, they're doing a whole new build. The whole place is getting rebuilt. And that was definitely a job that I did not want. We just didn't have the staff." [#13]
- The Native American owner of a DBE-certified construction company stated, "We always found it was quite tough to bid them [MDT], because their projects are so big." [#16]
- The owner of a WBE- and DBE-certified professional services company stated, "I think highlighting the direct hire opportunities, or direct bid, I can't remember what they're called. But when the thresholds were explained to me, like if you're under this rate, then they don't have to list it for RFPs. It's a double-edged sword in that it's great if you know someone who wants to give you a leg up and just help you get your foot in the door, that is awesome. But then you also have to be the person that they want to help get in the door. And then that's more of a person-to-person thing. I could have someone who is super pro diversity and wants to give me one of those direct hire contracts and that's huge for me. Or I could have someone who's neighbor rancher has a kid who's starting a business and they'd rather help that guy get his foot in the door and that's okay too. Because that guy is working hard too, you know?" [#23]
- The woman owner of a DBE-certified professional services business stated, "Except for just size and things are always easier for a big multi-disciplinary company. I mean, we have the opportunity to team, but you can't blame the MDT to want to go to a full-service company. I

mean, that's just the way it is. You can put together a team and try to look the same as a company that has it all under one roof, but it's just always going to be easier for them to deal with the big companies." [#28]

- A representative of a majority-owned professional services firm stated, "I think there could be. Just some of the larger contracts require larger workforce to complete them. So, they're potentially tougher for small business on some of the larger contracts." [#30]
- The owner of a majority-owned construction company stated, "I think when MDT lets these bigger projects, these $70 million projects, it really doesn't... When they have these big projects, all that money's going to one project, and it's hard to get... That money just doesn't disperse like it does when there's a bunch of smaller projects. There's not as much work around for a bunch of different contractors instead of... They're just eating up so much money on these big bridge contracts, that it kind of takes away from the whole program, I think. I know it needs done, but it's hard on everybody else. I think that's part of the reason we're down. We're down probably 20% this year from what we were last year. There are some cycles. We had those a couple years ago too where there was a couple big bridge projects, and then it came back. It's kind of a cycle, what MDT lets them work, the paving, and milling, and that kind of work seems to provide more work for us, and for people in our industry, whereas the big bridge jobs, there just isn't as much work for a bunch of subcontractors like us, I should say. They used to give a lot more time to finish these projects, now they don't. I think some of these big guys are making sure that people have enough staff, and enough experience to cover some of these bigger projects, because MDT just does not allow a whole bunch of time to get these done. You've got to have a pretty big... they're pretty demanding on what they want from subcontractors, as far as times concerned and availability." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Every job I've ever seen is too big for us. Like they need smaller DBE projects. Like I get, you have generals out there trying to help you with it. But again, you're bidding to a general, sometimes they only want certain portions of the work. They don't want all of your numbers. Sometimes they don't even know who's looking for these numbers. I mean like a lot of people call, but they call you like three days before the bid is due. And so, you, it's not by saying that you're looking at, because you don't know what people want numbers on it. And so, they'll call you three days before it's due. It's like, well, no, I don't have time to get this but see, now the reason they call her three days before it's due, is basically they don't want her to do the job. They just want to fulfill their percentage of reaching out for a DBE company. That's why it'd be nice if they just did smaller DBE projects. We were looking at, oh, in Yellowstone County news and they had some road work that we thought, oh, that'd be right up our alley, but they have it there was seven different areas that I think it's all one package, and then they want it all done in 40 days or whatever. We could have done that whole package, but we couldn't do it in 40 days." [#8]
- A representative from a majority-owned professional services company stated, "The thing that has happen is the federal program for all transportation alternatives reduced the local control for smaller project allow MDT to take the projects over and the project cost much more including small bridge projects. I would say the fact that we have a small team that MDT request we are not offered that opportunity because we are competing against larger companies. Not getting consistent work." [#AV225]

- A representative from a Native American-owned construction company stated, "We have been able to overcome any obstacles. Number one thing is the size of their jobs. Usually, they are over our limit of size." [#AV357]
- A representative from a focus group consisting of prime contractors stated, "And in fact, I would say Montana's probably, I think a smaller company would be more apt to survive in this environment as opposed to Colorado or something like that, where you get dominated by big construction firms that come through and they establish themselves, because you got to think of operating budget of Colorado's Department of Transportation, has got to be enormous compared to what we do. And where MDT excels is, we get a lot of not just bridge, but a lot of little projects, especially out in Eastern Montana. We have 400 timber structures out in Eastern Montana, and I would happen chance Colorado doesn't even come close to stuff like that. And little companies can come in, actually projects are just too small for us, for example, there's a little 50-foot bridge out in Eastern Montana that's coming up, that is just too small for us. So, I think it allows little companies to potentially come in and survive in this market to be able to go just do a little tiny structure with minimal amount of equipment and crew sizes, and to potentially succeed in the state where I think you might have trouble in some of the large markets. So, for example, [there is a small DBE that] is a prime example. They were a house builder down in Bozeman area. So, I don't know if you're familiar with that, but down just north of Yellowstone Park, Livingston Bozeman. So, they were just building houses. And I think in this, gosh, I want to say in the last 10 years, he decided to start maybe doing a little bridge job, so very little risk, right? You go out, it's maybe a little 50-foot bridge. You probably have to rent a crane, a pile hammer. He just goes out and does it, he does one and he succeeds, and he starts doing another one and he starts growing his business. And he's still fairly small obviously with respect to us, but he has the ability to go out and take on some decent sized MDT work at this point. And that's just one example, but with that, and you can see maybe smaller traffic control companies, [for example there is] a DBE in Billings and they've grown themselves into a good size company at this point as well. So, they're doing work all over the state, mostly mid to Eastern part of the state. So there is the ability to grow your company, especially taking on smaller projects, ones that have very low risk and minimal amount of crew size that can go in and take these projects and start building on the company and growing it. But you see a lot, I mean, fencing companies is one too that obviously a fairly low risk, you don't need a heck of a lot of equipment go out and install a fence. And so, you do see a lot of small companies that start out just taking on a few projects here and there, and grow themselves into pretty good size companies. There is that ability to grow your company in the state. No doubt." [#FG2]
- A representative from a majority-owned professional services firm stated, "I suggested is there a way? We even tried to negotiate. We can do this piece of this project because we know we can. For example, we do secondary road bridges for counties all over the state. But when MDT goes to put out a bridge, an RFQ for a bridge, they say, yeah, we need secondary road bridges, but we need somebody that could do these other large projects on interstates." [#PT1]

19. Bookkeeping, estimating, and other technical skills. Eighteen interviewees discussed the challenges back-office work such as bookkeeping, estimating, and other technical skills present [#1, #11, #18, #21, #22, #24, #25, #27, #28, #29, #3, #32, #33, #36, #4, #8, #AV, #FG1]. For example:

- The owner of a majority-owned construction company stated, "Well, every now and then you'll get a price that just doesn't seem real... seems unreasonable. And I'll give them a call and say, 'Hey, I think you might...' And this isn't necessarily with the DBE [certified firms], with any sub quote you get. If you think, are you comfortable with your numbers? Did you look at this and look at that? And that doesn't happen that often. But if I do see something that looks funny, I will contact them and let them know that maybe they better take... without divulging any information, maybe you better take another look at this item or feel comfortable with it. When it comes to bidding, it's just like an operator. It takes experience, knowledge, and practice. I'm not going to go pull some guy off the street who was flipping burgers and ask them to bid a $5 million painting job. If they're wanting to be in the industry, they should have some knowledge and background and experience. Regardless of if they're a DBE or a large business. I think the biggest thing any small businesses, anything... I think the most difficult thing a new business is going to run into is it's amazing how many times you can talk to a new business, and they don't understand payroll burden. They don't understand the intricacies of payroll. And there's nobody at the State of Montana that probably does either. So even if you have lots of experience working for a bridge contractor or fencing contractor, you go out on your own, you still don't understand that just because I pay you $20. I got to pay somebody else 60% of that for all the overhead, all the burden on top of it. So, there could be some, as far as new businesses, there could be some training and technical assistance and things like that. That would be a good area." [#1]
- The owner of a majority-owned professional services company stated, "It's kind of... We have an accountant that we send the stuff to at the end of the year, but we do everything, and he is the one that then makes sure everything's done. But we do it internally. We developed our own database programs to do all that." [#11]
- The owner of a majority-owned construction firm stated, "Estimating is done in-house. We use dedicated software for estimating. It is a viewpoint system called ProContractor. Fairly robust, I mean, on some of these public work bids, you have to realize, I can be bidding on a job that has 60-line items, so you have to have pretty good systems in place to keep all that stuff. Well, I mean, if you're doing bonded work, you have to have at least reviewed financials that have to come from an accountant, so you're going to have that outside cost. And then we do our own bookkeeping in-house. But I've had some turnover in that department, so I'll probably spend $1000 on that office manager just for QuickBooks training." [#18]
- A representative of a DBE-certified professional services firm stated, "That's a big issue. I mean, I have three bookkeepers. These are not funded positions, and I don't know what, other small businesses might just have one, but all of the requirements for taxes and reporting and managing, like it takes a lot. And so that's been a significant burden and challenge, and just funding that is really hard. So that would be something that small businesses really need support. That would probably be the one thing out of everything that is most important, because you can get in so much trouble if your books are off." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "That's always a challenge because they all take time, right? The estimating and stuff... For us, it's... I'm not an estimator. You get the people who know what they're doing. And sometimes it's

1099 for a period of time. And then if you get a business growing enough, then you get an estimator on staff that can do that on a daily basis. But again, that's a cost analysis. Because you got a guy estimating four projects a year and he costs you know all in, 125,000 dollars a year. Unless you're winning every bid you had, then is that project worth it? And small businesses don't have the money to burn to do that." [#22]

- The woman owner of a majority-owned construction firm stated, "Just that we had to educate ourselves on everything in the category that you just mentioned [bookkeeping, estimating, etc.]." [#24]
- The owner of a woman-owned construction business stated, "Bookkeeping, that's it." [#25]
- A representative of a majority-owned professional services company stated, "Yeah, as we grew, we started out with kind of our own spreadsheet stuff and we had our growing pains with that, and it was just kind of we made it ourselves and it worked okay, but as we grew, it became difficult, but now we're using a Jira software, and it does a good job of keeping track of our accounting and that kind of stuff. So, I feel like we're in a good spot after four years. It took us about four years to get here, but I feel like we're in a good spot with that now." [#27]
- The woman owner of a DBE-certified professional services business stated, "There's one huge thing, but I don't think anything can be done about it, and that is the FAR requirements. And MDT has worked really well with us. The Federal Acquisition Regulations, they have some very onerous audit requirements and bookkeeping requirements that are just, there's no way in the world that a two-person business would want to or need to set all that up. And MDT's worked really well with us in the past, either trying to help us work around that requirement. Yeah. But as in, I think it's a financial trigger. So, helping us not trigger that requirement on our projects. Does that make any sense?" [#28]
- A representative of a majority-owned professional services company stated, "This is a difficulty too, and, again, we don't struggle with it, but we know a ton of our subs struggle with it, is the audited overhead rate is prohibitive for a smaller firm. It's very expensive. MDT does have some measures to help with that, but it has consistently been a struggle for our very, very small sub consultants to deal with. No, because it's not that they can't do it or can't hire someone, anyone, a chartered accountant to do it, it's just it's very expensive. So, it's prohibitive, cost wise, for them to want to take that on if they are not a bigger firm or going to do a lot of work for MDT. These are firms that are probably only doing $100,000 a year at MDT or something, just not a lot, and it's pretty difficult to ... Once they make that step, though, from doing $100,000 a year to 250, then it becomes so prohibitive." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "It was in MDT, and it was a pretty big project. And they said the way you had to put in your request for payment I do it all. I might have a landman or two, but I do all the financial. I do everything. When you put in your bid you would have to say how much you did here, who did this, how many hours will they do this. How many hours does so-and-so and so-and-so, well, I was all those so-and-so's and they said, 'You can't be.'" [#3]
- The woman owner of a professional services firm stated, "With the organization we're with, there's a really hefty... From our distributors and our suppliers and stuff, we have a system set up that they, with our membership, they supply us with a lot of that information. So just our

membership, with our distributor supplier groups, we get great assistance that way, to be able to do stuff like that." [#32]

- The owner of a majority-owned professional services firm stated, "You can either get somebody who's good at it or outsource it. Understanding your financial condition at any time and understanding the profitability of a service and all of those things like that, if people do not have that information, they are in big trouble. Basically, what I would say is a mentor that could help people understand their financial condition and understand the ratios for profitability in their business would be critical. Mentoring I think is very helpful for people to get started if you have somebody who understands a business and probably understands your business." [#33]
- A representative of a Native American-owned construction firm stated, "Oh, yeah. It's hard to find people that are specialized in your field that are trained to do stuff like that." [#36]
- A representative of a DBE-certified construction company stated, "I think you have to; you have to be reasonable with your bids when you're bidding. Our two estimators are very good at what they do and are very experienced and seasoned. So, they're realistic about what the costs are and realistic about what the market will withstand when they're putting margins together and things of that nature. Two estimators have both been doing this for quite some time. They've both been with the company for more than 15 years each. So, they can look at a bid letting and identify areas where we can bid and bid competitively or think we can bid. You know, certain aspects of the big job that they know if we can't be competitive here. 'We can't compete with company A,' or, 'We can't compete with,' you know? Especially the larger companies, they're going to be able to throw a better number at it just because of their infrastructure, but we can bid here and be competitive because we're bidding against, you know? They are the companies that we'll be bidding against. It's a general rule. There are always one or two surprises, but as a general rule, depending on the location, the size, the specs of the job, there's usually three or four main people that are going to be bidding on that particular. Knowing who your competition is and how you stack up against them is important." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "We did a little bit [of on-the-job training] with [my late husband] and I'm really glad she [our current estimator] started out in the field. And then I don't know what year it was, but she was probably in the office a couple three years before [my late husband] died. And so, she knew how the office ran a little bit, but she didn't do his job. So, in our office, there's a fine line or an imaginary line. And [my late husband] who was the estimator and project manager never crossed over into the bookkeeping area, which is traditionally mine, and I would never cross over to his. So [our current estimator] didn't know a lot about estimating. She had worked on some of the contracts because a federal contract can be 200 pages long, and she's a very fast reader and she retains things really well. And so, towards the end before [my late husband]'s death, he would give her paperwork to read and to finalize. To make sure that we do have the bid bond and things like that. And I'm glad that he did that because when she did step into his, she at least was familiar with some of the things. But he was so old school, there was no estimating program. Some companies have an estimating program. [He] just had an Excel spreadsheet." [#8]
- A representative from a majority-owned professional services company stated, "The barrier is the overhead audit as it is not fair to most small businesses." [#AV20]

20. Other comments. Eight interviewees described other challenges in the marketplace and offered additional insights [#12, #28, #7, #AV, #FG1, #PT2]. For example:

- The owner of a majority-owned construction company stated, "Federal, they require training and daily record. And we get that in a big mine operation where you've got day shifts and night shifts and shifts that change throughout the day and night and week and months, all the time that different people come into play. In our area we've got three, four people. And if a piece of equipment is broke down, the whole job stops and- We've got to follow the same mine rules as like Asarco or the coal mines. We've got to follow the same rules as them. Even though we don't have that stuff, we fall under their same rules and regulation and that makes it very difficult, because we don't have the resources to do everything." [#12]
- The woman owner of a DBE-certified professional services business stated, "What's an issue is that the engineers never think the environmental work is important. That's a huge barrier but I don't think we can change that unless we integrate it into every engineering program that this is key." [#28]
- A representative of a majority-owned professional services company stated, "The only thing I would say is sometimes, I go back to accredited lab, all the specifications where it's private or federal, they require an accredited lab. And sometimes there are non-accredited labs that get work, and no one calls them out on that or is it our job to be the accredited lab police? I don't know. But that would be the only instance I'd see. I don't think the state does that. There are too many levels of review to get by there, but in the private sector it can happen. So, they're usually cheaper because they don't have to deal with all the accreditation processes. So that does happen from time to time but..." [#7]
- A representative from a woman-owned construction company stated, "It's hard to find good people that know how to work and want to work. A lot of companies seem to get so safety-minded that they just can't seem to get anything done. Sometimes the regulations and the paperwork, all the safety stuff you have to go through anymore." [#AV207]
- A representative from a majority-owned professional services company stated, "I do specific things regarding wetlands in conjunction with the Clean Water Act. Montana is not as forward thinking about environmental things as other states are." [#AV319]
- A representative from a majority-owned construction company stated, "It is a pain to get dumping sites. It is really hard." [#AV79]
- A representative of a DBE- and MBE-certified professional services company stated, "I feel like you need to be diversified and the building work is not regulated by a FAR overhead. I don't know how much you know about all that, but another one of the things I do and it's a game. It's a game because you can't make too much profit. You can't have too low of an overhead. I mean, honestly, I feel like we're almost a nonprofit because pretty much everything we get in profit, we give back to our employees in bonuses. Because we need our overhead to be high enough to actually function. The rate structure that comes through because of the federal projects is really difficult to nail down I mean, it's all over. One year, I mean, honestly, one year we're 185 and then one year we're 122, but it's for the prior year. Here you are in the year that your overhead is 185 and you're operating at a 122. We decided that we have to do whatever we can to make it be more. For the last four years, we've been conscious of that. And so, we haven't hesitated to maybe spend money in a certain way that we wouldn't necessarily have spent before. It cannot

be 122. And that's because our utilization was like 75%. Well, yes, you want high utilization, but you don't want too low overhead. I mean, it is a game. It is a game from start to finish." [#FG1]

- A representative from a respondent at a public meeting stated, "We even do private driveways and stuff, but it's hard to compete with them because we do have a lot of, I'm going to use a wrong term, I know it's going to be wrong to everybody who's listening, but we call them gypsies. And they come in from out of state, during the summer they'll come in from a warm state and then they will just do horrendous work. But they'll bid a job that we're bidding on. And of course, if I'm telling them, I'm going to give you three inches of mix, I'm going to give you three and three quarter, because we'll pound it down to three inches, but they'll give you an inch and a half, and you'll never see a roller on their job site, you know? And so, it's hard to compete with that because if we turn in a bid to just a homeowner, they'll say, well, what the heck? Why are you three times the price, right? And so, we've got to let it go. We let it go. And then after they'll get it done, they'll call us and say, well, now this is already crumbling. What are we supposed to do?" [#PT2]

H. Effects of Race and Gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority- or woman-owned firms.:

1. Price discrimination*;*
2. Denial of bid opportunities;
3. Stereotypical attitudes;
4. Double standards;
5. Payment discrimination;
6. Unfavorable work environments;
7. "Good ol' boy'" or other closed networks;
8. Resistance to use minority and woman-owned businesses;
9. Fronts or fraud;
10. False reporting; and
11. Other forms of discrimination.

1. Price discrimination. Four business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#16, #22, #3, #8]. For example:

- The Native American owner of a DBE-certified construction company stated, "We always had to pay a little more interest. Interest rates were pretty high compared to what the other contract, non-DBEs, and stuff, had to pay for their loans. Getting insurance, we never had much problems with that, but it seemed like we had paid an awful lot to get it. And talking to some friends that aren't a disadvantaged business, or tribally owned, seemed like their rates were a little bit better than ours. What the problem we had originally is, and it was explained to me by a surety agent who was very open and honest with me, but the reason we have so much difficulty in getting

surety is we feel we have no right in the tribal court or wherever you're going to take us as a tribal member. Two, if you fail us, that we can get back what we've lost on you as being surety. And they said that's basically the key, is that the legal part of it. They feel that you, because you are a tribal member, or a minority, that you're a higher risk, so they put you in that little higher risk, just like your insurance company does if you've got a bad driving record, et cetera. One bank was much more open and working with us than the other bank was." [#16]

- A representative of a Native American-owned SBE-certified professional services firm stated, "I think that's always the question, right? Tribes always struggle with that because of assets. Everything being in trust. Then banks, there's no... What do you want to say? They don't want to come to Tribal Court, one. Two, they don't want to... There's nothing they can go after in case you fail on a payment. So, I think that's always a challenge for Tribal organizations. I think it's a huge problem for Tribal small businesses that are new. Because one, you got the Tribal piece, right? That's the government piece. Two, you got the small business, so you don't have a lot of assets to put up against something. And three, you don't have a lot of past performance to be able to say that 'We can do this, and this is how we do.' So, banks are not as willing to take that risk. Again, it's a risk analysis. Everything in this line of work is a risk analysis. And it's almost a three-strike analysis right there. It's tough for banks. We can get it. We've got opportunities. It just takes more steps. And then banks and the public sector do not have a clue about what sovereignty means. Things that shouldn't take more than a month take a year because of all those naiveties that the non-native market has with how Tribal-owned businesses work. And then, I always wonder about what a broker or insurance agent thinks, 'Oh. See I can get these guys. They're not smart enough. I can get them for even another 5%.'" [#22]
- The Native American woman owner of a DBE-certified professional services firm stated, "Well, everything was hard in the beginning because I was a woman. And for me to buy a CAT, the first time I went to buy a CAT, they basically told me, 'We can't give you insurance and all this.' And I said, 'Why not?' And they didn't say because you're a woman, but it took me two and a half months in order for me to buy my first CAT and get it insured because I wasn't qualified. I didn't have... I think it was because I was a woman." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "Not supplies, I don't think. But lending and bonding, I do think has had an effect. If I was a man calling for certain things or emailing to increase my bond limits with the same financials as a man and you can hear it in their voices because most of my lenders are men. They just feel like the man is more competent and they're more willing to go out on a limb for them. Whereas they're not willing to go out on a limb for me." [#8]

2. Denial of bid opportunities. Three business owners and managers expressed their experiences with any denials of the opportunity to bid on projects [#16, #23, #30]. For example:

- The Native American owner of a DBE-certified construction company stated, "There's that, and that still goes on. So, yeah, I see it. So, yeah." [#16]
- The owner of a WBE- and DBE-certified professional services company stated, "Yeah. I have been denied. Just didn't have the capacity to go after something with me." [#23]
- A representative of a majority-owned professional services firm stated, "Our work isn't only bidding in price quotes, so there's been times where they've already, if we have a specialized

service or something that we could provide to the prime, but they already have another contractor that's working with them to provide those same services. Then that's kind of the importance of having those discussions early." [#30]

3. Stereotypical attitudes. Eight interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#11, #12, #21, #24, #25, #3, #4, #8]. For example:

- The owner of a majority-owned professional services company stated, "It's gotten a lot better working with private major primes. They seem to have moved and into this new realm quicker than the state or federal agencies has taken a little longer to get into that where they have accepted things. One of the... And that was probably... That was one of the reasons we didn't like doing stuff with MDT. They did not seem to... It was an incredibly male, heavily male dominated system. And we just, I mean, I have a daughter, and so my wife works and everything and we're all sitting here, we all have that. And so, we'd like him to have the same opportunities and it seemed like this was somebody who was not giving it for whatever reason. So, we just said, 'We're not going to work for you anymore.'" [#11]
- The owner of a majority-owned construction company stated, "The only thing that comes to mind is if I send my wife or my daughter's down for parts run or, or something, they get treated very poorly. That is the only discrimination that I can think of. I mean, my wife might have something different. But yeah, If I even send my daughters to a tire store, they treat them like they know nothing and most likely that my daughters have more experience and know what they're talking about better than the salesman that they're trying to get a tire from or a part store." [#12]
- A representative of a DBE-certified professional services firm stated, "I think that's a big issue, especially in Montana. They're coming along but I think there's a lot of gender discrimination. There's also a lot of racial and ethnic discrimination that's happening, even if it's implicit, if people don't know. So, I think that's a big issue. And I've seen that in ways that I can't even show you, but like showing up to conferences or meetings with State of Montana employees or people and it's like the good old boys' club. I know it's there. I don't want to be down on Montana. I just lived there for a long time, and I worked there a long time, so that's just how it is. And we haven't even talked about racial discrimination, and how native and communities of color are treated. I mean, it's very, very palpable in Montana. Montana's totally living in the dark ages in a lot of ways. What they get away with in Montana, you'd never get away with in other places." [#21]
- The woman owner of a majority-owned construction firm stated, "I go out to bid jobs sometimes and people are a little hesitant if a female bids a job." [#24]
- The owner of a woman-owned construction business stated, "Well, the biggest thing I know of as far as approval or getting the bid is that a lot of times, they will address a man and they don't want to address a female. In my particular field it's contracting a lot of times they assume that I don't know what I'm talking about and that a man does. So, they want to talk to a man they'll ask for my husband or they'll ask for my business partner. And he is actually the lesser of the two as far as knowing what we're doing. And that's a main problem that I've had." [#25]
- The Native American woman owner of a DBE-certified professional services firm stated, "I think maybe in the beginning." [#3]

- A representative of a DBE-certified construction company stated, "I think that the stereotype for the industry makes it difficult, especially for the females to enter and advance, just because of the stereotype that it's a man's field. Like I said, we have one of my best truck drivers is a female, she's terrific. So, it's not that it can't happen or shouldn't happen. I think that stereotype makes it difficult, especially for a young woman that wanted to enter the field. It's a very male dominated field. And so, it's extremely difficult to garner the respect." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "I am the paver operator when we're paving, and I have been since '05, and I have been so abused as a paver operator, by men. So, the disadvantage of being a woman is phenomenal. If I call an auto detail or an auto mechanic, my voice is really deep and I've been called sir 100 times to one ma'am. They treat you so differently. They don't have time for you. They don't want to talk to you. They think you're dumb. I don't know if this had any repercussions on it. I don't know if it was because she was a woman estimator, but they said, 'You were substantially low.' We were the low bidder and they said, 'You are substantially lower than the next type of high bid.' And so, they just put this doubt in her and then we ended up not getting to bid. So, there's a long story behind that, because they wanted us to address it the next day, but we were up the port of entry out of Turner. And we said, 'Could you give us until Friday?' And so, rather than waiting to hear her response, they basically just moved on. And come to find out, we were only $40,000 lower. To us, that's not substantial. So, I don't know if that was based on that or not." [#8]

4. Double standards. Seven interviewees discussed whether there were double standards for small, disadvantaged firms [#16, #25, #26, #3, #4, #7, #8]. For example:

- The Native American owner of a DBE-certified construction company stated, "There's superintendents that didn't believe in the DBE situation, and they come out and tell you when you start with them that, 'We're going to hold you to the line, and we're going to be tough on you. Tougher than we would on somebody that's not a DBE, et cetera,' because they didn't believe in this affirmative action stuff. It's been a year or so ago, but I talked to another tribal contractor, was actually from a different tribe, in fact, and he was still having that problem. He felt that way, that he was being discriminated against, a little bit." [#16]
- The Native American woman owner of a DBE-certified professional services firm stated, "Sometimes it felt like it, but I can't say a definite time. So, I will just have to say no." [#3]
- A representative of a DBE-certified construction company stated, "No, I mean, there's double standards, but I don't think they're DBE related. I think they're more related to the...how I would put this? There are certain larger contractors that seem to get a different set of rules than others. I don't think it's necessarily DBE related. I think it's more related to their ability to sway policy. So, I know that there are certain contractors that certain standards are different." [#4]
- A representative of a majority-owned professional services company stated, "We do experience that from time to time. We do have female technicians that go out to a job site. So, the stereotype, you can see the obvious stereotype there, a men dominated industry where a female comes out and tests stuff and tells them they're not doing well. And you can imagine the firestorm or the level of scrutiny there. And we did have some, not going to lie with that male to female thing, too. We did have an instance of some sexual harassment that I had to deal with. So, with our client and take care of that and help our technician out on that front. So, it does happen." [#7]

- The owner of a WBE- and DBE-certified construction company stated, "It seems like if you're a man, sometimes you get away with a little bit more than a woman I think that it's kind of they sit there and kind of rib each other and blah, blah, blah. But then when you walk up there, it's all business and there's no friendship or camaraderie. And sometimes when you have that camaraderie, you can read someone a little bit better. And maybe, you can tell them that there's no way that this is going to happen because you're asking the impossible if you're talking to an inspector. But as a woman, if you were to say the same thing to an inspector, they'd look at you like you have three eyes. … We were the general contractor, but the majority of that work was subbed up because there was a lot of road milling. And she was there every day to babysit. She took the camper, she stayed there. She was there every day and their supervisor he came up to her in almost like Manny the Rooster. And chest to chest almost, he was trying to just intimidate her. And basically, because he wanted to work on his schedule, well she could not work on his schedule because there's a schedule to go. And so, she had to pretty much go toe to toe with this guy on many occasions. And she got the job done. At one point, she had to go up to him and say, 'Hey, I'm going to pull my crew off from South Dakota and we're bringing them in here and this is what we're going to do.' Well, if you were a man, one, that guy would never have come up and done that. That guy would not be pushing the envelope as much as he was trying to because there's a man there saying, 'No.' Whereas since it was a younger woman, he completely tried to railroad her, and she just didn't let him. So, yeah, GCs will take advantage of you." [#8]

5. Payment discrimination. Slow payment or non-payment by the customer or prime contractor was mentioned by four interviewees as barriers to success in both public and private sector work [#16, #21, #7, #8]. For example:

- A representative of a DBE-certified professional services firm stated, "I think it happens more with women. I really do." [#21]
- A representative of a majority-owned professional services company stated, "Some of these VA jobs. Those are historically paid when paid and through the federal government, very slow process. And we were like last people to get paid. And we found internally if you don't get paid within 120 days, the odds of you getting paid basically go down to zero. So that's what statistics would show from our end or at least that's what we're told. But we, I think took three years to get paid on a job, but there are other, may have had some contractors willing to hold payment for various non-professional reasons. Just, what do want? They always use money if they get... I guess go back to my point, schedule and money are the two things that'll bring the worst out in them." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "I can't say if it's discrimination, but I do know that sometimes they try to take advantage of you. I mean, it's like if I was a man calling a company and saying, 'Hey, where's my money?' Talking to another man versus woman calling that company and saying, 'Hey, where's my money?' They're going to take the other guy a lot more serious because it's kind of that root force, that guy can come break my kneecaps. Whereas 'What's this woman going to do, I'm just going to ignore her.' And so it goes through my mind. Does it happen? I don't know." [#8]

6. Unfavorable work environments. Eight business owners and managers commented about their experiences working in unfavorable environments [#1, #14, #15, #16, #21, #23, #7, #8]. For example:

- The owner of a majority-owned construction company stated, "Trying to say this gingerly, this is still construction. And construction in a lot of respects is like being on the football team. Sometimes the coaches are loud and different people take that differently. Some people think that they're being yelled at or that's offensive, but I'm not aware of any DBE business owners being discriminated against. We treat everybody badly." [#1]
- The owner of a majority-owned professional services company stated, "I've heard some derogatory comments on the contractor side from some of the contractors about people's age. You don't have the years of experience to tell me what to do kind of a deal, but never gender or race related. The one incident I'm thinking of, there was a young lady, a Federal Highway engineer, and a subcontractor was given her a lot of grief because of her age. And he didn't like the fact that she was trying to tell him what to do. And as another subcontractor, I immediately got a hold of the general contractor, and we put a stop to it. I don't think it was generally gender related. It was more just he was a crusty old guy. And he didn't like a young, right out of college engineer, whether it was female or male, telling him what to do." [#14]
- The woman owner of a DBE-certified professional services company stated, "It's difficult for a woman to be out on a construction site, for sure. I have grown up in that and it's not an environment that women are out on very often, so it can be uncomfortable." [#15]
- The Native American owner of a DBE-certified construction company stated, "The first few years in business, I heard a lot of that, but I haven't, these last few years. Haven't heard any of that. I think people are finally waking up a little bit and understanding that people are people, humans are human." [#16]
- A representative of a DBE-certified professional services firm stated, "My first job at Montana State University as a co-PI, the big head of the department, I got hired and I brought my baby there and he was like winking at me looking at my body, it was super uncomfortable. And he was a white male in a position of power." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "That's why I started my own business." [#23]
- A representative of a majority-owned professional services company stated, "We do experience that from time to time. We do have female technicians that go out to a job site. So, the stereotype, you can see the obvious stereotype there, a men dominated industry where a female comes out and tests stuff and tells them they're not doing well. And you can imagine the firestorm or the level of scrutiny there. And we did have some, not going to lie with that male to female thing, too. We did have an instance of some sexual harassment that I had to deal with. So, with our client and take care of that and help our technician out on that front. So, it does happen." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Outhouses or lack of them. If you're a subcontractor and you're working as a subcontractor, the outhouses sometimes are one, not existent because there's a tire that most guys can pee on. And then the conditions of those outhouses or the locations of them." [#8]

7. 'Good ol' boy network' or other closed networks. There were a number of comments about the existence of a 'good ol' boy' network or other closed networks. Twenty-five firms shared their thoughts [#10, #11, #13, #15, #16, #21, #22, #23, #24, #25, #26, #28, #29, #3, #33, #36, #4, #5, #7, #8, #AV]. For example:

- The Black American woman co-owner of a construction company stated, "I mean, there's a reason that the same 12 companies get every DOT job that there is, because it's set up to be that way, in my opinion. You could take something as simple as erosion control, something like that. So however many years ago it was, 10 or whatever, 12, the MDT on a highway job, they went to lump sum erosion control bids. So, if you take what the specifications say and you bid a job that way, your erosion control number is going to be hundreds of thousands of dollars more than it needs to be. Where those companies that do DOT jobs all the time, and they know those inspectors, and they know what they can do, and they know what they can't do, they know what they can get away with, they just bid what they know the minimum they'll have to do. I mean, you're talking like a 30, 40, $50,000 difference. … That's the thing. These guys have all known each other since they were kids, all the owners of these companies. You can't tell me that there isn't some kind of collusion. And I'm not accusing anybody of anything illegal. I'm just saying, [company A] didn't bid the one section that [company B] got, but [company B] bought all their gravel from [company A's] pit right there. You can't compete with that kind of a rigged game. … When I used to estimate for a company, our bonding agent could tell us. He would never say unless we were the low one, and he wouldn't tell us by how much or anything. He would just be like, "Oh, don't worry about it. You guys got it." And he was right every time. So that tells you how small of a family of companies it is bidding that. Any time, and I don't care who it is, I don't care if you're the best people in the world, if you have a tight-knit community where everybody's successful and making money, you don't really tend to want to see outsiders come in. It's just not really how that works usually. When you're in that club, it's nice. But I mean, but the thing is I think anybody with a little bit of a moral compass, you start to realize that it's like, oh, I shouldn't have this ability. I shouldn't be able to do this on a state-funded job on something like that." [#10]
- The owner of a majority-owned professional services company stated, "That used to be what it was in the late eighties, nineties, and that sort of stuff. And now they put a whole bunch of rules and regs in front of there to stop that. And they're working hard to get that. And so, it has essentially stopped that process, but it used to be that they just, it was a good old boys club, and we did not want to ever take advantage of something like that. I mean, we just thought it was unfair." [#11]
- The owner of a majority-owned professional services firm stated, "There's some undercurrents of that culture, I think the good old boy. I think maybe especially within MDT, just more of a cultural thing that it's hard to put words on." [#13]
- The woman owner of a DBE-certified professional services company stated, "It favors large businesses that they're used to doing work with, because when you do a project for them, they have a ranking system so when you get done with the project, you get a ranking of how you did on that project. So, if you do projects over and over, you get rankings that are in their system. If you have never worked with them before, then we have to go solicit letters of recommendation, like three letters of recommendation, because they say they've never worked with us before. And so, it definitely favors the people... If you went and looked at firms that they work with, it's

the same group of firms over and over. I think the biggest thing that you boil it down to is the larger firms that they work with over and over, they're just more comfortable. I used to work for the Department of Energy in Washington and that's the way we did it is there were firms we were used to working for and we were comfortable because it made it easy because they worked with us over and over and over. They knew the process. And so why do we want to go try to find a small firm that doesn't really know the process and we have to hold their hand through the whole thing? You know what I'm saying? So, I think that's where it boils down, to be honest with you, is they're just got firms they're comfortable working with on the design side and it makes their job so much easier because those companies know the paperwork and know the process and they can just get things done quicker by using those same large firms that they do over and over. It feels like there is a good old boy network." [#15]

- The Native American owner of a DBE-certified construction company stated, "Yeah, you're probably right there." [#16]
- A representative of a DBE-certified professional services firm stated, "There's like a whole good old boy system, especially in Montana, I'm just going to lay it out there. So, it's all about who you know and what you know if you want to get the bids. And we've seen that play out with more like foundations or with tribes, I mean with universities. I mean that's a big barrier because you go into things not knowing that you don't have a chance. So, I don't know, I think there needs to be more equity and fairness in that process. I don't know if you ever get rid of that completely, but that's a big problem across the board, I think. I think that's a big issue, especially in Montana. They're coming along but I think there's a lot of gender discrimination. There's also a lot of racial and ethnic discrimination that's happening, even if it's implicit, if people don't know. So, I think that's a big issue. And I've seen that in ways that I can't even show you, but like showing up to conferences or meetings with State of Montana employees or people and it's like the good old boys' club. I know it's there." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Those companies, especially that are comparable to us but have been at it longer... They have relationships with people in positions of decision making. And so, when they know those people, they can have things kind of created or directed in their way. And I'm believing that, that's no different in Montana or any place else. Because again, it's familiarity, its comfort, it's a belief in success of those people." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "Super subjectively speaking, they all go to middle to older end of middle-aged white men who've lived in Montana their whole lives. I feel like I get, like pick you a skin sample and like that's the guy, like a little tough skin, really light. That's what it feels like. I think one of the things we as humans do is we look for people who are kind of like us because there's a lot of trust there. And if you're hiring someone to do a job, you want to make sure it's done well, and you want to trust that person. And unfortunately, we kind of have to work counter to our instincts to diversify the pool of people working on projects. And it's hard. It's hard not to hire someone like you. I love hiring smart, diverse women, but you know what, like I have also had some great white men hires. So, you just have to remember that it doesn't have to be the person that you're most comfortable with or that you have the most in common with. There are really great people from all kinds of backgrounds." [#23]

- The woman owner of a majority-owned construction firm stated, “Oh, there's definitely that.” [#24]
- The owner of a majority-owned construction firm stated, “That is a problem here. That is a big problem here. About half of the people here are not going to do business with you because you're an outsider, and this is very true, and it's true with state contracting here, and it's true in the private sector. The people might, if you go by and make sales calls, they'll look at your stuff and be glad to meet you and everything, they're just not going to do any business with you. They know you're an outsider. You don't have to say anything to them. It's just the way it is here. … It's about 50%. I've made sales calls where I knew that I was not going to get any kind of response from those people, other than when I left the office, that would be my last response. And I'm sure the good old boy system goes on here, just like it does everybody else. It's so-and-so's nephew, it's so-and-so's this and that. They get all the work, and the other people don't get any. It's not about bids. You might turn in a bid, but you're not going to get it. It's just real simple. I've done it with state contracts. I'm set up with eMACS here in Montana. I'm set up with SAM. I'm a registered SAM person. I have all that paperwork done. I get proposals for jobs, don't ever get the jobs. Nothing. It's sad. It's really sad, in a way. This is not private business that you're talking about here. These are government contracts. There's a lot of money spent on signs by the government. Look around, just go out here and look around. Thousands of them, thousands, and thousands of jobs out here. State parks, road signs, speed limit signs, this and that, wayfaring signs, all kinds of little signs out here, no littering, all this kind of stuff. They're everywhere. The same people are doing them most every time. Either somebody's being paid off, or it's something like that, and there's no room for anybody else out here. Just like I said earlier, so-and-so's brother-in-law, it's so-and so's, ‘Oh, they used to work for us,’ kind of thing. ‘Oh, that's Jim down there, his wife's a congresswoman, and then they're on top of all this stuff here, and they've been with the park for years. We can't let anybody else do it.’ I've heard everything in the world out here about why somebody can't do business with you. You can fill out all the paperwork you want to, and present all the bids you want to, ain't going to get the job, ain't going to get it.” [#26]
- The woman owner of a DBE-certified professional services business stated, “I would say there's always the old boys network. There's always the old boys’ network and there's also always the... We joke about, they all went to school, the MSU together and never left Bozeman. I don't know how you get around that. I think that the DBE program has done a lot of networking opportunities and things like that, but some of it is just real life. I mean, if they skied together on the MSU ski team and you didn't go to MSU and don't ski, it's just the way it is. We sometimes benefit from getting work from people we know, but of course a lot of the times there's the other side. So, if we don't play pickup basketball games and go to the men's locker room with the client, it's like, that is the way it is.” [#28]
- A representative of a majority-owned professional services company stated, “It still exists, for sure.” [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, “Well, I was working with oil companies. Some of the largest on the reservation, they were doing a lot of drilling. So, I was doing all the land work. And then, they needed well sites prepared and roads to the well sites. ... When they did the Highway Number 2, I wanted to have the gravel for that road. So, I thought I was looking ahead and getting the gravel pit. But when it came, I wasn't in the guy club. So, I just had a gravel pit that was not opened. But that was a huge... And I'm not sure that's

totally gone with the primes. … I told them, 'The proof is in the pudding.' Then I ended up helping the other guy get his part done. So, it was kind of a good old boy system back then. What I found in the highway, with this construction, is when you're a small company, you really, it's hard for you to be the prime. Almost impossible, when you really are small, and you don't have the bonding, and you don't know the big boys, and you're a woman. I just could not get in there. Way in the beginning, that was a major thing, yeah." [#3]

- The owner of a majority-owned professional services firm stated, "I'm sure that exists and I wish they were friendlier to me." [#33]
- A representative of a Native American-owned construction firm stated, "I would say yes, just because our industry's such a male-driven industry right now, which is crazy still, but it is." [#36]
- A representative of a DBE-certified construction company stated, "I think there's good old boy networks, but I think that's pretty common, especially in this industry. I think in a lot of industries, some of those good old boys, some of that's relationships, too. We've got relationships with certain people, certain companies, well, we'd much rather work with that particular company because we know what we're getting into. We know exactly what we're doing. I'll give you; we have a striping subcontractor that we use for the majority of our private striping in our private sector. And we had a newer company called up not too long ago, wanted to give us numbers on stuff. And, pretty much politely told them that we work with this particular striping contractor almost exclusively, just because we've worked with them for 20 odd years. And we know what to expect from them. They knew what to expect from us. We give work back and forth to each other. He'll get a job that's got some paving on it, 'Hey, can you come do the paving on this job?' And then I'll stripe it. And vice versa. So, for a newer company, that's probably a huge barrier is building up those relationships, especially with established firms that have been around as long as we have. We have a group of people that we work with almost exclusively on certain things." [#4]
- A representative of a majority-owned professional services firm stated, "I don't think that will ever go away. I think it's probably better than it has been in the past. There is a competition for selective projects now rather than just kick somebody off the list. There actually is a scoring and a proposal with MDT. I think that's really improved that. Could it be improved further? Yeah probably." [#5]
- A representative of a majority-owned professional services company stated, "Yeah. Is it good old boy? I would counter that with, that could just be good business practices if you've been able to keep a client for a long time as long as it's not but a under the table stuff, but then maybe that's what the good old boy mentality might be." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "I'm not a guy, so I don't golf with certain people, and I don't hang out with certain other guys, that's a detriment being a woman. I'm not a part of that and that's really sad, I mean, it would be nice to be able to. I've never had that luxury, if I was selling used clothing, there are so many different people that you could call and talk to and say, 'Hey, did you hear about this special? Or did you see this sale? And how did you find out about that?' Women are willing to talk to other women. You do get just this PR going, even when you're just shooting the breeze. Whereas I don't go and shoot the breeze with guys. But guys will shoot the breeze with guys." [#8]

- A representative from a Black American woman-owned professional services company stated, "DOT has not caught how the market flex, that has changed quite a bit, more people are moving here to Montana it set up for the 'Ole boys club,' all men's club, same people making decision. Impossible for small companies to break in… The same companies get 90% or 15 of the same companies get the work. That's why we (smaller companies) don't look at them. It is not fair." [#AV216]
- A representative from a majority-owned professional services company stated, "They don't expand beyond who they work with, they only give business to their regular firms. It is a good 'ole' boys club both in the transportation and aeronautics business." [#AV310]
- A representative from a Black American woman-owned professional services company stated, "There is a lot of other work to where I don't even have to take the risk of trying to get DOT jobs, even though I would like to do them. … The reason a lot of companies don't bid is that it seems set up for them to not have people bid. The jobs all seem to go to the same 10 or 15 companies if you look at the $250k to $700k jobs." [#AV337]
- A representative from a majority-owned professional services company stated, "Our observation if don't have an 'in' you're not in." [#AV65]
- A representative from a majority-owned professional services company stated, "You have to know somebody or be related to them in order to buy products. There's a lot of people that don't get the bids and I'm one of the people. I've bid under cost and still have never gotten one thing." [#AV109]

8. Resistance to use of minority- and woman-owned businesses. Eight interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#10, #11, #15, #16, #23, #28, #3, #8]. For example:

- The Black American woman owner of a construction company stated, "We've had companies meet us and then never call us, talk to us for a month leading up to wanting us to do a job and then meet us in person and then never call us back. I had my six-year-old in Town Pump in Three Forks about a month ago, and the guy behind me... I turned around and he didn't see I turned around and was faking to his friend like he was going to kick my son in the back. Stuff like that, yeah, is obviously hard. Like I said, in the professional level, people have learned a long time ago in businesses, you can't get away with saying that [expletive]. And there's much more creative ways like, 'You're not financially qualified for this.' Or 'You don't have the right experience,' or that type of thing. … So, he is one of the owners for the general contractor. Racist as all [expletive]. Literally, that is in six months on this job, that is the first nice thing he's said to me. He tried to get us ran off this job. He tried to get us this. In meetings, he won't even really look at my wife. He's from the South. But it's one of those where we know the reaction to that makes them right. And what he just did there, that is what we do the right thing for. Because at a certain point, people just can't argue with it anymore. We were ahead of schedule. We've beat every deadline they've given us. Even though he literally has sat there every time and told us we weren't capable of it, told us we weren't doing this kind of thing, but literally, he just showed up for a visit. He just flew in yesterday and was just leaving. But that means a lot to me too. Can't help how people are going to be, but you have to have a stronger mindset if you're going to be a minority in Montana, I think." [#10]

- The owner of a majority-owned professional services company stated, "Not that I'm aware of. Although I have seen primes argue to the Corps of Engineers about why they were giving certain contracts to small businesses and that sort of thing. They wanted the number to go much lower so that they could get it in terms of the bidding, because they wanted to take it all is what they were looking at. And then the Corps said, 'No. We're going to always make sure that we have subs that are minority-owned, small business, women-owned, all this sort of stuff.' And they were pretty upset about it. I was at a meeting in Omaha about that with the Corps." [#11]
- The woman owner of a DBE-certified professional services company stated, "Every once in a while, you get a contractor that thinks it's ridiculous that they're going to be forced to use a DBE, but in general, I think they all know they have to play the game." [#15]
- The Native American owner of a DBE-certified construction company stated, "We even had a guy that supposedly is representing the Department of Transportation even tell us exactly those words. 'Just want you to know, I don't believe in affirmative action, where I come from.' So, we had to be pretty careful around him, and he worked for the state." [#16]
- The owner of a WBE- and DBE-certified professional services company stated, "We applied for West Yellowstone and made it to finals. Didn't get it. Which, I understand we're new business, but the chief of aviation or director of aviation, maybe, at the Department of Transportation, was like, reach out to the winning team, because there's a state DBE that everyone has to try to fill. And I reached out and the architect was abrupt. He didn't tell me to [expletive] off, but you know. He was like, 'Our firm has all of this experience working with the parks and we know what they need best, and we don't need anybody to help us figure or this out.' Which wasn't really the point. One might have also pointed out that they were building like on top of the Nez Perce trail and didn't have any Native Americans on their team, that would've been an applicable thing to, if you were running the team to be like, I don't have anyone who can bring this point of view to the table or I've worked a lot with the State of Montana or with the Parks Department, which they have, they've done some really awesome work in Yellowstone. But they haven't done that much aviation that I have. I don't know. It came off super shortsighted and selfish and kind of like a get out of my way. This is my money and I want it. I did push at the Department of Transportation once I had that feedback from the prime. And it was kind of like, we're not going to do anything about it from our end. The prime has to pick you. And I felt like that was definitely only the opportunity for them to come in and say, hey, these DBE recommendations are for real recommendations, and you have to prove that you can't meet them. So, we just want to reiterate that this woman was one of three finalists, was one of your competitors in the finals, which means she's fully qualified. Regardless of being a DBE, I was fully qualified to win that project. So, there was an opportunity for the government representatives to engage in, what's the word, advocating for me. And they did not. Or advocating for, really, the DBE recommendation to be fulfilled and they did not." [#23]
- The woman owner of a DBE-certified professional services business stated, "In fact, the opposite, I would say that we've been contacted because they wanted a DBE on their team. I don't think it's meeting requirements. So, I think it's because they think it looks good." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "DBEs come in a little bit under... You know, you're not the one that stands... You're there as a DBE and they're there as, 'Do we really have to deal with you?' They don't ever say it, but it's just a... It's better than it used to be 15 years ago, I have to admit that. And they do it because they're forced

to. I mean, they call you and say, 'We have this job in Timbuktu, do you want it?' 'No, it's too far away. I can't.' But they do, so I have to give them credit for that." [#3]

- The owner of a WBE- and DBE-certified construction company stated, "When we've done work for in the past for Yellowstone County, the City of Billings, they look at two women coming out on that job site and a small company, and they frown at us. But now when we did in Carbon County, those county commissioners couldn't say enough. They loved the fact that we were family owned. They loved the fact that there was two women out there. So, it all I think comes down to egos. I've had the TERO office in Crow agency not let me renew our permits. He said, 'I don't want you in here. I want [your husband] in here.' And he says, 'And by the way, you should not be on that paver where you should be in an office somewhere working.' So. To my experience we've had really good luck with the Federal Government. But when it comes to City and County, especially Yellowstone County, they would rather move past you than work with you." [#8]

9. Fronts or fraud. Eight business owners and managers shared their experience with MBE/WBE/DBEs fronts or frauds [#1, #10, #11, #16, #18, #29, #5, #8]. For example:

- The owner of a majority-owned construction company stated, "[Their female employee]'s the minority behind it. They might not be DBE right now. Because they were just paying [the female employee] so much to use her name." [#1]
- The Black American woman co-owner of a construction company stated, "It's how they enforce them. … When you're talking hundreds of millions of dollars though, people are going to figure out a way to get that still. They just put a figurehead up there. … They would put that part in somebody's name and even though that person had no actual ownership or got any money from the business or anything like that. … You can pass any law you want, but if you don't have the enforcement in how it's set up, then it really doesn't matter. … Especially with the veteran-owned and stuff like that, people just take somebody that's a veteran and put them on there as the front of it. I think that's easily solvable is to make some kind of transparency requirements to prove that that person is actually part of this company. And not that they're actually part of it, that they're actually... I mean that's as simple as showing tax returns or something like that of what they actually got." [#10]
- The owner of a majority-owned professional services company stated, "It's just that I have been involved in one contract that was in excess of billions of dollars in which they had small business and disadvantaged business owners and all they... As part of it and you had to purchase or you went through them for something or whatever, but when you dug deep, you found out they're just a shell. And so, they didn't do anything except pass on an extra cost to the end, which I thought was a little... They just had a name, they put a shingle out and they could have been anywhere, but you had to get everything through them. So, they went and purchased it and then put a markup on it. And it ended up just inflating the overall cost of doing the work, which I thought was unfortunate because it was not actually helping them. In other places, we've had other groups that we've worked with, and they've had those. And I think it's been very helpful to them." [#11]
- The Native American owner of a DBE-certified construction company stated, "There used to be a lot of that go on, but I think they've really gotten it under control, including our local tribe, here.

Because there was a lot of them that did, a few years back, too, but I think it's pretty well controlled now." [#16]

- The owner of a majority-owned construction firm stated, "A lot of the other firms that I see certified are my definition of the paper tiger. The wife might own the shares, but the husband is the one that makes all the decisions. There are very few examples of truly owned DBEs, I know a couple, but the majority, the DBEs that I know, are simply paper tigers." [#18]
- A representative of a majority-owned professional services company stated, "About falsification. In the past, when we used to have those, we had firms that were, quote, women-owned or minority-owned, and they were not really. We never saw the person or talked to the person or had anything to do with the person that supposedly owned it. It was like maybe a wife that had nothing to do with it at all." [#29]
- A representative of a majority-owned professional services firm stated, "I've heard of that." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "I think that they're trying to improve that though Before COVID [a DBE specialist] physically came here once a year and did an interview. So they're trying to make sure that if I'm telling you that I am and that I'm running this business because they have been taken so advantage of in prior years. But now COVID has let that all go by the wayside." [#8]

10. False reporting. Seven business owners and managers shared their experiences with the "Good Faith Efforts" programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith Efforts programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals [#22, #23, #28, #3, #4, #8, #FG1]. For example:

- A representative of a Native American-owned SBE-certified professional services firm stated, "[For example,] Boeing, most of the time they send somebody who is in an area they need, or somebody who's a small business representative for this billion, multi-billion dollar corporation. And so, you'll sit down with them and talk about who you are, what you do, what you can do, and they'll look at you and go, I'm not buying that, or they'll look at you and say let me... Here's a name of a person. Call them. So, you don't get any personal contact. And then even at the other ones, like the reservation economic summit used to be a big procurement event. Well, it's not that anymore. And then the reality is sometimes I think the larger corporations send people these meetings to check a box. They'll say, based on the rules of this contract or this whatever, and I think even state agencies in Montana do it to tribes too; they've got that requirement of meeting with the nations. And so, I would say it's a check a box. With the Indians, check the box and then nothing ever. I met with them, and we ask me, I look, I met, here's the box I check. And then I go to these conferences and people say, did you get any work? I'm like, what do you think? I said, they're just checking boxes. Because you can kind of read the room when you meet with them and people aren't trying to do it, but you've been at it long. If you go out, we're at a tick, a box that check the box conference." [#22]
- The woman owner of a DBE-certified professional services business stated, "I have seen us be on a team and propose to do work and then the prime do our work internally themselves." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "I had somebody call me to do an SOQ. And they wanted to use me and I'm like, 'Okay, so what do I do?'

'Well, just send us your qualifications and all that and we'll put you in the SOQ as our DBE,' or blah, blah, blah. Or whatever. I never heard back from them. So, I'm like, 'Did they get the job? Did they get it because they had the DBE and all of these other things? Or did they just not get the job?' Or why didn't they tell me they didn't get it. So, I would never go with anybody again." [#3]

- A representative of a DBE-certified construction company stated, "Coming in, they've gotten a DBE status and I have to send this off to DBE X. So, I can check the box saying that I've tried to get a DBE candidate to fill this particular role or sub out this particular amount of work, and I'm sure that there are companies that feel that way." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "Like they need smaller DBE projects. Like I get, you have generals out there trying to help you with it. But again, you're bidding to a general, sometimes they only want certain portions of the work. They don't want all of your numbers. Sometimes they don't even know who's looking for these numbers. I mean like a lot of people call, but they call you like three days before the bid is due. And so, you, it's not by saying that you're looking at, because you don't know what people want numbers on it. And so, they'll call you three days before it's due. It's like, well, no, I don't have time to get this. But see, now the reason they call her three days before she's due, is basically they don't want her to do the job. They just want to fulfill their percentage of reaching out for a DBE company. That's why it'd be nice if they just did smaller DBE projects." [#8]
- A representative of a DBE- and MBE-certified professional services company stated, "We've also had other issues where the DBE or the design build is not regulated closely in Washington, like it is, like other contracts are. We've seen contractors do bait and switch. We've seen them engage and then drop that and go to another firm. I mean, they're not held to the same standard that other contracts are. And I mean, there's quite a few players, even big players that really don't want to be in that arena anymore because it's not advantageous. I don't think Washington regulates it the way that they should. And I mean, here's just one thing that happened. There's a contractor they've won a lot of design build. They're probably one of the tops that they go to. It was nine bridges, and we were contracted through the civil. It was them, then it was the civil. Then we were the structural for the ... Because it was 14 miles of roadway and nine bridges. And we went through the process. We got minimal amounts of dollars to do the proposal work. And we were one of the three that were chosen, blah, blah, blah. Then we won. Well, before they went to contract, they decided that they were going to go with somebody else because they did not like ... So, we did this work at a lesser rate to win the project. Then we were told, basically we weren't even told, we just found out that we weren't going to be on it. Nobody even sent us a letter. Nobody did anything. It was ridiculous. We filed a complaint with WSDOT. We filed a complaint with the State Attorney's Office. I mean, it was a big deal. We felt that on one of the bridges that the contractor was offering up to us that we should do something different because it was more cost effective. And we said, 'No, it's a hazard.' We felt like from our experience that it was not the right move to make, but you know what? They did it anyway because they only want to cut cost. That's all they care about. Well, what about your responsibility to the public? I mean, and they're just allowed to do these kind of things. And one of these days it's going to be a bad thing, I think. I mean, the design build only lines the pockets of the contractor. That's all it does. They just make more money by cutting cost." [#FG1]

11. Other forms of discrimination. Seven interviewees discussed various factors that affect entrance and advancement in the industry [#28, #33, #8, #9, #AV]. For example:

- The woman owner of a DBE-certified professional services business stated, "Entering or advancing in our industry, I mean, you start with an ample geologist and field camp is a requirement for the degree almost anywhere. Company wheelchairs go up a mountain and map rocks. I mean, there's huge issues to entry and it's a male dominated field, but I don't know what else you want there. I was the only female in the geology program where I got my bachelor's. So, one of the things is you learn to stare down your microscope and try not to laugh or blush if the joke's going around the room." [#28]
- The owner of a majority-owned professional services firm stated, "I know Montana is a monochromatic society. If you hear people talking, you get the idea that in the few cases where there are minorities or things like that there... my guess would be you would have a higher chance than not of seeing some discrimination, just because the culture of most of the area. I would say in the Bozeman area, it's changing somewhat. In some of the trades, for example, there's an awful lot of Latinos, particularly Mexicans in the building trades now. There's not a lot of gay people, although I've hired gay people on a couple of times, and they were great workers. I can't remember if I've ever had an African American or a Native American apply for a job, and I would happily hire them if they could do it. I would probably get some pushback from some clients or lose some business from it, but I don't really give a damn." [#33]
- The owner of a WBE- and DBE-certified construction company stated, "It's kind of been a disadvantage to me is I am a nice person, and these companies know that I'm a nice paver operator. So, when I hire out trucks or when I hire trucks, they will send their worst trucks and their least experienced drivers because they know, one, that we are a small company, and we don't use them a lot. And two, I will not yell at them. And that is a disadvantage as well. It is such a disadvantage because you have these guys that have never paved before. They might have driven truck. They might have hauled gravel and all they do is dump it, but they've never had a paver push them. And I've had truck drivers come in there and I don't know what they do, but they take out whatever was there. And we were paving at the airport. And so that parking lot is huge. And I had my blocks there that you go up on that to get onto a trailer with that paver, completely destroyed them. And then he gets in front of me, and you could just see he was just shaking, because I can see him in the mirror, and he can see me. And instead of screaming at him like a lot of paver operators do, I basically said, 'Take a deep breath and let's start.' And they do send those types out. And so, they cut their teeth on my jaw with me. And it is a disadvantage, and have I said anything to anybody? No, but..." [#8]
- The owner of a majority-owned construction company stated, "You see these offices are closed, and I want to talk to people. I have my earbuds and I can hear you pretty good, but normally wear very powerful hearing aids. I got my volume turned up wide and everything all the way open, wide open. I want to talk to that person. I want to watch his eyes. I want to watch his movement when I'm bringing out paperwork and showing paperwork. I'm one of them type people, I read human body's language. I've been deaf since 1973. My ear was lost in the military. I lost a lot of my hearing in the military, and so I want to watch that person's actions, is what I'm saying. And I have a pretty good, I guess trust, or a good opinionation [sic] of somebody when I'm talking to them if they're BSing me or being truthful. That's why I said, 'I'm going to put a hold on this until we get back to living a normal life.' I've wasted a lot of time attending meetings.

These people, oh, you're going... Nothing's ever going back to normal. I said, 'Well, that's fine, but eventually you're going to have to open the doors because you can't run a business...' I've been discriminated all my life because of my hearing, and that's a fact. … It's just that they don't have respect for you. And believe me, I was the oldest one there working. I know I've mentioned this to other people, and I just could see they got real antsy, like they didn't want to talk anymore about it. And I guess talk about discrimination in hearing loss, I have applied for numerous foreman positions in my life, and one of them I was so appalled. He says, 'Well, I can't grant you the permission to have this interview in person. We have to do it on the phone.' I said, 'Well, I don't hear well on the phone, so I don't know if I can answer you correctly.' Well, if I have to do it for you, I got to do it for everybody, so therefore you're going to have to. I mean, never checked with human resource, and never said, 'Well, let me check with human resource and see what we can do.' And believe me, I knew from then on, I took that as a grain of salt, said, 'You might as well quit applying for these jobs because you're never going to get one.' And that's what people hard of hearing are up against." [#9]

- A representative from a majority-owned construction company stated, "The idea that minority-owned and women-owned businesses are getting preferential treatment rather than white male, feels sexist and racist." [#AV300]
- A representative from a majority-owned construction company stated, "They lean heavily to minority-owned, women-owned, or veteran- owned businesses. I am sent home, then MDT gets a feather for every woman, vet, or minority they hire. I get a lot of discrimination for being white. I have lost a lot of jobs." [#AV328]
- A representative from a majority-owned construction company stated, "Should never be about the color, (referring to the minority question) only your abilities, also, doesn't matter about gender." [#AV8]

I. Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;
5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Insurance assistance;
9. Start-up assistance;
10. Information on contracting procedures and bidding opportunities;
11. Pre-bid conferences;
12. Other types of agency outreach;
13. Streamlining bidding procedures;
14. Unbundling contracts;
15. Price or evaluation preferences;
16. Small business set-asides;
17. Mandatory subcontracting minimums and contract goals; and
18. Small business subcontracting goals.

1. Awareness of programs. Twelve business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance [#12, #23, #26, #28, #3, #4, #5, #6, #8, #9, #AV]. For example:

- The owner of a majority-owned construction company stated, "I went to a thing about eMACS one time that was held at the college and then I've gone to through it's either through one of the payroll areas where you have to pay employee taxes and stuff. They had been work training meeting for doing your work and filing your documents and all of that. And I've been to that a couple of times. One that helped with the insurance, payroll, insurance, and stuff that was helpful. The one with eMACS like it opens the door but on the other side of the door, it's so overwhelming and it takes so much time that I don't have enough time to commit to it because I have all these other things that I have to work on. It's like, even in doing contracting with Forest Service for fires you have to have well in there was ORCA and then there was SAM, and DUNS

and VIPR and all of that. And so that was a learning curve and a long one. And now we're down to SAM and VIPR, ORCA went away. We still have DUNS, but DUNS don't require much of you. You just have to have it in order to get into the other stuff. And then VIPR has changed their program where it used to have to sign up every year. Now you to sign up certain parts of the industry every three years for renewals. It was such a long time ago that I went to that. I don't remember what they offered as far as that part was concerned. I actually did go and register in eMACS. But as far as ... We weren't 51% woman-owned, when we set up our corporation, we just set it up. He and I were each 50% owner, and it wasn't until probably we started contracting with the Forest Service that I even seen disadvantaged, or woman-owned stuff. And I have not looked because we are no… I have not looked into that." [#12]

- The owner of a WBE- and DBE-certified professional services company stated, "I've used a lot of the PTAC stuff. PTAC has been really helpful. I really like it. There are a lot of people who are cheering for me. And without PTAC, there's no way I'd still be, first of all, there's no way I'd be a female woman-owned certified business or a DBE because I just wouldn't have gotten there. Wouldn't have known it was available. Wouldn't have known how to figure it out. And it's all so simple, but it's just easier for them because they do it every day and it's hard for me because I have to learn it if I want to do it." [#23]
- The owner of a majority-owned construction firm stated, "I think Snowy Mountain Development, those type of people, they have helped a good many people. They've helped me in some ways. They seem to be an organization that does that. Other than that, I wouldn't know of anybody else." [#26]
- The woman owner of a DBE-certified professional services business stated, "I'd say DBE is primo. And I would say that the only other thing that we've really reached out for help with, oh, and PTAC is wonderful too. Those two things that we've gotten a lot of help from. When we've tried to reach out to SCORE … that was like walking into a guy's locker room. I would tell anybody else I know who's trying to do work, goes to talk to DBE and go talk to PTAC if they can. That we've had great help from them." [#28]
- The Native American woman owner of a DBE-certified professional services firm stated, "I did get a website. And DBE actually helped me. That was a really great thing because they hired, well I found a person that would do a website, and they paid him to do my website for me. Which was necessary. Like I said, back to that old thing where that's the last thing I wanted to do was do a website." [#3]
- A representative of a DBE-certified construction company stated, "Last spring, he went to, I think, the County Road Supervisors Convention. We had a booth set up there I know there are others. I haven't done any research on them. I couldn't even tell you what they were because I haven't really taken the time to research too many of the others." [#4]
- A representative of a majority-owned professional services firm stated, "I know that I looked really hard at trying to go after US Forest Service work and just trying to figure out the United States of America website and how you get in, how you get noticed, and how you can find out about opportunities to apply for and all that. There's actually an online course that takes a couple of days to go through it. There's a couple of programs in Washington State that have that you have to have a registered DBE firm on your team for 20% of the work or something like that." [#5]

- The owner of a majority-owned construction company stated, "We did it all. We used the Small Business Administration. We went to the local development centers. We exhausted everything we could, and we barely made it through it, to be honest with you. But we had a lot of help from, a lot of help with the BLDC, which the Butte Local Development Center here, they were a big help. Our banker guy really was very good about helping us get SBA loans, and stuff that he couldn't secure himself. We got lucky along the way to get as much help as we did, to be honest with you. I think people are willing to help all the time, as long as they're asked. Like the Montana Contractors Association, they could start there, and I know they would steer them in the right direction of people who could help them and do whatever. I would think MDT would be willing to maybe steer them in the right direction too, and find some people that could help, and find these, especially with specific questions. I know the Contractors Association would be happy to help." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Montana Contractors Association, we were a member of for five years, and then they doubled their dues. So, we called and asked why, and their response was that portion of the increase is going to go to [a local construction company] and another company to pay for their... them to train their employees. I am paying you, to pay them, to train their employees. So, I'm not a member anymore. But to tell you the truth, I didn't see any results from it. I mean, it's not like someone called me and said, 'Hey, I saw your name in MCA and we can bid this job or,' never. Somewhere along the line I got on this GSA. Like, you can go through this certification, if you will. But they say the certification is six months to a year to get into it and the paperwork is phenomenal. So, then I called Big Sky Economics, which is SBA. And I said, 'Is this wise? I mean, it's like... this is a lot of work, but I don't know what kind of work that they'll have. Is it going to be worth my time?' And one of the requirements is you have to have $25,000 of sale per quarter. Well, what happens if none of my job... if a job that I'm qualified for doesn't come up? So, she researched it and she said, 'No. Most of the time these guys are buying supplies or they're buying stuff that's not a service, like what you have.' So, I'm glad she said that because that would've been a big waste of time." [#8]
- The owner of a majority-owned construction company stated, "This COVID stuff hit, I'm still working. I was working up to getting my over 20 years of retirement in, and I talked to PTAC in both Washington and in Montana, and they said, 'Let's just get the paperwork started, get yourself all set up, get you some CAGE codes, numbers, and everything. And let's see what we can do.' I'd been redoing a lot of reviewing, but with the Forestry Service and so forth, and I haven't bid on any jobs due to the fact that I can't walk in their office down there and talk to them. What PTAC will do is they'll take somebody's bid from the past and they'll start to give you some hints, but they don't get right down and do your work. I mean, they don't... It's not, 'Hey, okay, look, you forgot about this. You need to have this and...' You need the software. You need what they have. I believe [my company] is registered with Montana Department of Transportation, because that's one thing I'm doing through all this meeting that I did with PTAC. They had me register with this stuff." [#9]
- A representative from a woman-owned professional services company stated, "PTAC has been very helpful." [#AV230]
- A representative from a Native American-owned professional services company stated, "There was a group that helped minorities with businesses get started and I think if we had more

organizations like that it would be great. I think the name of it was Lake County Development." [#AV355]

2. Technical assistance and support services. Six business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses [#15, #24, #25, #27, #28, #8]. Comments included:

- The woman owner of a DBE-certified professional services company stated, "I mean, when we got our projects with them, it was a learning curve, but you picked it up pretty easy. But on the Consultant Design, maybe that is a good training right there, is how do you do your plan review for... I mean, there's specific forms that the Consultant Design has that you have to fill out to get your plans reviewed at certain stages of the project. And there's specific forms that have to be included when you're going through construction and things like that. But again, none of that training will help if they just keep selecting those top three firms every time." [#15]
- The woman owner of a majority-owned construction firm stated, "Absolutely. We just probably wouldn't have ever known where to look for it. Do you know what I mean? We just wouldn't have known who to reach out for help with it." [#24]
- The owner of a woman-owned construction business stated, "Yes. Just obtaining the information. The guidance in different kinds of ... in that kind of stuff basically. Just information, the how-to kind of stuff." [#25]
- A representative of a majority-owned professional services company stated, "I guess if there would've been some, or there probably is some training that we could have sought out and found, but I think we could have sought out some of that or if it was available, we could have searched that out and figured out some of the things, mistakes that we made earlier and maybe gotten a little bit different route." [#27]
- The woman owner of a DBE-certified professional services business stated, "Yeah. I would think if the DBE program or something set up for helping small companies work through the FAR requirements and such, maybe that would be useful. The flip side is that it might be just not applicable for us because we're never going to do that. It's like, it would cost more than we may in five years to get us set up that way." [#28]
- The owner of a WBE- and DBE-certified construction company stated, "Okay. I try to do as many webinars as I think... And with COVID you can do a lot of webinars now and you never even have to leave your desk. And to tell you the truth, when I get done with a webinar, I am so frustrated because all it did was tell you things that you already know but not how to do it. And then sometimes when you're there, every so often they'll actually say, 'Okay, now we're going to actually go to this website and we're actually going to walk through the steps you need to do. Like if you were trying to find a job.' And while they're doing it, they will say, 'Oh, well that didn't quite work.' Or 'Oh, that might not be updated yet.' So, if they're having difficulties as an expert with it, how do they expect us who's trying to run a business, pay the bills and still try to find time to bid these jobs is going to handle it. So, like I said, there's a lot of webinars that I don't even do anymore because it's a waste of time. And with SBA, I've had people that will... So, for instance, they'll say, 'you have two days to spend with this specialist and this specialist is going to come out and evaluate your company and they're going to do whatever you need them to do.' And so, then I think, 'Oh, well, great.' And so, then the first guy we had come out and he was from

South Dakota, and he pretty much changed my entire chart of accounts in QuickBooks. And during the process I kept saying, 'Are you sure? I don't know if I should be doing this.' And so basically, he created a nightmare. He had me to change it. And then of course our time with him was gone and we didn't even finish it really because there was questions, I had that he didn't have the answers to and then he was gone. And so here we are now with a system that was ill arranged, and so we had to convert it all back over to how we had it. I also had another girl that came from New York. Same scenario. And I have specific questions because I've been doing this for 17 years. I'm pretty good with QuickBooks. And I will ask them hard questions and they don't know the answer. So, I think what they give you is people that are very good at helping businesses maybe start, that has never used QuickBooks, or they don't even have a bookkeeping system, they'll help them that way. But as far as estimating, nothing has come our way. Oh, I got to back up. I don't know who this came from, and I don't know how I got this information, but an estimating company down in Florida, and it was like $2,000 or $2,500 for the package. So, they sent the disc and stuff, and they sent a plans reading disc and she said it was a total joke. It was just like basic for people who've never seen any kind of construction. We got reimbursed. I don't think it was an agency class. I think they just gave funding for learning, and you got to choose what you wanted to learn. Then we found this guy, he used to work for a construction [company] here in town and now he's self-consulting and he said, 'Oh, I'll help you. I'll help you estimate. And when you have a project, just run it past me.' Well, whenever [our estimator]'s coming up against a deadline or a wall, I say, well, why don't you reach out to him? It would take me too long to give him these plans. Plus, every time I call, it's hard to get ahold of him or it might take him a week to get back to me. So, it would be really cool like... People ask, well, what would be really good for you? Some person who is an expert estimator who charges by the hour but has their own company. Because I can't put someone on staff because I'm too small for that. And I've tried it twice and those two guys walked away. So, but you could get them, but if you call them, they answer the phone. And they would learn enough about your company. Like my CPA, my lender, my insurance company, they all know how my company ticks. And so, this estimator's going to have to know, well what kind of equipment do you have? What do you think we should charge per hour? And then just to help her be more competitive." [#8]

3. On-the-job training programs. Twenty-three business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries [#1, #13, #14, #15, #16, #17, #18, #2, #21, #22, #25, #27, #29, #3, #30, #33, #35, #36, #5, #6, #7, #8, #AV]. For example:

- The owner of a majority-owned construction company stated, "We've been having a difficult time even finding people to go in our training positions. Well, they've got training built into some of our larger contracts where we're required to hire somebody to put in that position. And then we try to run apprenticeship programs. But I would say, of all of the apprentices that have started in the last five or 10 years, I'm not sure if there's even one that finished. Well, that's kind of a fallacy with the State of Montana that you can train somebody in 500 hours. And it used to be that on a large project, you could exceed that 500 hour, but anymore they cut you off at 500. They think the person is trained at 500 hours. Our apprenticeship programs are like 6,000 hours long and we set them up to operate different pieces of equipment, to drive different pieces of equipment and stuff. But again, to get a young person to stick with you for 6,000 hours is probably three to four construction seasons. … But in reality, it doesn't work to do training on a

project-by-project basis. If the state wants an effective training program, they've got to look at it over multiple projects and look at the whole of the person because you can't do anything in 500 hours. They just become familiar, vaguely familiar with a lot of different things in 500 hours. Wyoming doesn't have a training program per se, like Montana does. Wyoming requires you to continually to be training. And that's why we have our apprenticeship program is to try to comply with Wyoming more than Montana. They expect us to, based on the size of us to have a certain number of trainees kind of working at all times. The nice thing about Montana is you get paid by the hour to have somebody work for ya. Wyoming, you're not being reimbursed so you just have to incorporate it into your overhead or something somewhere else. But I think most companies at this point, look at training as an unnecessary thing that you can't really survive without constantly being training in place, because there's a lot of turnover and we're always in that mode. So I'm not sure if Wyoming is better than Montana, but it's different." [#1]

- The owner of a majority-owned professional services firm stated, "I didn't know about that. And I mean, there's two of us here that we've been using AutoCAD for 20 years. And so, we've just been having people learn on the job just trial by fire. Training programs that could help offset the cost or even, it sounds like if they could offset the cost of the software licenses, that would be helpful." [#13]
- The owner of a majority-owned professional services company stated, "We do extensive training. So, construction materials testing is a very small segment of civil engineering and so there are basically no schools. My people, a lot of them are NICET, which is National Institute for Civil Engineering Technology. And so, they take classes on how to perform... well, they don't take classes. They take exams on how to perform the tests, and those are all backed by ASTM or AASHTO regulations. And so, nobody has the training that we do so we have to train everybody. So, it doesn't matter if you're right out of school or you come in after being in some other field, you get trained, and we train all the time. As far as continuing education, as a licensed professional engineer, I have to relicense every two years. And I'm required to take a certain amount of continuing education courses as are my NICET senior technicians have to either continue to advance their certifications through different levels. They start off at level one and go through level four. And so, they can continue to take exams, which exempts them from having to take as much continuing education. But we do extensive testing. I have two young technicians right now in Spokane taking an ACI course, which is to test concrete. Every year, every winter, we try to send our people to get certifications and continuing education. It would be good [if the state had programs for training or reimbursement]. That's probably something that most of us were just looking to go to work. We don't think about looking for avenues to help us get things like training or other issues covered through the state. It's helpful." [#14]
- The woman owner of a DBE-certified professional services company stated, "They've come out of school, and we do a lot of on-the-job training to our standards and stuff. And then we do online training for specific things that we need them to know through various companies and websites that we know, such as Troxler if they need to get trained on using the nuclear gauge that we have, stuff like that. the only thing we've done is through the DBE program, they will reimburse certain amount of money that covers some of that training." [#15]
- The Native American owner of a DBE-certified construction company stated, "It'd be very helpful, yes." [#16]

- The woman owner of a DBE-certified construction firm stated, “Well, actually, to operate the heavy equipment, they don't need the CDL, it's just to drive their truck so they can haul the equipment. I don't know. Some people just have a knack for running this stuff, so they either have it or they don't. Try them out, if it works, they work. If they don't, they don't.” [#17]
- The owner of a majority-owned construction firm stated, “So we're a member of the Contractors Association. And so, through the MCA, they offer training, and we find the MCA training to be of higher quality, and that's included with our membership. So even though we're paying for it in our membership, we find the training to be higher quality and just a better use of time.” [#18]
- A representative of a majority-owned professional services firm stated, “We do quite a bit on the job training when we can, but we do external training as well when it just doesn't make sense to try to do it on the job. And so, we'll do different... Either somebody from our firm will do an internal training for everybody or we'll go to an external source.” [#2]
- A representative of a DBE-certified professional services firm stated, “We do those through our internships, and now we have five. We just hired another one today. So, we do that, but it's like we need to do more. I guess, everybody needs to do more. Especially in Indian Country because there's not a lot of opportunities to get that. Workforce issues are a major concern in Indian Country, and so even our clients they experience that too. partnering with young people, colleges, communities.” [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, “We do a lot of On-the-job training, OJT. And so, we haven't had that huge of a problem. Finding people who again, want to work was a challenge. And then, we have some kind of niche businesses. Like the stuff we do for Access Control kind of is a little niche-y. So, it's not like everybody and their brother can do it. They can learn it. But if you have some background, it's a lot simpler and smoother. And for us, we got the Tribal colleges. So, if we need some training, we can get that done pretty readily. IT services, some business services, some of those things. So, I would think that we've been okay there. But again, it's kind of case by case and location by location for us.” [#22]
- The owner of a woman-owned construction business stated, “That's kind of a sticky one because I would want to be the one doing the training because of our specific thing. Mostly it's just a matter of having enough time to go through any kind of training type thing. They kind of have to come with their tool belt on and know what they're doing.” [#25]
- A representative of a majority-owned professional services company stated, “Besides the work that we do, I guess every day when we're doing the work, I feel like it's on-the-job training, but I think there could be more specific things. To take the time to do specific training, I think it would be helpful. I think that would be a good program to start. Like I said, I feel like it's kind of an ongoing thing, especially for the younger engineers every day, they're getting things thrown at them and it's training as they go, but I think it could be more organized, or we could be more organized with that.” [#27]
- A representative of a majority-owned professional services company stated, “So pretty much everything we do is on-the-job because we can't find employees who are already trained, and so we pretty much have to hire new graduates or young people and train them ourselves.” [#29]

- The Native American woman owner of a DBE-certified professional services firm stated, "I didn't find anything that worked for me. I asked. I called on the job training, I called a couple others. I called some economic something in Great Falls, which I found to be a waste of my time." [#3]
- A representative of a majority-owned professional services firm stated, "I think in some cases it could be. It's difficult on the consulting side because we are private, we are for-profit. And so, finding the right balance around the job training to help support the projects with MDT in particular, in this conversation at the same time, while MDT knowing that is paying invoices for our people's time that are working on the process." [#30]
- The owner of a majority-owned professional services firm stated, "I hire people when they come out of college sometimes, if they are ready to go to work. By that I mean no college trains people and they're up to speed, but if we tell them, 'This is [our company's] methodology,' and they catch it, we'll do it, but there is some training involved. We don't have a specific training program like you would have if you were, let's say, in the medical field or engineering and things like that. But they have to be able to create valuable results for the clients, and some people can, and some people can't, and colleges don't get them ready for that. It's really relative to the individual. … Here's something that I have found is whatever your training was, the market is changing so rapidly that the only competitive advantage that you really have in many cases is to learn faster and better than others. To some degree, ongoing day-by-day learning and adapting to changing circumstances as technology changes, social mores change, and all of those things like that change, you better be on your A-game, in terms of continually getting some upgraded training, otherwise you're going to fall behind and your clients will know it pretty quickly." [#33]
- A representative of a majority-owned professional services firm stated, "Our field of study requires people have a college education, so we provide some on the job, but you have to be credentialed." [#35]
- A representative of a Native American-owned construction firm stated, "Oh, maybe in our field, I guess maybe reaching out to college trade training. Maybe they can provide apprentices, someone will help, training during their off-time, I guess, or hiring some of those guys on." [#36]
- A representative of a majority-owned professional services firm stated, "With those specialty skills. To find what we call a mid-level engineer or someone with five to 12 years of experience designing roadways that can use, is proficient in Intergraph MicroStation, very few of them. It's kind of a DOT employee-specific thing. About the best way that we've been able to recruit people to do that is to find somebody retiring from MDT and hiring them part-time or something to do that work. There's online [training programs], but it's 17,000 dollars a seat. If you're training somebody and then, with a lot of kids coming out a college I'm trying to think in the ... Since 2012, since I went into the consulting thing, the turnover has been ... with the kids. They come out of school, they learn from you and all of a sudden, I have four years of experience and off they go somewhere. They think they're worth more than they are. … Training assistance funds, that would help. Some type of training program, because right now, we train the employee, we write off most of their time as they're learning. In the consultant world, billable time is what keeps the lights on. We're all overhead." [#5]
- The owner of a majority-owned construction company stated, "We have a training program with the union that we use." [#6]

- A representative of a majority-owned professional services company stated, "The one thing I would note and is, so the private sector, we use a lot of ACI and ISET certifications. MDT, we did have an issue getting the work where industry standard, our technicians are certified, but MDT acknowledges what they call the 'WAQTC program', which is essentially the same thing. But it's an internal federal training program that the state gives all their employees and technicians. We had to go spend money and get re-certified in the same things but under a different umbrella. So, we had to double up our training just to do MDT, even though we were private sector trained and qualified to do it. So, that would be kind of a thing that caught us off guard because we got the work and then they told us we can't do it because we're not 'WAQTC' certified. And that was not mentioned in the bidding process. We felt that that's kind of, I don't know, unnecessary because we can go to an Army Corps accredited, but yet all our previous certs were not acknowledged by the state. So that would be one thing that caught us off guard." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "[She did a] little bit [of on-the-job training] with [my late husband] and then and I'm really glad [our current estimator] started out in the field. And then I don't know what year it was, but she was probably in the office a couple three years before [my late husband] died. And so, she knew how the office ran a little bit, but she didn't do his job. So, in our office, there's a fine line or an imaginary line. And [my late husband] who was the estimator and project manager never crossed over into the bookkeeping area, which is traditionally mine, and I would never cross over to his. So [our current estimator] didn't know a lot about estimating. She had worked on some of the contracts because a federal contract can be 200 pages long, and she's a very fast reader and she retains things really well. And so, towards the end before [my late husband]'s death, he would give her paperwork to read and to finalize. To make sure that we do have the bid bond and things like that. And I'm glad that he did that because when she did step into his, she at least was familiar with some of the things. But he was so old school, there was no estimating program. Some companies have an estimating program. [He] just had an Excel spreadsheet." [#8]
- A representative from a Native American-owned construction company stated, "Montana is pretty hard, even as a technician. They need to do something so maintenance can't work on something for $8/hour. They shouldn't be working on things tradesmen are doing like electrical and HVAC. It is like it's all on-the-job-training and nothing else." [#AV44]

4. Mentor/protégé relationships. Ten business owners and managers discussed their thoughts on mentor/protégé relationships and their effects on small and disadvantaged businesses [#1, #24, #25, #28, #30, #32, #33, #3, #35, #PT2]. For example:

- The owner of a majority-owned construction company stated, "To have somebody mentoring them, they almost have to be out of the industry at that point, like a retired estimator or something. Because like I said, [our company] mentored a company 20 plus years ago and now they're our competitor. So, we don't like growing competitors. It needs to be some sort of mentoring program." [#1]
- The woman owner of a DBE-certified professional services business stated, "Our mentor protégé stuff is always great. Especially with MDT because they have their own way of doing things. Anyway, that mentor protégé could help make that a little less opaque, it would be useful. No, nothing formal. Informally, it's priceless. Knowing people who've done work like what we do before and that are not competitive with us that we can ask questions of. The problem with

mentor/protégé things is that it's a client relationship and you always need to appear that you know or are willing to go find out all the answers on own. So having a mentor at the client doesn't really work. It's hard, that doesn't work. But friends and family, that works." [#28]

- A representative of a majority-owned professional services firm stated, "I think so. I think there's some good opportunities for mentor/protégé relationships between small and big businesses or DBEs and big businesses. And I think that there's a lot of potential growth and value that can be added to the industry as a whole with so of those programs." [#30]
- The woman owner of a professional services firm stated, "So with ours, because we're a marketing company, we don't qualify for a majority of those. In the past, we'd had looked into some of those for assistance and help, but because we're a marketing company, we don't qualify, because of the type of business we do." [#32]
- The owner of a majority-owned professional services firm stated, "You can either get somebody who's good at it or outsource it. Understanding your financial condition at any time and understanding the profitability of a service and all of those things like that, if people do not have that information, they are in big trouble. Basically, what I would say is a mentor that could help people understand their financial condition and understand the ratios for profitability in their business would be critical. Mentoring I think is very helpful for people to get started if you have somebody who understands a business and probably understands your business." [#33]
- The Native American woman owner of a DBE-certified professional services firm stated, "Well the bonding, I found, there's people that really want to help you. But if you aren't capable of pulling all your stuff together to get it to them, it's not going to happen. So, I don't know if a mentoring program that really was there for the people, and just sit down and say, "This is what we have to do," and then just do it. It's overwhelming. Well, I think they would be if they don't take a lot of time away from your mental capacity to run your business. That to me is, it's almost a two-edged sword. Because yes, you need the help, you want the help. But you don't have time just to do paperwork and do all this stuff that somebody else needs. I don't quite know how that would work. I do know that I could have gone to Kalispell and had some help. But like I said, if I didn't work, because I choose the work, it's just too hard. So, I ended up just saying, 'Thank-you very much, that was a great idea. But I'm too busy trying to stay alive.' … That's why I say, I almost think if you really did a mentoring program, or somebody that helped to work through whatever, bonding, they almost need to come to you to help. It can't be a six-week, six months. It might be okay, 'We meet this day, and this is the information that we're going to prepare and get down.' So that you can see that you're putting stuff in there, but there's an end. You're just going to do it and get it over with." [#3]
- A representative of a majority-owned professional services firm stated, "I don't know why any company would want to mentor a competitor." [#35]
- A representative from a respondent at a public meeting stated, "We're also certified in 8(a). And one thing that I'd like to do is have a team venture, or it would be ideal to have a mentor. The only way to develop these relationships is to subcontract now." [#PT2]

5. Joint venture relationships. Seven business owners and managers discussed whether joint venture relationships are helpful for small and disadvantaged businesses or shared their experiences with joint ventures [#21, #22, #23, #28, #30, #5, #PT2]. For example:

- A representative of a DBE-certified professional services firm stated, "So technically we only have one, in my corporation just has me as an employee, but we have about like 10 to 15 independent contractors who are basically they have their own business. But we work as a group collectively. So, there's about 10 to 15 of us that are working together regularly on projects." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "If we go after some of the bigger ones, sometimes we use a partner because us as a smaller company performing on smaller contracts, a lot of times people say, 'Well, how can you handle a cash flow?' No, you're right. 'You're handling, handling a cash flow right now on 1.2 million in contracts. How are you going to handle a cash flow that's in order to magnitude larger?' Right? So, it's 10 million a year. And so, there're times we need to bring partners in that have some of that to make a better case, better understanding that we understand it. And we can show we have partners that know it. For me in what I do, the most effective way for me to grow and to start is through teaming. sharing resources because there's... We're in a joint venture agreement or a teaming agreement with the company right now where we shall share the bidding process. So, they've got a staff of three people that works on it. We come in and help technically where we can, and pricing, and all that stuff. So, for us, that's the only way we can do this effectively because we don't know everything, right? But they've got more years of experience and can help us with shortcuts, and templates, and how things are done which is beneficial to us. I don't know... Unless you find a niche where you're one of... You're the unicorn, it's hard for us small businesses to get going." [#22]
- The owner of a WBE- and DBE-certified professional services company stated, "Well, we have bid on government projects where we are like one of two businesses that are teamed up on the bid." [#23]
- The woman owner of a DBE-certified professional services business stated, "I don't think so. Not for our specific instance of environmental and engineering consulting." [#28]
- A representative of a majority-owned professional services firm stated, "I think it's very case by case in that situation, again, back to risks, both risks to the owner, which would be the Montana Department [of] Transportation in this case, as well as risk to the contractors involved with a venture… [they] can have their place and their value." [#30]
- A representative of a majority-owned professional services firm stated, "We developed a partnership with a very large national firm, who can supply just about any type of expertise we need. That partnership has been very helpful. A lot of these larger engineering firms don't have the local services like our surveyors, our geotech firm, because that's equipment and people on the ground. It's not efficient for them to send those people all over the world." [#5]
- A representative from a respondent at a public meeting stated, "We're also certified in 8(a). And one thing that I'd like to do is have a team venture, or it would be ideal to have a mentor. The only way to develop these relationships is to subcontract now." [#PT2]

6. Financing assistance. Five business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses [#16, #21, #24, #25, #33]. For example:

- The Native American owner of a DBE-certified construction company stated, "We're pretty well self-financed these last few years. But, when we needed it, we went to the Bureau of Indian Affairs through our local tribe, here. Are backed by the BIA, in general. So, all the local tribes are... Because, when you get that guaranteed loan, or guaranteed surety, it's actually supported and backed by the Bureau of Indian Affairs." [#16]
- A representative of a DBE-certified professional services firm stated, "I think there needs to be more funding for small businesses in general. And I'm not like a restaurant, like we're not a service, we're not delivering like building a bridge or selling a hot dog. But I feel like the small businesses really took a hit because we're already working in the margins anyway. And I know there was some funding that came down to support small businesses, but didn't come to us, so we weren't eligible for it, we didn't apply for it. It didn't fit within what we do. So, I think there needs to be a specific line of funding for small businesses, for women-owned businesses, for minority-owned businesses and they are not competing. I think it needs to be almost like a cooperative agreement where it's like, 'Here's the funding, you do the work, we'll give you the money,' and we're not competing against all of the people in the world for the limited funds available. And there were like special loans you could take out too. I know I got notices from like QuickBooks, and I didn't do any of the loans because I didn't need them, but probably those kinds of things as well, just so small businesses could keep in operation. Well, I think like incentives and just making funding more available is huge." [#21]
- The woman owner of a majority-owned construction firm stated, "Probably more education on how to actually apply for the funding and what options are available to small businesses." [#24]
- The owner of a woman-owned construction business stated, "Maybe guidance even on how to obtain business loans or also the business loans basically for ... as far as working with the Department of Transportation or anything like that would be for instance, if we needed to get different kinds of equipment or tools and things like that to work with in that field, I mean, in that area." [#25]
- The owner of a majority-owned professional services firm stated, "When I first got into business, I started with a laptop in an office, somebody gave me a free office. I didn't really know much about where to go. Finally, within a couple years, I was able to get a 7(j) loan from the SBA, had no idea it was out there, didn't understand financing. There are some organizations like Prospera, your development corporations that help, but I'm not sure that everybody knows about it. If you haven't been in business before and gotten financing and you're not familiar with what they call the ecosystem, then that would definitely be a barrier to entry or a barrier to growth. If somebody communicated about how... if you've got a business and you need growth and you don't know what an SBDC is or any of those other things, having that information available to people quickly, either through your development corporations, through your chambers would be very helpful." [#33]

7. Bonding assistance. Five business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses [#1, #10, #16, #3, #9]. For example:

- The owner of a majority-owned construction company stated, "One of the things that we've done for them, I know a lot of times they have a limited capacity of bonding and if their work isn't going to happen until maybe later on in the project they requested, 'Hey, could we wait to issue the bond until we start working?' And typically, we're pretty good about doing that so that it's not tying up that bonding for other work that they could be doing now. So, I know those types of things we'll do to help them out that way." [#1]
- The Black American woman co-owner of a construction company stated, "I would say lowering the bond limit, yeah. Or, I mean, if it's something that they're serious and want to actually get minority or women-owned companies involved in, the state could help you with that bond. I mean, I don't know a specific way, but this doesn't take the smartest people to figure out a way for that to happen. That if you can show in financials that you are capable of doing... Because that's the thing, requiring that bond, which it makes sense, but you're 100% for payment bond, 100% performance bond and that. Like I said, the state never accounted for that that whole world has changed, too, after 2008. In the last 10 years, I mean you used to be, anybody could get a million-dollar bond. I know companies in 2010 that their bond rate was cut from like 10 million to 3 million, and they've never got it back. Once again, you're just making it so you're catering to only the wealthiest companies. It would almost be like when a court lets somebody bond out with 10% because they can't pay the whole thing and they can't get a bonding company. So, the court allows that bond through them if they can come up with 10%. I know there's some states that do a similar type thing with that, with the bonding. If it's a million dollars, if you can put up 100,000 as your bond, that the state can issue that bond for that thing based off that 100,000 and your business record and that. You know? Then on this job, and usually how they handle it, so this was a $2 million job for us. They had originally, because we're a smaller company and stuff, they asked us about bonding, so I just was honest with them. Like I said, it's a good time to be in the workforce kind of thing. So even though we couldn't bond that amount, they were still able to work with us on it. What they ended up doing was we upped our insurance. We upped our insurance to a $5 million umbrella policy with them as a payee on it. So that way they're at least covered if we do come in and screw something up. It's kind of the same thing, only instead of it costing us $25,000 and being something that we can't even meet the financial requirements of it cost us 2,500 and it was something that was very easy to get done. Because almost anybody could get a bond after you have the job. It's easy to go into a bank with a contract and be like, 'Oh, I have a $2 million contract,' especially something from the State of Montana or from something like that. And then get what you need then. I'm not saying that they should do that blindly, but to me, there needs to be some kind of happy medium between those two." [#10]
- The Native American owner of a DBE-certified construction company stated, "What's really helped them a lot is the guaranteed bonding from the Bureau of Indian Affairs. I think when they put that in, I think that really helped a lot of them." [#16]
- The Native American woman owner of a DBE-certified professional services firm stated, "What I needed is I needed somebody that knew what they were doing and to do it. Because everything that I did I had to learn on my own and did all kinds of workshops and all of that. The only thing they don't understand is when you own your own business you don't have time to go to those

workshops that may or may not work. That you might get one nice piece out of it, but you wasted a lot of time that you needed to be engaged in your business. I mean because what you do is you go to them and you're very enthused. And you leave and you go back to real life where you are just swamped with all the accounting and all the accountabilities. And all the, everything. So, you come back with good intentions but to sit down and go back through what you just kind of learned in your head and you really can't put it back down on paper and follow it all the way to the end. maybe like one-on-one assistance to get through the process might be a good way to help people." [#3]

- The owner of a majority-owned construction company stated, "Because I'm a disabled veteran, they'll give a surety bond. I won't have to pay for a surety bond, so that's out of way. I thought that was nice. And they do try to assist in some of the paperwork, or it sounded like." [#9]

8. Insurance assistance. One business owner thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses [#14]. For example:

- The owner of a majority-owned professional services company stated, "A lot of the state requirements for insurance and stuff like that, it can be a little bit hard for our business side of things to get a handle on." [#14]

9. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Four owners agreed that start-up assistance is helpful [#24, #25, #29, #6]. For example:

- A representative of a majority-owned professional services company stated, "Well, I guess, I would say, if I was going to start a business, as a woman, I wouldn't even know where to start. I'm sure that if I did some homework, I could figure it out, but I don't know that the availability of financial help or maybe even some help teaching them how to write a business plan. I think any of those would be very helpful. I, actually, weirdly enough, did a presentation at MDT. They had some things similar to this and they asked me to come talk about how to get your foot in the door if you were a DBE, and it is very difficult. I don't know that it's very obvious where you can get help or where you can learn, and this is probably for anybody, not just a DBE, and, like I said, it's very difficult to get your foot in the door. You'd have to start as a sub consultant. The sub consultants are very closed off. They don't really want to bring in somebody that's going to potentially be their competition in the future. … My husband recently started a business and there's nothing. It's very difficult to even know where to start. What you have to do, do you have to turn in your licensing to the state? It's just very difficult." [#29]
- The owner of a majority-owned construction company stated, "I'd like to see it go to help some of these... I don't know how you do it, but some of the new startups, that's the ones that could use the help. These guys that are making up these seven firms, most of them have been in business for 20 plus years." [#6]

10. Information on public agency contracting procedures and bidding opportunities.

Eight business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities. [#13, #16, #24, #25, #26, #33, #7, #9]. For example:

- The owner of a majority-owned professional services firm stated, "Years ago, we got a call, I think it was from Missoula, maybe it was Missoula City Parks, and they needed a survey and that wouldn't even have been on my radar. And so, we put in a proposal to do a survey for a future city park. We didn't get it because somebody else low balled it, but I wouldn't even have known that opportunity was out there if I hadn't gotten a phone call. Because I can't spend half my day, every day looking for new contracts that are popping up online. So, if they want to increase their talent pool, then reaching out, making a phone call only takes a couple minutes to put it on somebody's radar." [#13]
- The Native American owner of a DBE-certified construction company stated, "Montana really doesn't give a lot of support. It's a big learning experience. The school of hard knocks, you have to go through the experience of it all. The toughest part is, if you start reading all that and the specification, they throw out there in detail, it has a tendency to frighten you a little bit, maybe, and make you really conservative on your bids. And therefore, you're never going to get a bid. So, got to be willing to use a whole lot of your own gut feeling and common sense on putting it together." [#16]
- The woman owner of a majority-owned construction firm stated, "[More information on contracting and bidding] would be useful." [#24]
- The owner of a woman-owned construction business stated, "Just information on how to connect up." [#25]
- The owner of a majority-owned construction firm stated, "A lot of the stuff's too complicated for the average person to understand it. Unless you have a lot of experience in this business, some of those bids are hard for people that don't have any experience to understand what they want. I just, I think the whole thing, I'm skeptical of the entire process, man. I really am. I'm very skeptical of it. I ran across the same problems down South, the same stuff. They have preferred people that they're going to do business with, and that's what they're going to do. That's where they're going to send the jobs, to the same people, most every time. Now, do they publish the bids from the other people? Are the results from the bid, is that available? How many companies bid on it, and exactly what their bid was? Is that available to look at?" [#26]
- The owner of a majority-owned professional services firm stated, "The answer was no, until they had this electronic system where if you sign up for it, they start sending you stuff. That's okay. The way they describe what they want, how they want it, and what the bad conditions are and this, that, and the other are okay for an RFP, but they don't really give you a lot of information and it's not the kind of stuff, as a marketing agency, you really want. This goes back to... there's better ways to do it than what they're doing." [#33]
- A representative of a majority-owned professional services company stated, "I think if you were starting new and were trying to figure out how to acquire work, something along those lines of, hey, here is what the industry uses for bidding platforms and basically any job on there. And then the contractors will select if they're interested in it and then they'll have contact information. So, if you're starting a new business, it would be a lot of cold calling or document

information, and that is a wonderful resource, it's all there. So yeah, that would be if I were to start and wanted to do it, I would be surfing that for the public bidding process and because it all has to be posted there to satisfy all kinds of criteria." [#7]

- The owner of a majority-owned construction company stated, "First of all, I find it very cumbersome trying to figure out how to bid jobs. Not because I'm an engineer, but I've gone to school in college. There's so much unforeseen object, and anymore that the small business starting out, they can't afford all that high dollar software to do bidding and everything. And it'd be nice if they could say, 'Okay, you're a disabled veteran. Here, we're going to show you how to bid these jobs.' I mean, give you a one-on-one showdown. I mean, you make one big error, and it could cost you a significant amount of money and you could be out of business. You could lose all your equipment. [There was a company that] was one of the biggest road contractors in Montana, and they made some serious mistakes. I don't know the whole true story, be frank with you, but they're no longer in business. They went out of business about a year later after they made this big mistake with the Montana Department of Transportation, doing federal highways. And that's always put a little fear into my thought about bidding jobs for Montana Department of Transportation. I mean, there's just a lot of unforeseen stuff. They had the same type of familiar thing happen … for a [another] bridge with the Department of Transportation there and everything. And it was between the Montana Department of Engineers and the contractor. They weren't speaking. There wasn't no communication there. I should say a lack of communications. You see a lot of this in the National Electric Code. You read the National Electric Code, one person will interpret one way and another person interpret the other way. It's so ambiguous, and that's why I'd like to, hey, can you teach us how? I mean, we'd like to do work for you people. I'd like to talk to somebody at the MDT, just to know the ropes, what do they expect? Is that possible?" [#9]

11. Pre-bid conferences. Seventeen business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses to network and develop relationships with project managers and primes. Many firms explained that for large projects, such meetings are mandatory [#10, #16, #18, #2, #22, #24, #25, #26, #29, #3, #30, #33, #35, #4, #5, #6, #8]. For example:

- The Black American woman co-owner of a construction company stated, "They try to say because they went to that eMACS bidding and stuff and it's all online. Well, it used to be a lot different than that though. I mean, there used to be walkthroughs for every job. There used to be all this stuff and they think that they've streamlined it. Well, they have, but that's the thing. If you think about it, those walkthroughs were very informative before that they used to do. I mean, and all that, now it's like, 'Oh, it's all online.' Okay. So now you're just asking somebody to pretty much blindly bid. And it is laid out, but once again, if you're a company that that's all you do is that kind of job, of course, it's a huge advantage, which is fine. That's the thing where you used to get walkthroughs for every job, which you still do on some. On some jobs you still do, but that was you could forge relationships on that. You could meet people. People would get used to seeing you. We used to do a lot of stuff." [#10]
- The Native American owner of a DBE-certified construction company stated, "Oh, definitely. Yeah. That's the best time, because it's usually done on site, and you can ask your questions right then and there." [#16]

- The owner of a majority-owned construction firm stated, “Most of the time, pre-bid stuff is somewhat useful. Sometimes we participate in that stuff. Sometimes we don't. I don't. MDT has this question-and-answer thing, and I mean, sometimes I have a problem with it because they don't really answer the question. They refer you to the spec section. Well, if I don't understand the spec section, why don't you just answer the goddamn question?” [#18]
- A representative of a majority-owned professional services firm stated, “We do pre-bid for like design build time. So, we do... I would say they're not. I mean that they're not real helpful. And the reason is that, for us, for like design build ones, the other teams don't want to show all their cards. And so, no one's really asking the questions they really want to ask because they don't want the other firms to hear it. And so, it's more just kind of just a formality almost. I feel like we're, you're reading this stuff and, ‘Okay.’” [#2]
- A representative of a Native American-owned SBE-certified professional services firm stated, “If let's say the, a Logan Airport in Billings wants to do something there and we're a company that's been through there a ton of times, but we haven't seen the skeletons in the closets behind the locked door, then we don't know that piece. So, site visits are awesome because you get to see it and really visualize what the work is.” [#22]
- The woman owner of a majority-owned construction firm stated, “We attend a lot of them.” [#24]
- The owner of a majority-owned construction firm stated, “Any kind of meeting would be useful for the people that are actually buying the product from you. They don't know who you are. You're just a person out here in the cyber world that has a business.” [#26]
- A representative of a majority-owned professional services company stated, “I think the pre-construction conference, I know that that's been a struggle because of COVID, but something like that actually is hugely helpful. It allows you to be around the MDT employees. I think that, in itself, is huge.” [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, “For a pre-bid meeting. And yes, they were helpful because then you could learn more, and you met some people. Maybe you could find a little niche in what needed to be done there.” [#3]
- The owner of a majority-owned professional services firm stated, “Absolutely. If you can talk to people and ask questions... also the other thing I think would be valuable is if we had the opportunity to talk one-on-one with the marketing directors of the state, which is currently forbidden now, presumably to keep everything fair. But typically, even a well-written RFP doesn't answer some of the questions, then you have to write questions and send them in, and they send it back. The question-and-answer process is cumbersome. Also, it's supposed to engender fairness, but it doesn't give you a good opportunity to understand what the guys are really thinking, and sometimes the people answering the questions certainly are not marketing and advertising people, not to criticize them, but they're acquisition people and they're not necessarily really responsive.” [#33]
- A representative of a DBE-certified construction company stated, “I think so because they get a chance to put a name with the face, and see who's going to be working on that particular project or... Again, too, it also helps identify who potential bidders are. Having been in the industry for so long, we know the different people that are going to show up to the pre-bids so when they see this person or that person, they can identify them as being from company X or company Y. And I

think that that helps from a bidding standpoint. You know, 'Okay, company X is coming from Butte to do this job in Billings. We're here in Billings. That's going to cost them this much.' Then we can adjust that accordingly." [#4]

- A representative of a majority-owned professional services firm stated, "I know that the pre-meetings they had on the alternate contracting design builds, those were useful. Usually, they bring in the shortlisted firms so we can all sit there and stare at each other, but they also present the information on the project. Those have generally been helpful." [#5]
- The owner of a majority-owned construction company stated, "Sometimes they are. A lot of times they're... it's probably 50/50. A lot of the ones we go to, all the reservation work has pretty good meetings, so we do go to those, and some of them are helpful, and some we've worked on plenty in the past, and it's just a repeat of what normally [the work entails]..." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I don't go to a lot of pre-bid meetings because they're so far, it's sometimes a five-hour drive there, so 10 hours total. That's over a day worth of work when I'm trying to keep up with all the bids and projects going on, I can't always drive there. We are starting to do a lot more Zoom ones, but again, I don't even do those either." [#8]

12. Other types of agency outreach. Twelve business owners and managers described other types of agency outreach that could be helpful for small and disadvantaged businesses [#13, #15, #21, #23, #24, #26, #33, #4, #5, #6, #8, #AV]. For example:

- The owner of a majority-owned professional services firm stated, "Reaching at doing specific outreach to small businesses and maybe then feedback on the bids and the work themselves would be helpful." [#13]
- The woman owner of a DBE-certified professional services company stated, "We try to do vendor fairs. When we go to the engineering conference once a year, we send our engineers to the engineers' conference in Helena, they have meetings and it just never was that productive for us, so we really don't participate in those, but we do try to go to vendor fairs and market." [#15]
- A representative of a DBE-certified professional services firm stated, "I do think Montana, they feel like they're a little behind on like social media and just looking at different businesses and contractors. Like every once in a while, I go to the State of Montana website because we have to register annual reports and things like that, but it just feels like their social media presence and how they share information about other people, small businesses, et cetera, is a little bit maybe lacking." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "I went to the fair last summer. It was a virtual fair, but still, where you meet representatives from all the different government groups. I forget what it was called. But I've been trying to go to events like that. Honestly, though, I've sunk so much time and energy into government contracting, and it's yielded nothing." [#23]
- The woman owner of a majority-owned construction firm stated, "Not in our business." [#24]
- The owner of a majority-owned construction firm stated, "That would be helpful. I have gone to some of those." [#26]

- The owner of a majority-owned professional services firm stated, "I have gone to some vendor fairs that had the government there and what I found is... I don't know if there's too much of anybody who really got much out of them, and I've talked to other people. Don't hold a fair if you're not planning on actually putting out bids and hiring people. In other words, you get together, a whole bunch are there, you talk to nice people, shake hands, send them some stuff, and then nothing. The next time you do it, nobody believes you, or they come out and same thing happens all over again and they're just repeating themselves." [#33]
- A representative of a DBE-certified construction company stated, "Last spring, he went to, I think, the County Road Supervisors Convention. We had a booth set up there." [#4]
- A representative of a majority-owned professional services firm stated, "I guess I've been to MACo, the county. What's the other one? The League of Cities or something. Generally, you do those marketing there, and I don't know if you really get that much in return out of them." [#5]
- The owner of a majority-owned construction company stated, "We go to all the electric contractors' associations meetings, and the annual events. They have it semi, they have one in the winter, one in the summer, we go to both the conventions. Yeah, we do that." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I don't go to vendor fairs, but I go to... we call them meet and greets. But again, these meet and greets are federal. I don't know if I've ever seen, and I just might be out of the loop, and so I hate to say this, but I don't think that the city and county has meet and greets, or the state. So, like what a meet and greet is with the federal government is, they will have a higher... I mean, have a big room and they will send Army Corps of Engineers. They will send BLM, they will send GSA, they will send Indian Health Services. And so, these are companies that you want them to know you exist. It would be nice if each county would have a representative and they go into a room, and you go and talk to those county maintenance people. But now wouldn't it be nice if I knew the person to talk to at Fish, Wildlife and Parks and say, 'Hey. What information can I give you about my company, so you will call me when you have another job.' And same with DNRC, tell me who I need to talk to, and I will reach out to them and tell them I exist. Because one of your questions was, how do people find out about you? This is an example where it would be wonderful for me to tell them about me. But then when you do a meet and greet though, somebody needs to take charge of these meet and greets. Because it is hard and especially for a startup business, to walk to a table where there's three and four of these people and try to get a conversation going and those three and four people not intimidate you. And you don't come off looking foolish. So wouldn't it be wonderful if somebody would start the meeting and say, I don't know, for instance, the people that are at the table have the most communication skills that anybody in the country has. And they draw you in and they say, 'Hey, this is what our company does. This is what we traditionally look for.' They just talk to you. They let you know about them and then how can I help them? That's the key. I'm in business to make their life easier. But I don't know quite how to make their life easier if they don't talk to me. So, these meet and greets where you just go, and you're supposed to go to table by table, and you stand in line waiting for the person in front of you to stand up. So, you have five minutes to talk because then there's a line behind you is almost just maddening. And then the people they send there, they're not a CO, they're not a COR, they're not a maintenance professional. And I'm not being disrespectful, but they have no credentials to tell you about their company because they truly don't know. They don't even know what their company needs. So, if you're going to do it, do it to where gosh everybody comes out, they are

going, 'Hey.' Not only for the agency, because now they have contact people. So, when they have this job come up, they know who to talk to. And the people that went there saying, 'Hey, those people, agencies know about me.' It's a win-win." [#8]

- A representative from a majority-owned professional services company stated, "In the Sheraton Hotel we attend conventions to get work for all entities." [#AV201]

13. Streamlining bidding procedures. Eight business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses [#15, #21, #22, #24, #25, #26, #33, #35,]. For example:

- The woman owner of a DBE-certified professional services company stated, "That could be useful." [#15]
- A representative of a DBE-certified professional services firm stated, "Getting through like the red tape, the bureaucracies." [#21]
- A representative of a Native American-owned SBE-certified professional services firm stated, "Streamline I think would make a lot more sense, because I think there're ways to even mitigate the risk fear. If you streamline the process and you said, all right, here's what I need here. What would it cost me? And you'll say... And you give as much information as you can. RFP usually are pretty good. There's a few questions that always come out of it, but you kind of have the basis and you say on their end they have an idea of what they think it's going to cost them. And then nobody ever provides that cost. An estimate of cost because if they can get it for half that and then somebody gets a promotion and a bonus, but if all the people bidding on it, look at it and say 'No, that's we can't do it for that, and we don't waste any time.' And then they'll, look at it and say, nobody bid on it. Well, the pricing must be off or why don't you all bid on it even if you don't make that price? And if it's $20,000 higher or whatever, as a general group, then let's take that and let's see who's got the simplified qualifications and pricing structure, and then let's do an interview with them to find out what they really know or what they really don't. Because I'm not sold that sometimes I think there's people that can really write well that don't know what they're doing. They'll win a contract and then fail it because they don't know what they're doing on the contract, but they looked really cool in writing. And so, I think there's a simpler way to do this. And for technical people to sit down and talk and understand whether a potential partner or client or customer or whatever it is really understands what they're doing. I think that's a simple process. It might take a little bit less time in the reviewing of the written word, a little bit more time in the interview process, but I mean, you can do that in a half an hour." [#22]
- The woman owner of a majority-owned construction firm stated, "That would be useful." [#24]
- The owner of a majority-owned construction firm stated, "Anything you could do to simplify it would be good. It just seems to be a mysterious process, in a lot of ways. And a lot of times you read this stuff; you're not going to get any of that stuff. There's not even any point in even bidding on it." [#26]
- The owner of a majority-owned professional services firm stated, "I think they have a very difficult RFP process for... and this is fairly true of government in general. It doesn't necessarily get them the best quality and the process itself is expensive and time consuming. We've worked with the state before, I just think they need to revamp and simplify their process." [#33]

14. Unbundling contracts. Seven business owners and managers shared mixed thoughts on breaking up large contracts into smaller pieces. Many thought that it could be helpful for small and disadvantaged businesses, while others noted that it may increase the complexity of project management for MDT [#15, #16, #28, #30, #8, #PT1, #PT2]. For example:

- The woman owner of a DBE-certified professional services company stated, "Yeah, [that would be helpful]." [#15]
- The Native American owner of a DBE-certified construction company stated, "Number one would be that they maybe slice off some of the big pie, so that the smaller contractor can afford to bid on them. I've always said that for a long time. They're getting so their projects are so darn big, and for a smaller person to get the bonding to do it, even though you think you might be able to do the work, being able to get all the surety to form the work. There was a time Montana used to bid off some smaller ones, the secondary roads, et cetera. They seem to quit doing that, and they put them in big packages anymore." [#16]
- The woman owner of a DBE-certified professional services business stated, "I can't see it happening. When they need a big environmental study, they might as well go get a big environmental company. We do the stuff when we are a sub to a prime. We do the environmental that has to do with a specific project, which is much smaller than a big environmental study." [#28]
- A representative of a majority-owned professional services firm stated, "Sometimes breaking up into smaller portions of works can cause more issues and potentially cost more money to the owner at the end of the day. And so, I think it's case by case, but those options should exist that the owner could think about those ideas." [#30]
- The owner of a WBE- and DBE-certified construction company stated, "I tell everybody I could possibly tell, rather than doing 10 miles of a highway, could you break up... break them up into sections? And they say, 'Well, that's not cost effective because we can have one company come in there and do it all by... do it all.' Well, yes, but then that big company is trying to get DBE companies to fulfill their DBE quota. So, when these big companies like, let's say Knife River. Knife River will call me and say, 'Do you want to do some of this paving?' Knife River can pave that entire project in days. So, they're looking at me now, this little company, to pave this stretch of it so they can fulfill their quota, knowing full well that we're going to slow them down, we're going to break their rhythm. So, here's this little company coming in to do their part, almost feeling foolish, because we know we're under a microscope, because these guys are going, 'Well, geez, here's this crew of four and we have a crew of 12, and we have to wait for them to do this part.' And how cost effective is that? So, when DBE or DOT... or MDT says, 'You know, it's not cost effective.' Well, how cost effective it is for a big company to wait for a little company to do a part, just to fulfill this quota?" [#8]
- A representative from a majority-owned professional services firm stated, "I suggested is there a way? We even tried to negotiate. We can do this piece of this project because we know we can. For example, we do secondary road bridges for counties all over the state. But when MDT goes to put out a bridge, an RFQ for a bridge, they say, yeah, we need secondary road bridges, but we need somebody that could do these other large projects on interstates. So, I've talked a little bit to folks about, is there at all a possibility you could break those projects apart? Can there be some kind of a smaller business? I mean, small business definitions from a federal standpoint

are all those big firms that we still compete with. So that doesn't necessarily work, but can we come up with a standard for a smaller business that's under a hundred employees? Or a Montana preference, I don't know. Where the majority of your employees live in Montana, so those would just be some possible solutions that I've thought of." [#PT1]

- A representative from a focus group consisting of prime contractors stated, "It seemed to be wanting to let bigger contracts, which I will tell you that I'm definitely not against. We have the ability to take on larger contracts. And when I told you about those 3 to 400 bridges in Eastern Montana, I know a lot of talk is going into, 'How can we get these done as fast as possible?' And so bundling bridges together makes it a hell of a lot more attractive for us and also for out-of-state contractors to come in. You start attracting the [large companies] and whatnot to come up here and do that work. The problem with that is you start bundling those together, it makes it pretty difficult for the small guy to come tackle those. So, I think inevitably they're going to have to maintain, that's not the right word. They're going to have to let a few small projects to just allow these small guys to either have the ability to get in and bid some of these." [#FG2]
- A representative from a respondent at a public meeting stated, "With these MDT jobs, instead of having such huge jobs, multi-million-dollar jobs, it would be cool if they could break it down to different phases or make them, like instead of 10 miles of road, a mile. And so that way I could probably GC it, you know? So that's, that's where I'm at with it." [#PT2]

15. Price or evaluation preferences for small businesses. Five business owners and managers thought price or evaluation preferences for small and local businesses are helpful [#10, #15, #25, #3, #6]. For example:

- The Black American woman co-owner of a construction company stated, "You look at Wyoming. Wyoming does a state contractor preference. So, if you get beat by an out-of-state contractor by 10%, you're still the low bid, because they know that that keeps that money in the state and that keeps it in their economy." [#10]
- The woman owner of a DBE-certified professional services company stated, "We work with a contractor here in Bozeman and they just come back to us over and over and over because of our DBE status and they get some sort... It's not required, but I think they get kind of a better... I don't know if ranking's the right word. Because they are reaching out and using DBEs. And we've worked with them for so many years that it just is a good partnership because they know we're a DBE and that helps them too." [#15]
- The Native American woman owner of a DBE-certified professional services firm stated, "That is another time that I got projects or jobs or whatever is because I ranked high because I was Native, woman, disadvantaged, HUBZone. I think there was five, I was a five-point person so to speak." [#3]
- The owner of a majority-owned construction company stated, "I don't think so because right now you're at the point where you're just trying to find anybody to bid it. Honestly, some of these smaller... they're not even that small, but they've got so much work, there's so much work right now that they can only take on so much work, so we're not getting a lot of, even electrical stuff, we asked seven of them, and I think we got two quotes. It was... a lot of it was they're busy, and a lot of it is if it's close to them, they'll do it, but they're not traveling from Kalispell to

Billings, they don't want to go that far for a job like this. Same with the bridge thing. I think that we talked to five bridge guys, and we got quotes from two." [#6]

16. Small business set-asides. Ten business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses [#1, #10, #23, #25, #26, #27, #29, #3, #30, #PT2]. For example:

- The owner of a majority-owned construction company stated, "I know the State of Montana has run into cases where they've accepted bids from the low bidder, which is a new firm and the firm's gone broke. Sometimes the state and federal government have the best intentions. And I don't remember the specifics of it, but we bid that MATOC [Multiple area task order contract] project in the park. We were second place bidder, and the low bidder on a $32 million project was a guy from California who was a small business. And the biggest job he had done prior to that was less than $3 million. So Federal Highways had this MATOC, which they pre-qualified all these contractors, but they had a small business set aside which they put two small businesses in there. So Federal Highways, this guy bid it, and I'm not sure how he got a bond, but the bond company ultimately paid the price. He bid a job so much over his head that he didn't know how to manage it, but ultimately, they broke a small business because of what a program they were trying to implement. So sometimes when they do these set asides, you can set things aside for a small business. But if you've got a firm doing $2 million contracts, you might give them a $5 or a $7 million contract, you don't give them a $32 million contract. Of course, they might've been at an up-and-coming company that would have done well, but it's broken by virtue of trying to help them. Montana doesn't have the small business [set asides]." [#1]
- The Black American woman co-owner of a construction company stated, "I guess the set aside stuff for government stuff like that in Montana isn't super attractive anyway. And you know, it doesn't matter if they set aside a big job or something like that for it, if you can't bond that job, it doesn't do any good. It's just like the set-aside. They always like saying, 'Oh, this is set aside for small businesses.' What's the qualification for a small business, under 50 million a year or something? Right? I mean, if they're 35 million a year, which is ridiculous. That's not a small company. And the thing is, is to keep under that, all those companies, just all they do is incorporate different divisions. So yeah, this division of this company does less than that, so it qualifies, but it's still... It's how they enforce them. It's the same way when I was working in California. So, all that fire stuff was set aside for double DBEs. So, you had to be a double DBE to be able to get that. Right? Well, I mean, just figure, when you're talking hundreds of millions of dollars though, people are going to figure out a way to get that still. They just put a figurehead up there. People were doing it in the oil field in North Dakota. You had to be a Native-owned business. So, they would put that part in somebody's name and even though that person had no actual ownership or got any money from the business or anything like that. I think that it's a great idea, but it's just like any good idea. You can pass any law you want, but if you don't have the enforcement in how it's set up, then it really doesn't matter. I think that yeah, the other thing that I think that would do is if you set aside stuff for actual small companies, like people that do under 10 million a year, maybe, a real small company, that it allows you to get into that and start competing at that type of job." [#10]
- The owner of a WBE- and DBE-certified professional services company stated, "For a lot of DBEs, starting out on your own means, you're not making any money and that is super problematic. So basically, you have to have about two years of history to apply on any of these projects. So, I

think they almost need to make custom built DBE, like an internship. Like when you're in college or whatever, and you want to get into an industry, but you have zero experience. Someone will let you in the door and they'll let you apprentice on a project. You know? So almost build out the DBE project sub grant program, where the state gives you a small grant, like $5,000 and you sign up to be a sub on the project and you don't have to bring a big skillset and you don't have to have a big background. It's almost like a workforce training program, but it then gets to count towards your business history and experience history. And you can put it on your portfolio. I would probably have done it for free, but even if there was a $2,000 or $5,000 opportunity to just be a part of the project, be a sideline member of the project. It's like an internship program for big kids. That would've really helped. And I think that when you build it like a grant, there's an easier template to follow because we have a lot of grants in place for small businesses, but no one has thought to associate that grant with a project. They're always just like, here's free money, good luck building your business. It'd be way better if it was like, here's free money allocated to your work on a project. Good luck because now you already have business. Yay, we all want to work for our money." [#23]

- A representative of a majority-owned professional services company stated, "If there were certain projects that could be open to newer contractors, just to give them a chance to start working with MDT and work doing MDT projects. So maybe eventually you could get the experience with MDT, so you could compete with the other companies on projects in the future, you know? Even if it was kind of a phased approach just to where, 'Okay, you can do this little project. We'll give you a shot to try this little project.' And you get feedback and then learn from that and then get another chance to step up to the next size project. Just some way for smaller firms to being able to do work with MDT, I guess that's all." [#27]
- A representative of a majority-owned professional services company stated, "This is counterproductive for me as I am saying these things because it would bring in more competition, which is never spectacular, but I would say, if you're looking to open that up, is maybe on some projects that are not complex or difficult or not politically concerning, maybe shortlist firms that are lower on the list and give them an opportunity, because there's some jobs that go out that really aren't that hard and they're shortlisting those six top firms. Well, really, you could maybe have an opportunity for one of those lower firms if they shortlisted those easy jobs a little differently, maybe. So, I think if there was some sort of way to help establish small businesses, maybe it's a set-aside. So, the federal government has a small business set-aside, and we are, we do qualify for the small business set-aside. So, let's say they have six IDIQ contracts, they might set aside two of those, or they might do a solicitation and they would have a small business set-aside. Oftentimes, they'll run the small business set-aside. They'll start it out as a question. They'll put it out and say, 'If we put this out, would you be interested?' and I think they do that, rightly, because, oftentimes, they don't get people. So, then what's the point of the set-aside if they can't find the people to do it, but we do qualify still as a small business under that, under the federal government guidelines, and that does help us compete. Then, once we get our foot in the door, we're great, because then you're working off of your past history. So, I would say that a small business set-aside for maybe term contracts at MDT, because those are smaller. You could handle some of them with a five-person firm or whatever. That would probably be very helpful, and then maybe just some education on ... which I'm sure is probably out there." [#29]

- The Native American woman owner of a DBE-certified professional services firm stated, "If they could say, 'Okay, I have this construction company and there is a set aside here.' If those companies knew what the set aside meant and how to do the paperwork to get it, then they would. I would think. But, to say there's a set aside and you look at that and, well, I can do that. But you really don't have the time, the patience, the money, the mental capabilities to put all that together to get there." [#3]
- A representative of a majority-owned professional services firm stated, "I think they can be." [#30]
- A representative from a respondent at a public meeting stated, "8(a) has been a godsend for us because there are times when they will just have us one or two women-owned. That's one thing that I really wished that they would widen and put more audits for women-owned companies, because there's not that many women on civil construction companies and now that we're not women-owned are not self-certified anymore, you actually have to SBA has to certify you. Because I think that's why they didn't want to use women-owned because they were thinking, well, are you truly woman-owned, did you certify yourself correctly? Well, that monkeys off their back now because SBA actually does certify you as woman-owned. So, the government does know it's been done correctly. Cause we're going to graduate out of 8(a) in 2025. And so, we continue to say, hey, you know, can you open more things up to women-owned, because when you start to graduate out, you have to do less and less federal work the year that you're in. The last year you can only do like 10 or 15%. So, and that's a little scary because we've gotten a little bit dependent upon 8(a). Yeah. And I've heard companies that have graduated out and struggled." [#PT2]

17. Mandatory subcontracting minimums and contract goals. Eleven business owners and managers shared their thoughts on mandatory subcontracting minimums and contract goals. Many perceived mandatory subcontracting minimums and contract goals as helpful for small and disadvantaged businesses, while others noted that industry specific requirements may be necessary [#1, #10, #18, #2, #23, #26, #29, #3, #30, #4, #5]. For example:

- The owner of a majority-owned construction company stated, "We're in business and we bid contracts to be the low bidder. When somebody puts in front of us a DBE requirement, that's against everything we know. Because if we have to pay that DBE 10% more than this other non-DBE contractor, that means our price of our contract just went up. So, we're really reluctant to use that DBE. Not because they're a DBE, but because they just caused our bid price to go up. So, if MDT, and I remember the last contract that we actually went through, the Good Faith Effort and MDT actually waived, we didn't meet the contract goal. … Anyway, somebody went on vacation and Civil Rights Bureau actually recommended award to the highway commission. The job was awarded to us. When she got back, we heard through the grapevine that she was appalled that our bid wasn't rejected. And what it came down to is we had a DBE price, but they were like over 15% over our other non-DBE price. And we thought that was too big. So, MDT is going to have a good faith effort again, they either need to find a way to pay for the difference or they need to say they need to say... They need to find the gray area. They need to say if there's over a 10% discrepancy, or price difference between the non-DBE and the DBE, you don't have to use the DBE. They put too many gray areas in the program, and they make us the goat." [#1]

- The Black American woman co-owner of a construction company stated, "I think that would be helpful, yeah." [#10]
- The owner of a majority-owned construction firm stated, "Virtually every project, whether it's MDT, depending on funding, they'll have a goal or a mandated goal. And a goal is just to try to see if you can get their mandate goal is they want that number hit. So, we actually utilize MDTs, DBE page for we're currently bidding a public works job where they have a goal. And so, I'll put all the information in that system, but that then is my good faith effort to reach out to the DBEs around the state, alerting them of this project. Historically we have never had a response from that system. I guess I really don't know. We're asking for the scopes of work to be done by DBE or fence work and landscaping or electrical. And I think those firms that do those kinds of things already have enough work, and they're just not for more." [#18]
- A representative of a majority-owned professional services firm stated, "I could see even as a smaller firm, it would be difficult because then they would be really handcuffed or forced to go to this certain sub-consultant with that DBE designation. Even though we can do the services here, we'd have to force us to hire somebody else to do the services that we'd normally do in-house." [#2]
- The owner of a WBE- and DBE-certified professional services company stated, "I do think it would be worthwhile to consider mandating the DBE participation because as my feedback from other engineers and architects in the industry, even ones who aren't DBE, is that people treat that as a throwaway. If it's just a recommendation, they don't take it seriously that they're supposed to fulfill it. And like that guy who told me to take a hike on the West Yellowstone project, I don't think he's worried about proving to anybody that he tried to fulfill the DBE recommendation. And my understanding from other parts of the US is that you were supposed to show that you put it up on like a notice board or did this or did that. And I emailed him, and I told him I'm DBE and I told him I'm woman-owned small business and I told him I have applicable experience and where I could be supportive on the project. So, I put our name in his lap and he didn't use us. And he was rude about it too, on top of that. On top of that, he wasn't like, oh, I'm fulfilling my DBE requirement elsewhere. Oh, whatever. It was more just like, no thanks lady. We're good." [#23]
- A representative of a majority-owned professional services company stated, "Well, we used to have contract specific goals and it was very difficult. I would say, it almost is worse because we couldn't find anyone, at least ... So, I guess, for the prime, that makes it very difficult. We did have problems with being forced to use ... and we still have this problem on the contracting side, where they are required to use a certain percentage of, I don't know the proper term of it, and we have a lot of trouble getting them to show up and stuff like that." [#29]
- The Native American woman owner of a DBE-certified professional services firm stated, "I do have to say that when it was [mandatory to give a DBE a certain percentage of the contract], then we did get some things. But since it's been a 'We would like you to do this,' then I don't know that I've seen anything after that." [#3]
- A representative of a majority-owned professional services firm stated, "I think so. I think it encourages finding opportunities to find strong talent that are within the small or DBE firms or contractors, and also find those opportunities again for kind what you mentioned earlier of mentor protégés and on job training." [#30]

- A representative of a DBE-certified construction company stated, "It's been a bit of help to us because if they have to sub out X percent of the work to a DBE, then that gives us a foothold to be able to be competitive. Where the prime, it can be a bit burdensome if we've got a sub out. But again, all for the DBEs and we've pretty much met the DBE requirement before the prime on it" [#4]
- A representative of a majority-owned professional services firm stated, "Idaho has some. They just flat come out so much of the work got to be DBE and we've gone through and tried to find DBEs to partner with and wind up passing on some opportunities that were out there in order to compete because we couldn't find DBEs to be on the list. I know I just had a project here with Cascade County, hopefully that contract will be approved next week. I was trying to use, kind of my go to archeologist and he's been too busy." [#5]

18. Small business subcontracting goals. Four business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses [#16, #25, #26, #30]. For example:

- The Native American owner of a DBE-certified construction company stated, "It absolutely would be, yes." [#16]
- A representative of a majority-owned professional services firm stated, "I think in some cases that could be [helpful]. A lot of that would boil down to how the risk is managed. Because [whether] it's small business or a large business, as a subcontractor there's different risks involved that need to be managed." [#30]

J. Race- and Gender-based Measures

Business owners and representatives shared their experiences with MDT's certification, DBE measures, and small business programs and provided recommendations for making them more inclusive. For example:

1. MDT and NPIAS airport programs;
2. Federal DBE Program; and
3. Recommendations and comments about programs for certified firms.

1. Experience with MDT's and NPIAS airports' programs. Seventeen business owners and representatives shared their experiences with MDT's and NPIAS airports' programs [#1, #14, #15, #16, #2, #23, #28, #29, #3, #31, #4, #6, #8, #AV, #FG1, #FG2, #WT1] For example:

- The owner of a majority-owned construction company stated, "I know one thing Montana specifically doesn't let us do is even advance a DBE money. And I'm not sure what I'm saying, but I think in some respects, Montana throws a few roadblocks in front of DBEs that don't necessarily have to be there but it's a hard competitive market to get into for a new business. For instance, I remember years ago we had a DBE that was just a little short of money to make payroll or something. And we advanced them money on it, and we are all that simply the one that got scolded by MDT because we advanced them enough money to cover their payroll. So, from MDT's position, it's a very hands-off approach to DBEs. They got to do their own financing. They have to buy their own equipment. They have to stand on their own, whereas Federal

Highways used to have programs that actually set up mentoring programs between contractors and DBEs and you actually worked with them on specific projects and worked with them. MDT likes to think they're helping them because they're giving them access to resources, which is people work and stuff like that, but that's not the access to resources they need, they need capital, they need management help, they need things to help them succeed. But ultimately, the process is designed to be cumbersome. If you look at the State of Montana's website for DBEs, you might find they have 150 DBEs listed. And in reality, there's probably less than 20 people of all those 150, that actually bid our type of work. Right, and they always come back to, there's 150 or 200 people on there, we've got all these opportunities. It's like, no, there's a couple dozen or three dozen of them that bid the kind of work in the state, and we don't have that many to draw from. But the State of Montana, since they're not getting this, they're into numbers, it looks good if they got 150 people on their list. In reality, their goal is to reproduce one decent DBE subcontractor here, somebody that actually makes it because if I look over the last 30 years, can you name five DBEs that have made it? And that brings up another question, at what point do you graduate from the program? How do they monitor that? I know a company that's been in there about 20 years. It'd be nice to have a list of 25 people that were actually willing to go to work. So, we don't have to contact 160 numbers, and really concentrate on the ones that are going to work, not the ones that are just on the list. 30 years ago, [the] Civil Rights Bureau maybe had three people in it. I would say because it's not being given to them, that they're less effective today than they were with three people, and they probably got, I don't know how many people are in there, over 10? I also think they need to a non-activity clause where, if you're not actively working in the State of Montana or can't show that you're trying to get work, like bidding projects or putting quotes out to contractors, that you get dropped from list after two or three years. I think that they're more reactive than proactive in their program. We usually get the results and then it's, 'Oh, my god, we're in trouble.' Six months before the end of the year, and they're worried if they're going to make the goal not." [#1]

- The owner of a majority-owned professional services company stated, "Usually, the Federal Highway contracts and the FAA work almost always have some kind of DBE incentive or requirements in them. And so, the contractors will look for those types of businesses to help make up that quota or requirement. I'm not sure what the word would be, but those requirements. I think there are some parts of our industry that have even evolved into that. I find that a lot of our traffic control companies are DBEs. And I know that there is a desire and an attempt to hire people who meet that classification, even by the general contractors. They'll try to find minorities or disadvantaged, whether they're disabled or whatever, folks to meet that requirement. They actively try to hire people. And I get asked that question if I meet the DBE category. We're generally such a small percentage of a contract that if we don't meet it there, there's not a whole lot of other companies that they could go talk to. So, we haven't lost any work because we weren't. But I know that they do seek and hope to obtain participation by those businesses." [#14]
- The woman owner of a DBE-certified professional services company stated, "The only thing we've done is through the DBE program, they will reimburse certain amount of money that covers some of that training. Some of the contractors in their contract language say that as the project proceeds through and we are supposed to be paid as they get paid through a federal agency or entity or whoever, they're supposed to pay us for our work. And some of the contractors had clauses in there that say they withhold 5% until the end of the project. And then

at the very end of the project, they will pay us that last 5%. And the DBE organization has worked with us as a DBE and said they're not allowed to withhold that 5% until the end. And so, we just work with them and say, 'Hey, I don't think you're supposed to be withholding.' And then they'll change their contract language. … Well, they provide us support, training. There's a lot of training opportunities. There are some reimbursements for some of our training that we do. They send us emails about projects that are out for bid so that we don't have to always be looking as much as we would normally because they're sending them to us. Just knowing some of the contractors we work with and the stress... Not the stress, but the importance that's been put on trying to hire DBEs as much as possible has helped, I think, with getting some of the subcontract work that we've had. The last few I've taken are some marketing ones, some companies that can help with websites and how to market your companies. There's been... I'm just trying to think of some other ones. Some trainings on financials and accounting and bookkeeping. We tried to get them to do a training on AutoCAD but that never really materialized too much because MDT didn't use it at the time." [#15]

- The Native American owner of a DBE-certified construction company stated, "We haven't, but, well, I'm sending somebody here shortly to learn how it's done. I went through a lot of their lot of their training programs... Oh, definitely, yes [they're helpful]." [#16]
- A representative of a majority-owned professional services firm stated, "I know some other states have a much more stringent requirements for DBEs, for percentages and such. just recently, MDT has implemented their public involvement contracts. And a lot of times, what they'll do is they'll actually use a term contract assignment with a public involvement firm that's then assigned to say a project that a consultant would have like us. And so, we, I guess, are kind of forced into working alongside that PI firm or with that PI firm. And it's just sort of a way that you could, I guess, introduce DBE companies or new companies to working with, you know, the firms that do the majority of the work already with [them]. So that the experience building, and the relationship building is, again, sort of forced, but, but it obviously would help working, you know, for those smaller companies, DBEs." [#2]
- The owner of a WBE- and DBE-certified professional services company stated, "San Francisco has a required for Disadvantaged Business Enterprise and actually minority-owned business. So, I didn't know about DBE, but I went into government contracting thinking, oh, when you're a minority business, this is a really great access point to larger projects because there's a diversity requirement, because there had been on SFO. And I didn't realize that Montana, it's not a requirement, it's a recommendation. And then once I was like, oh, well, I can understand that they have to try. And then I was oh, it's a completely recommendation in print, not in spirit." [#23]
- The woman owner of a DBE-certified professional services business stated, "Networking opportunities, training when we were early on, they helped us pay to get our website up. We're both chains for continuing education and there's been funds available for that. It's just lovely. we just are looking at changing our organization and because my business partner wants to retire, and my first thought when it was like, 'Oh, we might have to go from an LLP to a sole proprietorship,' my first thought was, 'Oh, we might call the DBE people and see if they can give us some hints and help.'" [#28]
- A representative of a majority-owned professional services company stated, "Their programs, I think, are good, but they need to be functional, and I know some of them where you have to hire

a certain amount of people from, say, the reservation and you can't get them, or they don't show up, is always a problem." [#29]

- The Native American woman owner of a DBE-certified professional services firm stated, "I have to say the DBE has really done a lot just in trying to... I don't know how to say it but try to get people like me to understand or to go to things and figure it out. But there may be a disconnect, a little disconnect between MDT and DBE. And I don't know what the disconnect is. I have to say the DBE program is an excellent program. I mean, but I think there needs to be some fine tuning as to what the DBE people or the small businesses that they are assisting, what they really need. And I know that as a DBE, they ask and ask, and they ask. And the small companies have a hard time answering, so there is the only disconnect I see with DBE and small companies is to what are the questions that you need to ask that person so that person can tell you what they need. I mean, everybody is talking but nobody is talking on the same... the communication part is not connected. Because I find I am one of the worst is, 'What do you want?' I don't know what I want. I don't know what I need. It's almost like if there was a department in the DBE that their job would be to go in when these projects come up in an area or whatever. Then they say, 'Okay, in my DBE...'" [#3]
- The owner of a WBE- and DBE-certified professional services company stated, "We are certified as DBE/ACDBE, and we've been also certified and welcome to perform on the highway related projects, aviation, and transportation. So, this is very different for us now. We really want to get those contracts and be more visible through the goal-setting activities through the engineering firms and architectural firms on every project and we just don't know how we can become more visible. I remember being at the DBE meeting one of them because we tried to attend as many as possible, and at that time, the program was building its database of suppliers in Montana and I asked, where is our industry? So, our industry didn't even have a space within the database of suppliers. So, we were fortunately added on to the database, which I'm so grateful. So, we have actually temporary staffing agency or recruiting agencies within the DBE vendor list, but now I understand there are some other things that we need to be understanding better, like the race neutral versus the race and gender conscious goal. I know we can contact the vendors who get awarded DBE contracts on transportation, aviation, and highway projects, but also why couldn't we be part of this solution and be more visible through including our NAICS codes within the DBE goals? Especially when it says based on the disparity study from 2019 found that minority- and women-owned firms are being underutilized in our state and that's really close to my heart. We've been working with one of the engineering firms that is really interested in all of this, and it seems like he recognizes that as a great idea and actually almost suggested this to say, 'How come your code is not included in our calculations?' That would be actually something valuable to our organization to meet these goals by including your NAICS codes, but it doesn't exist. Nobody really knows about them." [#31]
- A representative of a DBE-certified construction company stated, "I have a pretty good relationship with several of the people over at MDT, just because I've gone to the DBE summits, and I've worked with their labor people on different issues. And so, we've got a pretty good relationship with MDT and can. Even six years ago when I started and I went to my first conference, the MDT people were really easy to work with and real easy to deal with, and more than willing to be helpful. You know, 'Here's my card. If you have any questions, let me know. I can walk you through this.'" [#4]

- The owner of a majority-owned construction company stated, "One of the main DBE people in the state right now is our competitor, but they've been in business for 40 years. They're still a disadvantaged business. They're no more disadvantaged than we are. They've been in business, and they do as much business as us, and they're every bit as competitive as us, but they're still a DBE contractor. The same with... Looking at this data, seven firms in Montana account for 79% of the total dollars of DBE spent in Montana. I think they're probably the biggest of that bunch." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Being DBE certified is good because once a year they reimburse you $2,500 if... for bonding or whatever, whatever, training. What a nice perk. And then when things come up, like if they know that there's going to be this gathering, they'll let you know. So, it is a good resource, but if I could literally do work as a DBE, it'd be better. It will not keep my doors open if I was relying only on DBE." [#8]
- A representative from a Native American woman-owned construction company stated, "My only other thought is they need to enforce DBE program. All states have one, but Montana does not enforce it. So why have one if it is not enforced. Recently the last couple of years they tried to work with people. We have a labor and supply shortage. Right now, I have two paver machines one has been waiting for a part for a month. I cannot get the part in. It is the main equipment for paving." [#AV206]
- A representative of a DBE- and MBE-certified professional services company stated, "One of the things that we noticed and one of the big RFPs that came out was that there was no goal set. When I reached out, I was told that the goal is set differently in Montana than it is in say, Washington, which I'm more familiar with. It's more of an overall goal based on work throughout the whole state, as opposed to each individual RFP or whatever is coming out, even those with federal funding. We were a little taken back by that." [#FG1]
- A representative from a focus group consisting of prime contractors stated, "I see the DBE still a challenge in the state Montana, just for the simple fact of there is, like I said, an extensive list, but if you actually went down the list and you start looking at what people specifically do, not a lot of it pertains to what we need. And I don't know if that's taken into account. I have no idea. I haven't been highly involved with that from MDT standpoint, I've never sat in meetings or anything like that when they've had these discussions on what their DBE goals are and whatnot, I don't know how any of that's achieved. And so, there's a lot of engineering firms in there, which doesn't do us any good. I mean, obviously we're in, for the most part, when we're bidding those projects, it's engineered, it's done. We're going out there just to build it. There are some other things too, a lot of consulting firms and whatnot, just stuff we do not need in order to build our project. And so yeah, it's going to be a challenge and there's going to have to be some companies that are going to have to either switch potentially to a DBE firm or new companies will have to hopefully fill those voids that are there to allow them to continue meeting goals. Especially as you see all these price increases, you think about if there's 30% increase on materials, but you have a traffic control company coming in with their normal bid. Of course, yes, signs and stuff might be a little more expensive, but you're not going to see a huge, probably 30% increase on their price. Eventually materials are going to start pushing that overall percentage down, right? Cost 30% more to do the work and you're getting the same amount DBEs participating, that aren't buying big materials, that numbers got to get smaller, I would think. And I think you're going to see it nationally. It's going to be the nature of the piece; I think is as these prices

continue to skyrocket. I mean, right now a sheet of plywood, right now I think we're paying $58 a sheet and maybe five years ago that was $20 cheaper. It's crazy." [#FG2]

- The owner of an MBE- and DBE-certified goods and services company stated, "I've been on three of the airport DBE goal settings of the upcoming years. The information that I've gained from these meetings is that they haven't had a lot of participation from DBE. One of the airports reported that the DBE were too busy, or they didn't have time to build these projects. That may have been a response from a contractor." [#WT1]

2. Experience with federal DBE program. Eight business owners and representatives shared their experiences with the federal DBE program [#15, #16, #30, #3, #4, #8, #FG1, #PT]. For example:

- The woman owner of a DBE-certified professional services company stated, "It's a lot of paperwork. They have that same registration and all that, but it was a lot of the similar documentation you needed for the state DBE program. And the DBE program through the state helped us walk through it on the computer. But federal contracting is a monster, for sure." [#15]
- The Native American owner of a DBE-certified construction company stated, "We're certified to work with like federal highway stuff, but we haven't gone through any of their programming. Pretty much, it's just been the Montana Department of Transportation and DBE programs… that they put out for us." [#16]
- A representative of a majority-owned professional services firm stated, "I think it's been a good focus on DBEs and trying to find ways to encourage and increase the use of DBE small business." [#30]
- The Native American woman owner of a DBE-certified professional services firm stated, "Here's what I found. It was overwhelming for me to go to a workshop, and first of all, I had to take time off to go to the workshop. DBE was great about paying for it, but my downtime on going to workshops was more than I have, than I could afford to give. I would go, learn all this great stuff, get back to work, and dive right back into what I had to do just to keep alive. I didn't have the time, or maybe I didn't feel like I had the knowledge. But it was more time consuming, that I didn't have time to go back to work and work on all that. I had to work. … But I have to say that the DBE, they try really hard to get you all of that information. But I have to go back to the same thing. I didn't have time to work and learn that at the same time. It almost would be, they have to come to you." [#3]
- A representative of a DBE-certified construction company stated, "Not currently. Like I said, way back in the day, we were 8(a), which was a federal program, but that had a time frame. My understanding is had a timeframe to it. And after so many years you graduated out of it." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "Now with 8(a), and we are in 8(a), 8(a) is an exceptional beast. We have been fortunate since we've been in 8(a) because we do have some contracts with federal agencies. But I have heard that companies that have graduated out of 8(a) almost fold, because they get kind of used to that. And we're going to graduate out in 2025 and so we're trying to hit the ground running when we graduate out. And that's where we're finding a little bit of our difficulty, because she bids so much for federal jobs and she's not going to turn them down hoping to bid on a city or county job and then not get that one but then pass this federal job up, so it's kind of a double edge sword." [#8]

- A representative of a DBE- and MBE-certified professional services company stated, "I will tell you that in Washington, we have a really good reputation. We do, we have a really good reputation, and we can do very complex bridges and load ratings, and anything related to bridges. We have a couple of PhDs. I mean, we've got some really great bridge people. We do have a reputation and we probably offer things that some of the even smaller than us DBE firms don't. And I would say in Washington, when they're looking to fulfill a goal, we're probably one of the top firms they come to because of our expertise. And so, in that regard, we've seen a change in how we market. … We actually did a decent size on a design build, and we designed an underground station. He spent two years of his life on this project. We only got that because we were a DBE, but it was a great experience for him. I mean, the wealth of knowledge that he got and the experience he got was worth so much." [#FG1]
- A representative from a respondent at a public meeting stated, "And to tell you the truth, the federal government truly, I feel values a contractor's opinion and you go there, and you work as a team. And I feel that, and it's been really rewarding. They've taught us terms like scope creeping, our first COR basically said, don't let them scope creep on you. And so, it's like, when I've said I wanted to kind of a mentor/protégé relationship, I kind of feel like the federal government is a bit of a mentor because they'll tell you like about scope creeping, who would have known and so they've been good to us." [#PT2]

3. Recommendations and comments about programs for certified firms. Interviewees provided other suggestions to MDT and NPIAS airports about how to improve their certification process and programs for certified firms [#1, #10, #12, #15, #16, #2, #21, #23, #30, #33, #3, #36, #4, #5, #6, #8, #AV, #FG1, #PT1, #WT2]. For example:

- The owner of a majority-owned construction company stated, "Well, the Civil Rights Bureau had, for a couple of years, they had meetings at different places in the state. And I was on a couple of their panels and there is 10, 15 people out there that want to be in the business and they're asking questions. And that might be a really good starting point, but the state hasn't done that in years and years and years. But nobody sitting in the audience that day listening to me for an hour … can pick up [on all the] small points. If they pick up one or two, maybe that's good, but MDT needs to concentrate on people that they... And they can't do it. So, it's maybe an impossible task is to say they need to actually concentrate on people that want to be in the industry and are active in the industry. It needs to be some sort of mentoring program. I think if you look at a scorecard for MDT, I would say they're lucky if they have an F. And they might have a different idea in their mind what grade they have, but there's been almost... I will do it for the sake of this program. I'll go through the computer. I'll do a printout of every sub we've used in the last three, four years. I'll identify which ones are new and which ones have been here forever. And there are very few people that start down the DBE path that actually make it. So that tells you at some point, the path that they're using, isn't working." [#1]
- The Black American woman co-owner of a construction company stated, "That whole, what a small business is, because they always go by that federal requirement. I'm not sure, but I want to say it's like 35 million a year or something. I think, so if you're doing 35 million, figure you're just running bare bones, so you're doing 10%, that's still, I think once you're a multimillionaire every yeah, making that much every year, you're a little past what most Americans would consider a 'small business.' You know?" [#10]

- The owner of a majority-owned construction company stated, "The mine safety industry is so complicated. State has a training, and we went to one last year in Missoula. It was so complex and not pertaining to our business that I didn't even finish the course. It was a three-day course, and I went a day and a half, and nothing came to what we were doing whatsoever. We were required to have the training, but if we're dealing with 50-ton coal truck and 200 employees and stuff like that. So, it was actually worthless information. I mean, we all want to be safe, and we want to keep our employees safe, but you know, we need training in what we're doing, not what the coal mine is doing. … Smaller, more refined itemized topics. So even like in eMACS, I open an up window and if I go find the book that was given from the man that I took the course with, or get him on the phone, I might be able to walk through it and figure out, okay yeah, this is how I make it through X, Y, Z, only reach out to me for this area or these kinds of opportunities and stuff like that." [#12]
- The woman owner of a DBE-certified professional services company stated, "I think the DBE program has been helpful for us, for sure. I would like to see them implement it through the design side as much as they do the construction side as far as some recommendations and requirements, but they've been very helpful for us." [#15]
- The Native American owner of a DBE-certified construction company stated, "Training programs to a new subcontractor starting out on just sort of good business practices especially if you don't have any experience, they can help you with that it'd just be a little bit nicer if they could get their percentage of the work of a project a little bit higher. They have so many programs out there available to you, as far as training and education, and even have classes for bonding, and how to get financing, et cetera. And then, just how to run a business from the accounting end of it, right. The thing they lack, I think maybe is the physical, actually out there and turning the dirt over, and that kind of training." [#16]
- A representative of a majority-owned professional services firm stated, "The only thing I can think of is the networking [support] who to network with and some different opportunities, because say like the MDT knows that they know what each of the larger sites, say, larger firms can do in-house and stuff and what they would typically sub-consult out. So, probably helping network and, you know, 'Here's a couple of different firms to talk to,' or I don't know if they want to be that specific, but maybe just, 'Here's the list of pre-qualified ones and, you know, maybe start networking with the top people here, because those are the ones that are being selected more.'" [#2]
- A representative of a DBE-certified professional services firm stated, "I think the biggest thing is having resources. Like when you call a 900 number, they're available, so just having support whether if you're trying to register, if you're trying to do bookkeeping or whatever, so just making sure that resources that people need are available." [#21]
- The owner of a WBE- and DBE-certified professional services company stated, "The biggest barrier to me applying for more government contracting stuff is that I don't have the resources to commit to filling all that stuff out. So, if PTAC were to expand to say like people who can help you get your application started, for example, they know all my information, they have my capability statement. Maybe they can make 10, 20 pages for me that start to input my information into that and then they give it back to me to finish. You know what I mean? If they can literally make an assistant to help you fill out your proposal and then you can come and fix it the way you want or align it differently or change the fonts or whatever you want to do

stylistically, that they can help you get all of your stuff on the page… If PTAC had like a fair or even proactively stop in small shops or reached out to local businesses, like a lot of people are registered at the Chamber of Commerce and they might not even be aware that they qualify as a DBE. But if you emailed everyone in Chamber of Commerce or Chamber of Commerce holds events. So, if you hold events with a local Chamber of Commerce, and you say PTAC representatives will be at the Chamber of Commerce for these three days. And email ahead to book your slot, choose one thing that you want to prepare a proposal for, and they will help you get it done. You know, because then I, as a business owner, know that I'm going to spend three hours and I'm going to propose on this project in that time. Then I know what to expect in terms of syncing my resources. And I know that there's someone who's going to help me get it done. And having something like that, where reach out to the larger business community and help people self-identify would be really great." [#23]

- The owner of a WBE- and DBE-certified professional services company stated, "I do know that in Montana it's ethnicity lined DBE. I'm not so sure about that one. Like I said, I feel like if I showed up with a white male partner, then it might make things a little bit easier. But I mean, I'm Hispanic. So, I do think there's a difference between a Hispanic woman and a white woman walking into a room, even if they have the exact same financial statements. And I think, especially in Montana of where we have such a significant Native American population, saying that those women have the same access to opportunities as some rancher's wife is ridiculous. So, I think including ethnicity in the DBE is important. It's valuable to our state too." [#23]
- The owner of a majority-owned construction company stated, "We had applied to try to be a disadvantaged business. I own 25%, they own 75%, or she did. But we were denied because she had another job, and my wife had another job. All four of us had another job. I think the barriers of getting these new DBEs is kind of tough because some of the rules to be a DBE, it's got to be your main focus, which I think it is, but people also need to make a living. One of the main DBE people in the state right now is our competitor, but they've been in business for 40 years. They're still a disadvantaged business. They're no more disadvantaged than we are. They've been in business, and they do as much business as us, and they're every bit as competitive as us, but they're still a DBE contractor. The same with... Looking at this data, seven firms in Montana account for 79% of the total dollars of DBE spent in Montana. I think they're probably the biggest of that bunch." [#6]
- A representative from a respondent at a public meeting stated, "I have a problem with small business too, because within most of my NAICs code, small business is $13 million. You know and so it would almost be better if they could change the rules to small business being number of employees. Because when we look at a job that says small business, to tell you the truth, we will sometimes bypass it just because we'll still be competing with Knife River and Riverside, those companies that are huge because they're still considered small business. So that's a thought, instead of going by sales for small business, go by number of employees. And then I think you'd get a true picture of a small business." [#PT2]
- A representative of a majority-owned professional services firm stated, "I think what the state continues to do is good. They continue to find opportunities for awareness of the businesses and networking opportunities for those businesses within the industry." [#30]
- The owner of a majority-owned professional services firm stated, "The other thing that they can do is matchmaking." [#33]

- The Native American woman owner of a DBE-certified professional services firm stated, "If they really want to help new DBEs, there needs to be a little bit more follow through on, I'm trying to think. Your new ones, they really want to learn, and so they take the time to try and go and learn. But they soon find out that they're spending a lot of time learning something, that they can't make the total application when they get back home. Because then they dive right back into their work, that they don't have time to. I can't explain what it's like. It's like you really want to know, and you really want to do this, but you get back into your own world, and you're like, 'I don't have time. I need to live. I need to keep myself alive.'" [#3]
- A representative of a Native American-owned construction firm stated, "I would just say more available training, I guess. In our field, in the trade industry, I mean, there's training out there, but some people can't afford it, whatever it may be. But I think if there's more of, I don't even know how you'd put it, just an availability, I guess, to people who don't have the opportunity." [#36]
- A representative of a DBE-certified construction company stated, "They changed the policy, and this isn't DBE, this is MDT, with regards to oil and the oil tickets on chipping or scrub seal jobs and oil needing to be approved before payment. And that's cost us to incur late fees on material, suppliers, bills, and stuff, because now we're having to wait considerably longer to get paid on those types of jobs because we had to wait for the oil to be approved. And so, that is something that is frustrating and to us and to our suppliers, because we pay our suppliers when we get paid. If we're not getting paid, we're not getting money to our suppliers and our suppliers are having to wait and we're getting charged interest on unpaid balances and things of that nature." [#4]
- A representative of a majority-owned professional services firm stated, "I guess listed as a DBE and market that a little bit. Let other firms know that you are a DBE because in some of those programs that I mentioned where its mandatory, you got to have a DBE firm like in Idaho if you're not on the list, you can't use them. I don't know if Montana has anything like that. I'm not aware that they have a mandatory. You have to have a mandatory certified DBE on your team. I don't if MDT keeps a list in the consulting world DBE firms that are out there. Maybe having that list when some of this work comes up some other firms use them." [#5]
- The owner of a majority-owned construction company stated, "I'd like to really make sure they're ready, willing, and able, DBEs that are available, are really ready, willing, and able. It is, I think it's kind of skewing what should be required. If you're looking at MDTs subcontractor information, we got some of this. We look, we pay attention to it, but of 788 bids, 148 were from DBE firms. I think that's almost 20%. 92 of the 148 were a large DBE firm, which is like 62%. I think there's participation, but I think it's from the same companies all the time. I think the most recent MDT thing indicates there's 112 certified highway related DBE firms. There're just not that many available that are willing to quote any work at all. I think it skews the percentage, the goals we're trying to meet. I think Montana would be better of trying to help some new DBEs, and new people in the state that would actually quote some of this work, other than have 112 that are supposedly ready, willing, and able, and five are from Alabama. You know good and well there's no way they're coming to do any work in Montana. They should try to build the DBE firms in Montana, maybe have some kind of program that helps some people even start some new DBE firms or help them achieve DBE status. I think there's, like I said before, there's some that, I think there's some that could qualify, but when you have two jobs and this, even like to

start out sometimes, it's only a part time thing, your new company is a part time thing getting going, because it's hard to drop everything and start a new company. I'm not sure it's designed to, if you put project goals on these things, and you're giving it to these guys that have been in business for 40 years, I don't think that program was designed for that, especially one that's just... they're making... Because a lot of times when it comes to those big projects like that, they have a 5% goal, the only way you're getting that 5% goal is the guy that's bidding $6 or $700,000 contract, even though the competitor is $200,000, they know they get the 6%, you could be 6, and it's just... It's a waste of money, and you're really not helping anybody." [#6]

- The owner of a WBE- and DBE-certified construction company stated, "In our NAICs code, small business is 30 million and less. I'm still competing with the [large local construction companies], and these guys can do multimillion dollar projects, but then yet they'll still bid on a $40,000 project. They're using the bigger cities size standard because big cities naturally are always more expensive. They're using the east coast and so the west coast, and they're saying, well, this is a standard small business on these. Let's apply it to the Midwest that nobody lives there. So, they need to have different areas need to be different size standards. I mean, to me a small business is 2 million and less. We'll be woman-owned forever. So, I've asked federal agencies, can you put that out as a woman-owned, instead of 8(a), because I want to... we're going to graduate out of 8(a), I want to... I mean because I can bid as woman-owned all the time. And they don't because it's too hard for them. I guess with 8(a), because you know it's a very long... it took me three years to get into 8(a) and the process is phenomenal. But they will not put jobs out to bid as women-owned only, because it's too hard for them to do that. The best thing with DBE would be, they could actually have 100% DBE company do a job if they would make it smaller. Because then, I could general... I could GC it, and they would have 100% DBE. You remember when I told you about that guy, that came from South Dakota and messed up everything and then the girl from New York. And then you talked about how these companies could vet and have people in their wheelhouse that they can call up on? They need to vet better. They do. They need to make sure that these people are qualified to come and truly help a company. A company that's just starting up. They need those entry level people, perhaps. But then they need those people that are so very experienced that when they come and they leave, I feel not like my head is spinning, but it's like, 'Wow, look what we did today.' It's got to be a finished project. Don't just tell me what to do and then leave. be well versed on what you're telling me." [#8]
- A representative from a majority-owned professional services company stated, "We are a service-disabled veteran owned. I don't think MDT has a program for that. We would like it if they had something like that. We have tried submitting a few. It is tough to break into, especially on the environmental side. So cheap not worth it." [#AV252]
- A representative from a majority-owned construction company stated, "More work out there than contractors can handle we get looked over because we are a service-connected disabled veterans with the veteran's admin but not a minority." [#AV275]
- A representative from a majority-owned construction company stated, "They should help small contractors--they have not done that so far--giving us some of the business would be great--I have tried this before and they never pick me." [#AV368]
- A representative from a majority-owned construction company stated, "We're a disabled veteran-owned company and we'd like to take advantage of opportunities available through SAM and SBA. But the paperwork and getting the assistance you need to go through." [#AV51]

- A representative of a DBE- and MBE-certified professional services company stated, "I mean, support your local business as opposed to your corporate business, because small business and local business needs to survive. And those people live in the town, they spend the money here. They support the local government with their taxes. I mean, I just feel like they need to acknowledge that piece of it. I don't know, maybe Montana really uses a lot of Montana-based, but I do know they use HDR, and they do have an office in Montana, but they're a huge multimillion, billion dollar firm that's in every country of the world. I don't know. I just feel like bringing it home to people that are here. I don't know. In Washington, there's a lot of diversity. There's a lot of minorities. I don't see that so much in Montana. I mean, I don't know whether it's maybe more indigenous people here that have businesses. I feel like you can't push a government to mandate a percentage if they don't have the pool to pull from. I mean, how fair is that? I mean, is there are enough DBE firms to even do the work that they would mandate? I have no idea." [#FG1]
- A representative from a majority-owned professional services firm stated, "I mean, small business definitions from a federal standpoint are all those big firms that we still compete with. So that doesn't necessarily work, but can we come up with a standard for a smaller business that's under a hundred employees? Or a Montana preference, I don't know. Where the majority of your employees live in Montana, so those would just be some possible solutions that I've thought of." [#PT1]
- The owner of a WBE- and DBE-certified professional services company stated, "A) Overall DBE goals are based on Race Neutral (RN) participation (at 100% level), not on Race and Gender Conscious (RC) participation (RC goal are set at 0%). The MDT Disparity Study from Oct. 2009 and Sept 2014 found that the minority- and women-owned firms were being underutilized based on their availability. Additionally, the study noted both quantitative and qualitative information suggesting that there is not a level playing field for minority- and women-owned businesses in Montana transportation contracting industry. As a 100% woman-owned, DBE/ACDBE certified small business owner, I'd like to make the effort and take steps to encourage utilization, inclusion and creating opportunities for DBE certified women-owned suppliers in Montana for DBE goal project participation. B) none of our industry NAICS codes for providing skilled labor, workforce placement, contingent labor, personnel, temporary employee placement, recruiting services, and other, are included in the DBE project goal calculations, making our DBE /ACDBE certified small Montana woman-owned, MT based, and operated business invisible for the purpose of the overall DBE goal calculations and setting; furthermore, it makes our small business irrelevant within supplier data base. C) staffing and employee placement codes are not broken down into specific codes other than NAICS code that as mentioned above, is not used by engineering and general contractor firms in overall DBE goal setting calculations. D) we are not certain if MDT would be able to provide guidance on increasing visibility and inclusion of the type of services our firm offers with regard to RC and RN goals." [#WT2]

K. Other Insights and Recommendations

Interviewees shared other insights or recommendations [#10, #11, #18, #21, #27, #3, #31, #32, #33, #4, #5, #8, #9, #WT2]. For example:

- The Black American woman co-owner of a construction company stated, "I think that there's a ton of things that they could easily change and would make it a much more competitive field with MDT. I just don't have a lot of faith in them to actually do it." [#10]

- The owner of a majority-owned professional services company stated, "It's going to sound weird, but I'll say it anyway, that when the state has these meetings, that the state... And they're going to meet with these different subs or whatever... That the state itself has a diversity of people at that meeting. Not just old white guys. Because it could be wildlife, plant ecologist, whatever, but a biologist. It seems like in those organizations themselves because I used to know the guy who we had to talk to all the time at MDT and he himself felt that in the decision-making process, within that organization, he was at the same level as the janitor. Now this is coming from an employee of MDT and had been there for many, many, many years and retired from there. So, it was not like somebody was there for a year or two. So, he did his entire career there. And he told me that he felt at times, part of the problem he has is that his decision, he's not part of the process and the engineers make all the decisions, even knowing those things that they know this much about, zero. And they do it. And they ask him. And so, he said it was frustrating to him. I can say this because he is no longer there, but it was frustrating to him that he was never part of the process. And he thought the janitor had more pull with the engineers than he did." [#11]
- The owner of a majority-owned construction firm stated, "Yeah. I mean if they want to provide assistance, startups, QuickBooks training would be. Now, like the local business development bureau, which here is Bear Paw Development, but they have Yellowstone and Billings. And I mean, there's one in every major city. Generally, they do some training, and I don't know if that's federally funded or what kind of funding they do. I think MDT needs to do a better job of reviewing how they treat contractors and what the ramifications of those treatments of those contractors are. Ultimately, those ramifications are higher project costs. Because if I know that MDT is a son of a [expletive] to work for, they're going to pay more for me to work for them. So, I think they need to look at more at their culture of how they treat contractors because, in my opinion, it's not that good. They probably should have a couple of people that specialize in walking subs through policies and procedures through MDT that make it a little easier to work through the technicalities of these contracts." [#18]
- A representative of a DBE-certified professional services firm stated, "Things need to change everywhere, but especially in Montana, I just think that it's not an equal or level playing field for women, for minority-owned businesses. And it's always been that way. I think that opportunities and funding streams need to change, so that it can be more equal and equitable." [#21]
- A representative of a majority-owned professional services company stated, "Yeah, I guess just if there's anything that could be done to give new companies or smaller companies an opportunity to work with MDT, even though it's just hard to break that barrier of not having worked with MDT before and showing experience. If there was any way that... I think that's the biggest thing for us, is just how do we even start getting to work with MDT because we have that as one of our

goals to work with MDT but it's really hard to compete against all those companies or those several companies that work with MDT all the time." [#27]

- The Native American woman owner of a DBE-certified professional services firm stated, "I just think that to me it really is MDT and the primes. They have to figure out what is a fair thing. Because just saying primes have to hire really isn't fair to the primes. And then also the DBEs have to be... I don't know how, but your DBE has to be a good company. And I'm thinking for the people that take the time and become DBEs, they are generally your better companies." [#3]
- The owner of a WBE- and DBE-certified professional services company stated, "I'm always just looking for better understanding on how this all works. How can we be more visible and how we can participate especially when I've heard that this is a solution that would be helpful to some of the engineering firms, it's really encouraging that there's a change of thought. It's not just women-owned businesses that have maybe runway asphalt company that's available, but thinking it differently and saying, 'Oh, could a workforce solution recruiting type of agency help us to get our workforce and still be part of this goal-setting strategy?' So, it's just really encouraging that some businesses are thinking differently." [#31]
- The woman owner of a professional services firm stated, "I think more and more like any of the area that are businesses that are in the cities, they need to go to this. Utilize, buy local, I guess would be the most and easiest way is to continue encourage to buy local." [#32]
- The owner of a majority-owned professional services firm stated, "Be people-centered rather than process centered. I know that governments thrive on process, but they need to bring the human element back to it. Whatever the inequities or the sins that people are going to be, they're not as grievous as the bureaucracy, in which people can actually play the bureaucracy and you have the problem of bureaucracy and people playing the bureaucracy at the same time. Measure for measure in an imperfect world with ambiguity. Get people who know their job and like other people into the process, and it'll be better for the agencies that they work with and the people that they work with, but it's really going to be better for the state and for the Department of Transportation." [#33]
- A representative of a DBE-certified construction company stated, "Get your name out, build up those relationships. I mean, start trying to build relationships as so much of this industry is built on the old adage, 'It's not what you know as much as it is who you know.' And lean on the DBE people. They really do know what they're talking about. They're very, very good. [The DBE program director] and her crew down there over in Helena are phenomenal. [The person] who takes care of the labor side of things, is phenomenal and are more than willing to help at any time, on anything. So, and they're valuable. You just have to reach out to them. They're invaluable." [#4]
- A representative of a majority-owned professional services firm stated, "Be professional. Get work done on time. We have schedules for everything, timely work, quality of work. For a startup, a DBE even contact a lot of the prime firms out there, saying hey we're here, we're available. Don't be afraid to send an unsolicited email to somebody. I'd prefer to get solicitations via email rather than having people cold calling or show up, usually too busy." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "If you go back to MDT and say, 'Hey, this company wants to know more about how they can find these various owners that might need their work.' Find out what jobs are there. What's the best way to be able to find

a job and bid on it? How do we let them know we exist? How do we vet with them to where maybe they will look at five or 10 vendors or service companies that they might put me on that list? This information was for me to help MDT, but maybe is there a way that MDT can help me? I am willing to put in the work for it too. So just for them to widen their horizons, maybe a little and say, 'What are we going to do to let these people know that, hey, we need this or this.' No, but we need things like that." [#8]

- The owner of a majority-owned construction company stated, "I've been deaf since 1973. My ear was lost in the military. I lost a lot of my hearing in the military, and so I want to watch that person's actions, is what I'm saying. And I have a pretty good, I guess trust, or a good opinionation [sic] of somebody when I'm talking to them if they're BSing me or being truthful. That's why I said, 'I'm going to put a hold on this until we get back to living a normal life.' I've wasted a lot of time attending meetings. These people, oh, you're going... Nothing's ever going back to normal. I said, 'Well, that's fine, but eventually you're going to have to open the doors because you can't run a business...' It's like, 'Let's get through COVID.' And you don't want to make any big decisions or big moves until you get through that." [#9]
- The owner of a WBE- and DBE-certified professional services company stated, "Overall DBE goals are based on Race Neutral (RN) participation (at 100% level), not on Race and Gender Conscious (RC) participation (RC goal are set at 0%). The MDT Disparity Study from Oct. 2009 and Sept 2014 found that the minority- and women-owned firms were being underutilized based on their availability. Additionally, the study noted both quantitative and qualitative information suggesting that there is not a level playing field for minority- and women-owned businesses in Montana transportation contracting industry. As a 100% woman-owned, DBE/ACDBE certified small business owner, I'd like to make the effort and take steps to encourage utilization, inclusion and creating opportunities for DBE certified women-owned suppliers in Montana for DBE goal project participation." [#WT2]

APPENDIX E.
Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to estimate the availability of Montana businesses for the transportation-related construction and professional services work awarded by the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports. Federal regulations around minority- and woman-owned business programs recommend using approaches similar to the one BBC used to measure availability. Moreover, our approach has been specifically approved by the Ninth Circuit Court of Appeals. Appendix E expands on the information presented in Chapter 6 to further describe:

A. Availability data;

B. Representative businesses;

C. Survey instrument;

D. Survey execution; and

E. Additional considerations.

A. Availability Data

BBC partnered with Davis Research to conduct telephone and online surveys with hundreds of businesses throughout MDT's *relevant geographic market area* (RGMA), which BBC identified as the entire state of Montana. Businesses Davis Research surveyed were ones with locations in the RGMA BBC identified as doing work in fields closely related to the types of transportation-related contracts and procurements MDT and NPIAS airports awarded between October 1, 2015 and September 30, 2020 (the *study period*). BBC began the process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract MDT and NPIAS airports awarded during the study period and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. We then compiled information about local businesses D&B listed as having their primary or secondary lines of business within those work specializations.

As part of the survey effort, the study team attempted to contact 4,520 Montana businesses that perform work relevant to MDT's and NPIAS airports' transportation-related work. The study team successfully contacted 833 of those businesses, 460 of which completed availability surveys.

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business operating in the RGMA. Instead, it was to collect information from a large, unbiased subset of Montana businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an

accurate, statistically-valid manner.[1] In addition, BBC did not design the research effort so the study team would contact every Montana business possibly performing construction and professional services work. Instead, we determined the types of work most relevant to MDT and airport contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure E-1 lists 8-digit work specialization codes within construction and professional services most related to the relevant contract dollars MDT and NPIAS airports awarded during the study period, which we included as part of the availability analysis. We grouped those specializations into distinct subindustries, which appear as headings in Figure E-1.

C. Survey Instrument

BBC created an availability survey instrument to collect information from relevant businesses located in the RGMA. As an example, the survey instrument the study team used with construction businesses is presented at the end of Appendix E. We modified the construction survey instrument slightly for use with businesses working in professional services to reflect terms more commonly used in that industry.[2] (For example, BBC substituted the words "prime contractor" and "subcontractor" with "prime consultant" and "subconsultant" when surveying professional services businesses.)

1. Survey structure. The availability survey included 13 sections, and Davis Research attempted to cover all sections with each business the firm successfully contacted.

a. Identification of purpose. The survey began by identifying MDT as the survey sponsor and describing the purpose of the study. (For example, "The Montana Department of Transportation is conducting a survey to develop a list of companies that have worked with or are interested in providing construction-related services to MDT, public airports, and other local public agencies.")

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information (see areas "X" and "Y" of the availability survey instrument).

c. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded "yes" to that question.

d. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B's work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

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[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

[2] BBC also developed e-mail versions of the survey for businesses that preferred to complete the survey in that manner.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Asphalt paving		**Concrete work (continued)**	
16110200	Surfacing and paving	17710103	Gunite contractor
16110204	Highway and street paving contractor	17710200	Curb and sidewalk contractors
16110205	Resurfacing contractor	17710201	Curb construction
16119903	Highway reflector installation	17710202	Sidewalk contractor
17210303	Pavement marking contractor	17719902	Concrete repair
17710301	Blacktop (asphalt) work	17919902	Concrete reinforcement, placing of
17990202	Coating of concrete structures with plastic	17959901	Concrete Breaking For Streets and Highways
17990203	Coating of metal structures at construction site		
17990207	Glazing of concrete surfaces	**Concrete, asphalt, sand, and gravel products**	
		14420000	Construction sand and gravel
Bridge construction		28999908	Concrete curing and hardening compounds
16220000	Bridge, tunnel, and elevated highway construction	29510000	Asphalt paving mixtures and blocks
16229900	Bridge, tunnel, and elevated highway	29510201	Asphalt and asphaltic paving mixtures
16229901	Bridge construction	29510202	Coal tar paving materials
16229902	Highway construction, elevated	29510204	Concrete, bituminous
16229903	Tunnel construction	29510206	Road materials, bituminous
16229904	Viaduct construction	32410000	Cement, hydraulic
17910000	Structural steel erection	32419903	Portland cement
		32730000	Ready-mixed concrete
Building construction		35310401	Asphalt plant, including gravel-mix type
15410000	Industrial buildings and warehouses	50320100	Paving materials
15419905	Industrial buildings, new construction	50320101	Asphalt mixture
15419909	Renovation, remodeling and repairs: industrial buildings	50320102	Paving mixtures
15419910	Steel building construction	50320504	Concrete mixtures
15420100	Commercial and office building contractors	50329901	Aggregate
15420101	Commercial and office building, new construction	50329904	Cement
15420103	Commercial and office buildings, renovation and repair	50329905	Gravel
15420400	Specialized public building contractors	50329907	Sand, construction
15420402	Fire station construction	50329908	Stone, crushed or broken
15429900	Nonresidential construction	51690701	Concrete additives
		52110502	Cement
Concrete work		52110503	Concrete and cinder block
16110206	Sidewalk construction	52110506	Sand and gravel
17410102	Retaining wall construction		
17710000	Concrete work		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Electrical equipment and supplies		**Highway and street construction**	
36480110	Street lighting fixtures	16110000	Highway and street construction
36690206	Traffic signals, electric	16110201	Airport runway construction
39930100	Electric signs	16110202	Concrete construction: roads, highways, sidewalks
50460106	Signs, electrical	16110207	Gravel or dirt road construction
50630504	Signaling equipment, electrical	16119900	Highway and street construction
52119906	Electrical construction materials	16119901	General contractor, highway and street construction
		16119902	Highway and street maintenance
Electrical work		16290000	Heavy construction
17310000	Electrical work	16299900	Heavy construction
		17710300	Driveway, parking lot, and blacktop contractors
Excavation, site prep, grading, and drainage		17710302	Driveway contractor
16110203	Grading	17710303	Parking lot construction
16290400	Land preparation construction		
16290401	Land leveling	**Landscape services**	
16290402	Land reclamation	7810200	Landscape services
16290403	Rock removal	7820206	Seeding services, lawn
16299901	Blasting Contractor, Except Building Demolition	7829902	Highway lawn and garden maintenance services
16299902	Earthmoving contractor		
16299903	Land clearing contractor	**Other construction materials**	
16299904	Pile driving contractor	35319908	Road construction and maintenance machinery
16299906	Trenching contractor	50820300	General construction machinery and equipment
17940000	Excavation work	17210200	Commercial painting
17949900	Excavation work	17210201	Exterior commercial painting contractor
17949901	Excavation and grading, building construction	17210300	Industrial painting
17990900	Building site preparation	17210302	Bridge painting
17990901	Boring for building construction	17410000	Masonry and other stonework
17990903	Shoring and underpinning work	17419901	Bricklaying
		49590100	Road, airport, and parking lot maintenance service
Fencing			
17999912	Fence construction		
52119907	Fencing		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Plumbing and HVAC		**Trucking, hauling and storage**	
17110000	Plumbing, heating, air-conditioning	42129905	Dump truck haulage
17110301	Fire sprinkler system installation	42139902	Building materials transport
		42139903	Contract haulers
Traffic control, signs, and guardrails		42139904	Heavy hauling, nec
16110100	Highway signs and guardrails		
16110101	Guardrail construction, highways	**Water, sewer, and utility lines**	
16110102	Highway and street sign installation	16230000	Water, sewer, and utility lines
17999929	Sign installation and maintenance	16230300	Water and sewer line construction
32310302	Reflector glass beads, for highway signs	16230302	Sewer line construction
34440509	Machine guards, sheet metal	16230303	Water main construction
34449905	Guard rails, highway: sheet metal	16239900	Water, sewer, and utility lines, nec
34460107	Railings, banisters, guards, etc: made from metal	16239902	Manhole construction
36480101	Airport lighting fixtures: runway approach, taxi	16239903	Pipe laying construction
36690200	Transportation signaling devices	16239906	Underground utilities contractor
36690201	Highway signals, electric	16290105	Drainage system construction
36690203	Pedestrian traffic control equipment	16290108	Irrigation system construction
50399914	Metal guardrails	17419904	Drain tile installation
50990304	Reflective road markers	17999906	Core drilling and cutting
73599912	Work zone traffic equipment (flags, cones, barrels)	17999907	Dewatering
73899921	Flagging service (traffic control)	17999908	Diamond drilling and sawing
		17999941	Protective lining installation, underground (sewage)
Professional Services			
Advertising, marketing and public relations		**Environmental services and transportation planning**	
73110000	Advertising agencies	87420410	Transportation consultant
73119901	Advertising consultant	87480204	Traffic consultant
73190100	Transit advertising services	87489905	Environmental consultant
73360000	Commercial art and graphic design	89990701	Geological consultant
87430000	Public relations services	89990702	Geophysical consultant
87439903	Public relations and publicity		
		Other professional services	
Engineering		87419902	Construction management
87110000	Engineering services	87420402	Construction project management consultant
87110400	Construction and civil engineering		
87110402	Civil engineering	**Surveying and mapmaking**	
87110404	Structural engineering	87130000	Surveying services
87119903	Consulting engineer	87139902	Aerial digital imaging
		Testing and inspection	
		73890200	Inspection and testing services
		87340000	Testing laboratories

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4) and if they were subsidiaries or affiliates of other businesses (Questions A5 and A6).

f. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past prime contracts and subcontracts (Questions B1 and B2).

g. Interest in future work. The surveyor asked businesses about their interest in future prime contracts and subcontracts with MDT and other government agencies (Questions B3 and B4).

h. Geographic area. The surveyor asked businesses where they perform work or serve customers in Montana (Questions C0 through C5).

i. Capacity. The surveyor asked businesses about the value of the largest contracts on which they had bid or had been awarded during the past five years (Question D1).

j. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 and E2). If businesses indicated they were minority-owned, they were also asked about the race/ethnicity of the business' owners (Question E3). The study team confirmed that information through several other data sources, including:

- MDT Disadvantaged Business Enterprise/Small Business Enterprise certification lists;
- MDT vendor data; and
- Information from other available certification directories and business lists.

k. Business revenue. The surveyor asked questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section included questions about their revenues and number of employees across all locations (Questions F1 through F4).

l. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working with MDT and other local government agencies and general insights about conditions in Montana's marketplace (Question G1a and G1b). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the Montana marketplace (Question G2).

m. Contact information. The survey concluded with questions about the participant's name, position, and contact information for the organization (Questions H1 through H3).

D. Survey Execution

Davis Research conducted all availability surveys in 2021 and 2022. The firm made multiple attempts on different days of the week and at different times of the day to reach each business. The firm attempted to survey the owner, manager, or other officer of each business who could provide accurate responses to survey questions.

1. Businesses the study team successfully contacted. Figure E-2 presents the disposition of the 4,520 businesses the study team attempted to contact for availability surveys and how that number resulted in the 833 businesses we successfully contacted.

Figure E-2.
Disposition of attempts to contact business for availability surveys

Source:
BBC availability analysis.

	Number of Establishments
Beginning list	4,520
Less duplicate phone numbers	37
Less non-working phone numbers	691
Less wrong number/business	168
Unique business listings with working phone numbers	3,624
Less no answer	2,510
Less could not reach responsible staff member	279
Less language barrier	2
Establishments successfully contacted	**833**

a. Non-working or wrong phone numbers. Some of the business listings Davis Research attempted to contact were:

- Duplicate phone numbers (37 listings);
- Non-working phone numbers (691 listings); or
- Wrong numbers for the desired businesses (168 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them. For those businesses, BBC conducted additional research to find different working phone numbers so Davis Research could attempt to reach them again. The values for duplicate phone numbers, non-working numbers, and wrong numbers reflect those efforts.

b. Working phone numbers. As shown in Figure E-2, there were 3,624 businesses with working phone numbers Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts for 2,510 businesses.
- The firm could not reach a responsible staff member after multiple attempts for 279 businesses.
- The firm could not conduct the availability survey due to language barriers for two businesses.

Thus, Davis Research was able to successfully contact 833 businesses.

2. Businesses included in the availability database. Figure E-3 presents the disposition of the 833 businesses Davis Research successfully contacted and how that number resulted in the businesses BBC included in the availability database and considered potentially available for MDT and NPIAS airport work.

Figure E-3. Disposition of businesses successfully contacted for availability surveys

Source:
BBC availability analysis.

	Number of Establishments
Establishments successfully contacted	833
Less establishments not interested in discussing availability for work	224
Less unreturned fax/online surveys	18
Establishments that completed surveys	591
Less not a for-profit business	5
Less line of work outside of study scope	34
Less no interest in future work	61
Less multiple establishments	31
Establishments potentially available for MDT or airport work	**460**

a. Businesses not interested in discussing availability for MDT or NPIAS airport work. Of the 833 businesses the study team successfully contacted, 224 businesses were not interested in discussing their availability for MDT or NPIAS airport work. In addition, upon request, BBC sent e-mail surveys to 18 businesses that did not return surveys. In total, 591 successfully contacted businesses completed availability surveys.

b. Businesses available for MDT or NPIAS airport work. BBC deemed only a portion of the businesses that completed availability surveys as potentially available for the prime contracts and subcontracts MDT and NPIAS airports awarded during the study period. We excluded some of the businesses that completed surveys from the availability database for various reasons:

- We excluded five businesses that indicated they were not for-profit organizations.
- We excluded 34 businesses that reported that their main lines of business were outside of the study scope.
- We excluded 61 businesses that reported they were not interested in contracting opportunities with MDT or other government organizations.
- Thirty-one businesses 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 according to several rules:
  - If any of the locations reported bidding or working on a contract or procurement within a particular subindustry, BBC considered the business to have bid or worked on a contract or procurement in that subindustry.
  - BBC combined the different roles of work (i.e., prime contractor or subcontractor) different locations of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one location reported that it works as a prime contractor and another location reported that it works as a subcontractor, then we considered the business as available for both prime contracts and subcontracts.

- BBC considered the largest contract or procurement any locations 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).

After those exclusions, BBC compiled a database of 460 businesses that we considered potentially available for MDT or NPIAS airport work.

E. Additional Considerations

BBC made several additional considerations related to its approach to measuring availability to ensure estimates of the availability of businesses for MDT and NPIAS airport work were accurate and appropriate.

1. Providing representative estimates of availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of MDT and NPIAS airport contract and procurement dollars that minority- and woman-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for MDT or NPIAS airport work and should not be used in that way.

2. Using a custom census approach to measuring availability. Federal guidance around measuring availability recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. BBC rejected such approaches when measuring the availability of businesses for MDT and NPIAS airport work, because dividing a simple headcount of certified businesses by the total number of businesses does not account for various business characteristics crucial to estimating availability accurately. Instead, BBC used a *custom census* approach to measuring availability that adds several layers of refinement to a simple counting approach. For example, the availability surveys the study team conducted provided data on qualifications, business capacity, and interest in MDT and NPIAS airport work for each business, which allowed BBC to take a more precise approach to measuring availability.

3. Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., 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 to assigning businesses to specific D&B work specialization codes. Specifically, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. In addition, when the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to classify businesses more accurately in the availability database.

4. Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, BBC collected corresponding D&B

information for their businesses 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 capacity but were asked to answer such question in terms of ranges of dollar figures. Where possible, BBC verified survey responses in a number of ways:

- BBC compared data from the availability surveys to information from other sources such as vendor information we collected from MDT and NPIAS airports. For example, certification databases include data on the race/ethnicity and gender of the owners.
- BBC examined MDT and airport data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts businesses performed during the past five years with actual contract data.
- MDT and NPIAS airports reviewed contract and vendor data the study team collected and compiled as part of study analyses and provided feedback regarding their accuracy.

Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the Montana Department of Transportation, also known as MDT.

This is not a sales call. The Montana Department of Transportation is conducting a survey to develop a list of companies that are potentially interested in providing construction-related services to MDT, public airports, and other local public agencies.

The survey should take between 10 and 15 minutes to complete. Who can I speak with to confirm information about your firm's characteristics and interest in working with local government organizations?

[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 SURVEYS WILL ADD TO EXISTING DATA ON COMPANIES THAT HAVE WORKED WITH OR ARE INTERESTED IN WORKING WITH MDT, PUBLIC AIRPORTS, AND OTHER LOCAL PUBLIC 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 A2

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – TERMINATE

Y1. What is the name of this firm?

1=VERBATIM

Y2. Is [*new firm* name] associated with [*old firm* name] in anyway?

1=Yes, same owner doing business under a different name – SKIP TO A2

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – TERMINATE

99=Refused to give information – TERMINATE

Y3. Can you give me the complete address or city for [*new firm name*]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

A2. Let me confirm that [*firm name*/*new firm name*] is a for-profit 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

A3a. 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 that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes – SKIP TO A3c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. 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 BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

97 = (NONE)

A4. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location – SKIP TO A7

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. 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

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or received an award—in either the public or private sector—for any part of a contract as either a prime contractor or subcontractor?

[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No – SKIP TO B3a

98=(DON'T KNOW) – SKIP TO B3a

99=(REFUSED) – SKIP TO B3a

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY _____

98=(DON'T KNOW)

99=(REFUSED)

B3. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company *interested* in working with MDT or public Montana airports as a <u>prime contractor</u>?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B4. Is your company *interested* in working with MDT or public Montana airports as a <u>subcontractor, trucker/hauler, or supplier</u>?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

Now I want to ask you about the geographic areas your company serves within Montana.

C0. Is your company able to serve all regions of Montana or only certain regions of the state?

1=All of the state – SKIP TO D1

2=Only parts of the state

98=(DON'T KNOW)

99=(REFUSED)

C1. Could your company do work in District 1, extending from Ravalli through Powell and Flathead to the Canadian border?

DISTRICT 1 INCLUDES FLATHEAD, MISSOULA, LAKE, RAVALLI, SANDERS, POWELL, LINCOLN, MINERAL, AND GRANITE COUNTIES]

1=Yes, able to work in this District

2= No, not able to work in this District

98=(DON'T KNOW)

99=(REFUSED)

C2. Could your company do work in District 2 extending from Meagher through Park to the Idaho border?

[NOTE TO INTERVIEWER: IF ASKED, MDT DISTRICT 2 INCLUDES GALLATIN, MADISON, PARK, BEAVERHEAD, SILVER BOW, JEFFERSON, BROADWATER, MEAGHER, AND DEER LODGE COUNTIES]

1=Yes, able to work in this District

2= No, not able to work in this District

98=(DON'T KNOW)

99=(REFUSED)

C3. Could your company do work in District 3, extending from Glacier to Lewis and Clark to Blain and up to the Canadian border?

[NOTE TO INTERVIEWER: IF ASKED, MDT DISTRICT 3 INCLUDES CASCADE, LEWIS AND CLARK, CHOUTEAU, BLAINE, TOOLE, HILL, PONDERA, TETON, GLACIER, AND LIBERTY COUNTIES]

1=Yes, able to work in this District

2= No, not able to work in this District

98=(DON'T KNOW)

99=(REFUSED)

C4. Could your company do work in District 4, extending from Phillips to Rosebud extending to the North Dakota border?

[NOTE TO INTERVIEWER: IF ASKED, MDT DISTRICT 4 INCLUDES VALLEY, SHERIDAN, ROSEBUD, ROOSEVELT, PHILLIPS, GARFIELD, POWDER RIVER, CARTER, RICHLAND, DAWSON, DANIELS, CUSTER, FALLON, MCCONE, PRAIRIE, AND WIBAUX COUNTIES]

1=Yes, able to work in this District

3= No, not able to work in this District

98=(DON'T KNOW)

99=(REFUSED)

C5. Could your company do work in District 5, extending from Judith Basin to Petroleum to the Wyoming border?

[NOTE TO INTERVIEWER: IF ASKED, MDT DISTRICT 5, INCLUDES YELLOWSTONE, FERGUS, BIG HORN, CARBON, STILLWATER, JUDITH BASIN, SWEET GRASS, MUSSELSHELL, WHEATLAND, TREASURE, GOLDEN VALLEY, AND PETROLEUM COUNTIES]

1=Yes, able to work in this District

2= No, not able to work in this District

98=(DON'T KNOW)

99=(REFUSED)

D1. What was the largest <u>prime contract or subcontract</u> that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=$100,000 or less

2=More than $100,000 to $250,000

3=More than $250,000 to $500,000

4=More than $500,000 to $1 million

5=More than $1 million to $2 million

6=More than $2 million to $5 million

7=More than $5 million to $10 million

8=More than $10 million to $20 million

9=More than $20 million to $50 million

10=More than $50 million to $100 million

11= More than $100 million to $200 million

12=$200 million or greater

97=(NONE)

98=(DON'T KNOW)

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 by Asian Pacific American, Black American, Hispanic American, Native American, or Subcontinent Asian individuals. By this definition, is [*firm namelnew firm name*] a minority-owned business?

1=Yes

2=No – SKIP TO F1

98=(DON'T KNOW) – SKIP TO F1

99=(REFUSED) – SKIP TO F1

E3. Would you say that the minority group ownership of your company is mostly Asian Pacific American, Black American, Hispanic American, Native American, or Subcontinent Asian 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 Marianas Islands, Macao, Fiji, Tonga, Kirbati, 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)

F1. Dun & Bradstreet lists the average annual gross revenue of your company, including all your locations, 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 F3

2=No

98=(DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

F2. Roughly, what was the average annual gross revenue of your company, including all of your locations, over the last three years? Would you say:

[READ LIST]

1=Less than $1 Million

2=$1.1 Million - $6 Million

3=$6.1 Million - $8 Million

4=$8.1 Million - $12 Million

5=$12.1 Million - $16.5 Million

6=$16.6 Million - $19.5 Million

7=$19.6 Million - $22 Million

8=$22.1 Million - $26.29 Million

9=$26.3 Million or more

98= (DON'T KNOW)

99= (REFUSED)

F3. Dun & Bradstreet lists the number of employees at your company, including both full-time and part-time employees, to be [*number of employees*]. Is that an accurate average of your company's number of employees over the last three years?

1=Yes – SKIP TO G1a

2=No

98=(DON'T KNOW) – SKIP TO G1a

99=(REFUSED) – SKIP TO G1a

F4. About how many full-time and part-time employees did you have working in your company across all locations, on average, over the last three years?

[READ LIST IF NECESSARY]

1=100 employees or less

2=101-150 employees

3=151-200 employees

4=201-250 employees

5=251-500 employees

6=501-750 employees

7=751-1,000 employees

8=1,001-1,250 employees

9=1,251-1,500 employees

10=1,501 or more employees

G1a. We're interested in whether your company has experienced barriers or difficulties related to working with, or attempting to work with, MDT or other local government organizations. Do you have any thoughts to share?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G1b. Do you have any additional thoughts to share regarding general marketplace conditions in Montana, starting or expanding a business in your industry, or obtaining work?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those topics?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM NAME

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

10=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. And at what email address can you be reached?

1=VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Megan Handl from the Montana Department of Transportation at 406-444-6324.

If you have any questions for the Disparity Study project team or wish to submit written testimony regarding your insights or experiences related to working in the local marketplace, please email MDTDisparity@bbcresearch.com.

APPENDIX F.
Disparity Analysis Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority- and woman-owned businesses in transportation-related construction and professional services work the Montana Department of Transportation (MDT) and National Plan of Integrated Airport Systems (NPIAS) airports awarded between October 1, 2015 through September 30, 2020 (the *study period*) with the percentage of contract dollars one might expect MDT and NPIAS airports to award to those businesses based on their *availability* for that work.[1] Appendix F presents detailed results from the disparity analysis for relevant business groups and various sets of contracts and procurements MDT and NPIAS airports awarded during the study period.

A. Format and Information

Each table in Appendix F presents disparity analysis results for a different set of contracts and procurements. For example, Figure F-2 presents disparity analysis results for all relevant MDT contracts and procurements BBC examined as part of the study considered together. The format and organization of Figure F-2 is identical to that of all disparity analysis tables in Appendix F. Figure F-2 presents information about each relevant business group in separate rows:

- "All businesses" in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) presents results for white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (9) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as DBEs.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as DBEs.

1. Utilization analysis results. Each results table includes the same columns of information:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the contract set as well as the number of contract elements in which businesses of each group participated. As shown in row (1) of column (a) of Figure F-2, BBC analyzed 4,709 contract elements MDT awarded during the study period. The value

[1] ""Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

presented in column (a) for each individual business group represents the number of contract elements in which businesses of that particular group participated. For example, as shown in row (5) of column (a), Asian Pacific American-owned businesses participated in 46 prime contracts and subcontracts MDT awarded during the study period.

- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure F-2, BBC examined approximately $1.8 billion associated with the 4,709 contract elements MDT awarded during the study period. The value presented in column (b) for each individual business group represents the dollars MDT awarded to businesses of that particular group. For example, as shown in row (5) of column (b), MDT awarded $6.7 million worth of prime contracts and subcontracts to Asian Pacific American-owned businesses during the study period.
- Column (c) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (c) 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. For example, for Asian American-owned businesses, the study team divided $6.7 million by $1.8 billion and multiplied by 100 for a result of 0.4 percent, as shown in row (5) of column (c).

2. Availability results. Column (d) of Figure F-2 presents the availability of each relevant business group for all contract elements BBC analyzed as part of the contract set. Availability estimates indicate the percentage of dollars one might expect MDT to award to businesses of a particular group based on its availability for that work. For example, as shown in row (5) of column (d), the availability of Asian Pacific American-owned businesses for all MDT work considered together is 1.5 percent. That is, one might expect MDT to award 1.5 percent of relevant contract and procurement dollars to Asian Pacific American-owned businesses based on their availability for that work.

3. Disparity indices. BBC also calculated a disparity index for each relevant racial/ethnic and gender group. Column (e) of Figure F-2 presents a disparity index for each group. For example, as reported in row (5) of column (e), the disparity index for Asian Pacific American-owned businesses was 24.8, indicating that MDT actually awarded approximately $0.25 for every dollar one might expect the agency to award to Asian Pacific American-owned businesses based on their availability for relevant prime contracts and subcontracts. For disparity indices exceeding 200, BBC reported an index of "200+." When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of "100," indicating parity.

B. Index and Tables

Figure F-1 presents a table of contents presenting the different sets of contracts and procurements for which BBC analyzed disparity analysis results. The heading of each table in Appendix F also provides a description of the set of contracts or procurements BBC analyzed for that particular table.

Figure F-1.
Table of Contents

Table	Characteristics						
	Time period	Contract area	Contract role	Contract size	Agency	Funding	District
F-2	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	All districts
F-3	**10/01/15 - 03/31/18**	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	All districts
F-4	**04/01/18 - 9/30/20**	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	All districts
F-5	10/01/15 - 9/30/20	**Construction**	Prime contracts and subcontracts	All sizes	MDT	All funding sources	All districts
F-6	10/01/15 - 9/30/20	**Professional services**	Prime contracts and subcontracts	All sizes	MDT	All funding sources	All districts
F-7	10/01/15 - 9/30/20	All industries	**Prime contracts**	All sizes	MDT	All funding sources	All districts
F-8	10/01/15 - 9/30/20	All industries	**Subcontracts**	All sizes	MDT	All funding sources	All districts
F-9	10/01/15 - 9/30/20	All industries	**Prime contracts**	**Large**	MDT	All funding sources	All districts
F-10	10/01/15 - 9/30/20	All industries	**Prime contracts**	**Small**	MDT	All funding sources	All districts
F-11	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	N/A	**NPIAS airports**	All funding sources	N/A
F-12	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	**1**
F-13	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	**2**
F-14	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	**3**
F-15	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	**4**
F-16	10/01/15 - 9/30/20	All industries	Prime contracts and subcontracts	All sizes	MDT	All funding sources	**5**

Figure F-2.
Agency: MDT
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	4,709	$1,756,078			
(2) Minority and woman-owned businesses	982	$206,920	11.78	7.92	148.7
(3) Non-Hispanic white woman-owned	811	$192,671	10.97	3.87	200+
(4) Minority-owned	171	$14,249	0.81	4.05	20.0
(5) Asian Pacific American-owned	46	$6,745	0.38	1.55	24.8
(6) Black American-owned	0	$0	0.00	0.35	0.0
(7) Hispanic American-owned	59	$1,629	0.09	0.23	41.1
(8) Native American-owned	62	$4,071	0.23	1.93	12.0
(9) Subcontinent Asian American-owned	4	$1,803	0.10	0.00	200+
(10) Minority-owned or woman-owned DBE	755	$113,811	6.48		
(11) Non-Hispanic white woman-owned DBE	597	$102,411	5.83		
(12) Minority-owned DBE	158	$11,399	0.65		
(13) Asian Pacific American-owned DBE	42	$6,139	0.35		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	59	$1,629	0.09		
(16) Native American-owned DBE	57	$3,631	0.21		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Agency: MDT
Time period: 10/01/2015 - 03/31/2018
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	2,271	$812,459			
(2) Minority and woman-owned businesses	486	$98,055	12.07	8.40	143.7
(3) Non-Hispanic white woman-owned	408	$91,254	11.23	4.20	200+
(4) Minority-owned	78	$6,802	0.84	4.20	19.9
(5) Asian Pacific American-owned	27	$4,531	0.56	1.68	33.1
(6) Black American-owned	0	$0	0.00	0.38	0.0
(7) Hispanic American-owned	25	$935	0.12	0.20	57.6
(8) Native American-owned	26	$1,335	0.16	1.94	8.5
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	361	$48,617	5.98		
(11) Non-Hispanic white woman-owned DBE	287	$42,303	5.21		
(12) Minority-owned DBE	74	$6,314	0.78		
(13) Asian Pacific American-owned DBE	24	$4,074	0.50		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	25	$935	0.12		
(16) Native American-owned DBE	25	$1,304	0.16		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Agency: MDT
Time period: 04/01/2018 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	2,438	$943,618			
(2) Minority and woman-owned businesses	496	$108,865	11.54	7.51	153.6
(3) Non-Hispanic white woman-owned	403	$101,418	10.75	3.58	200+
(4) Minority-owned	93	$7,447	0.79	3.93	20.1
(5) Asian Pacific American-owned	19	$2,214	0.23	1.43	16.4
(6) Black American-owned	0	$0	0.00	0.33	0.0
(7) Hispanic American-owned	34	$694	0.07	0.25	29.6
(8) Native American-owned	36	$2,736	0.29	1.92	15.1
(9) Subcontinent Asian American-owned	4	$1,803	0.19	0.00	200+
(10) Minority-owned or woman-owned DBE	394	$65,194	6.91		
(11) Non-Hispanic white woman-owned DBE	310	$60,108	6.37		
(12) Minority-owned DBE	84	$5,086	0.54		
(13) Asian Pacific American-owned DBE	18	$2,065	0.22		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	34	$694	0.07		
(16) Native American-owned DBE	32	$2,326	0.25		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Agency: MDT
Time period: 10/01/2015 - 09/30/2020
Contract area: Construction
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	3,462	$1,603,582			
(2) Minority and woman-owned businesses	770	$195,797	12.21	7.68	158.9
(3) Non-Hispanic white woman-owned	606	$183,517	11.44	3.63	200+
(4) Minority-owned	164	$12,280	0.77	4.05	18.9
(5) Asian Pacific American-owned	45	$6,596	0.41	1.69	24.4
(6) Black American-owned	0	$0	0.00	0.03	0.0
(7) Hispanic American-owned	59	$1,629	0.10	0.24	41.6
(8) Native American-owned	60	$4,054	0.25	2.10	12.1
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	581	$105,727	6.59		
(11) Non-Hispanic white woman-owned DBE	425	$94,344	5.88		
(12) Minority-owned DBE	156	$11,383	0.71		
(13) Asian Pacific American-owned DBE	42	$6,139	0.38		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	59	$1,629	0.10		
(16) Native American-owned DBE	55	$3,614	0.23		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Agency: MDT
Time period: 10/01/2015 - 09/30/2020
Contract area: Professional services
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	1,247	$152,495			
(2) Minority and woman-owned businesses	212	$11,123	7.29	10.43	70.0
(3) Non-Hispanic white woman-owned	205	$9,155	6.00	6.39	93.9
(4) Minority-owned	7	$1,969	1.29	4.03	32.0
(5) Asian Pacific American-owned	1	$149	0.10	0.10	100.5
(6) Black American-owned	0	$0	0.00	3.76	0.0
(7) Hispanic American-owned	0	$0	0.00	0.03	0.0
(8) Native American-owned	2	$17	0.01	0.15	7.4
(9) Subcontinent Asian American-owned	4	$1,803	1.18	0.00	200+
(10) Minority-owned or woman-owned DBE	174	$8,084	5.30		
(11) Non-Hispanic white woman-owned DBE	172	$8,067	5.29		
(12) Minority-owned DBE	2	$17	0.01		
(13) Asian Pacific American-owned DBE	0	$0	0.00		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	0	$0	0.00		
(16) Native American-owned DBE	2	$17	0.01		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Agency: MDT
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	1,320	$1,159,157			
(2) Minority and woman-owned businesses	204	$81,557	7.04	4.90	143.6
(3) Non-Hispanic white woman-owned	181	$76,740	6.62	2.91	200+
(4) Minority-owned	23	$4,817	0.42	1.98	20.9
(5) Asian Pacific American-owned	9	$1,854	0.16	1.12	14.3
(6) Black American-owned	0	$0	0.00	0.40	0.0
(7) Hispanic American-owned	1	$139	0.01	0.08	14.6
(8) Native American-owned	9	$1,021	0.09	0.38	23.2
(9) Subcontinent Asian American-owned	4	$1,803	0.16	0.00	200+
(10) Minority-owned or woman-owned DBE	145	$30,021	2.59		
(11) Non-Hispanic white woman-owned DBE	127	$27,156	2.34		
(12) Minority-owned DBE	18	$2,865	0.25		
(13) Asian Pacific American-owned DBE	8	$1,705	0.15		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	1	$139	0.01		
(16) Native American-owned DBE	9	$1,021	0.09		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Agency: MDT
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	3,389	$596,920			
(2) Minority and woman-owned businesses	778	$125,364	21.00	13.79	152.3
(3) Non-Hispanic white woman-owned	630	$115,932	19.42	5.72	200+
(4) Minority-owned	148	$9,432	1.58	8.07	19.6
(5) Asian Pacific American-owned	37	$4,891	0.82	2.38	34.4
(6) Black American-owned	0	$0	0.00	0.25	0.0
(7) Hispanic American-owned	58	$1,490	0.25	0.51	49.4
(8) Native American-owned	53	$3,051	0.51	4.93	10.4
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	610	$83,790	14.04		
(11) Non-Hispanic white woman-owned DBE	470	$75,256	12.61		
(12) Minority-owned DBE	140	$8,534	1.43		
(13) Asian Pacific American-owned DBE	34	$4,434	0.74		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	58	$1,490	0.25		
(16) Native American-owned DBE	48	$2,610	0.44		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Agency: MDT **Large contracts**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	524	$1,050,312			
(2) Minority and woman-owned businesses	43	$61,024	5.81	3.22	180.6
(3) Non-Hispanic white woman-owned	38	$59,073	5.62	2.04	200+
(4) Minority-owned	5	$1,952	0.19	1.17	15.8
(5) Asian Pacific American-owned	1	$149	0.01	0.50	2.9
(6) Black American-owned	0	$0	0.00	0.37	0.0
(7) Hispanic American-owned	0	$0	0.00	0.06	0.0
(8) Native American-owned	0	$0	0.00	0.26	0.0
(9) Subcontinent Asian American-owned	4	$1,803	0.17	0.00	200+
(10) Minority-owned or woman-owned DBE	21	$18,078	1.72		
(11) Non-Hispanic white woman-owned DBE	21	$18,078	1.72		
(12) Minority-owned DBE	0	$0	0.00		
(13) Asian Pacific American-owned DBE	0	$0	0.00		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	0	$0	0.00		
(16) Native American-owned DBE	0	$0	0.00		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Agency: MDT **Small contracts**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	796	$108,845			
(2) Minority and woman-owned businesses	161	$20,532	18.86	21.12	89.3
(3) Non-Hispanic white woman-owned	143	$17,667	16.23	11.30	143.6
(4) Minority-owned	18	$2,865	2.63	9.81	26.8
(5) Asian Pacific American-owned	8	$1,705	1.57	7.15	21.9
(6) Black American-owned	0	$0	0.00	0.75	0.0
(7) Hispanic American-owned	1	$139	0.13	0.34	37.3
(8) Native American-owned	9	$1,021	0.94	1.58	59.4
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	124	$11,942	10.97		
(11) Non-Hispanic white woman-owned DBE	106	$9,077	8.34		
(12) Minority-owned DBE	18	$2,865	2.63		
(13) Asian Pacific American-owned DBE	8	$1,705	1.57		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	1	$139	0.13		
(16) Native American-owned DBE	9	$1,021	0.94		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.
Agency: Airport
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: Federal

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	662	$226,149			
(2) Minority and woman-owned businesses	129	$15,858	7.21	10.51	68.6
(3) Non-Hispanic white woman-owned	96	$9,355	4.17	5.73	72.8
(4) Minority-owned	33	$6,503	3.04	4.78	63.6
(5) Asian Pacific American-owned	15	$1,322	0.57	1.62	35.2
(6) Black American-owned	2	$80	0.03	0.56	5.9
(7) Hispanic American-owned	5	$507	0.24	0.32	76.3
(8) Native American-owned	9	$4,558	2.18	2.28	95.7
(9) Subcontinent Asian American-owned	2	$36	0.01	0.00	200+
(10) Minority-owned or woman-owned DBE	61	$6,584	2.97		
(11) Non-Hispanic white woman-owned DBE	38	$5,176	2.36		
(12) Minority-owned DBE	23	$1,409	0.61		
(13) Asian Pacific American-owned DBE	14	$1,304	0.56		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	4	$10	0.00		
(16) Native American-owned DBE	5	$95	0.04		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.
Agency: MDT **District 1**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	1,019	$394,744			
(2) Minority and woman-owned businesses	197	$26,490	6.71	7.60	88.3
(3) Non-Hispanic white woman-owned	162	$25,326	6.42	3.75	171.0
(4) Minority-owned	35	$1,164	0.29	3.85	7.7
(5) Asian Pacific American-owned	4	$369	0.09	1.50	6.2
(6) Black American-owned	0	$0	0.00	0.32	0.0
(7) Hispanic American-owned	16	$79	0.02	0.28	7.1
(8) Native American-owned	15	$716	0.18	1.75	10.4
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	156	$21,185	5.37		
(11) Non-Hispanic white woman-owned DBE	124	$20,262	5.13		
(12) Minority-owned DBE	32	$924	0.23		
(13) Asian Pacific American-owned DBE	3	$220	0.06		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	16	$79	0.02		
(16) Native American-owned DBE	13	$625	0.16		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.
Agency: MDT **District 2**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	814	$301,096			
(2) Minority and woman-owned businesses	147	$23,086	7.67	8.93	85.9
(3) Non-Hispanic white woman-owned	127	$22,119	7.35	4.05	181.4
(4) Minority-owned	20	$968	0.32	4.88	6.6
(5) Asian Pacific American-owned	9	$723	0.24	1.71	14.1
(6) Black American-owned	0	$0	0.00	0.13	0.0
(7) Hispanic American-owned	8	$75	0.02	0.26	9.8
(8) Native American-owned	3	$169	0.06	2.79	2.0
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	123	$17,426	5.79		
(11) Non-Hispanic white woman-owned DBE	103	$16,458	5.47		
(12) Minority-owned DBE	20	$968	0.32		
(13) Asian Pacific American-owned DBE	9	$723	0.24		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	8	$75	0.02		
(16) Native American-owned DBE	3	$169	0.06		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.
Agency: MDT **District 3**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	932	$316,163			
(2) Minority and woman-owned businesses	207	$36,921	11.68	9.17	127.3
(3) Non-Hispanic white woman-owned	179	$34,005	10.76	4.37	200+
(4) Minority-owned	28	$2,916	0.92	4.80	19.2
(5) Asian Pacific American-owned	7	$1,047	0.33	2.27	14.6
(6) Black American-owned	0	$0	0.00	0.13	0.0
(7) Hispanic American-owned	6	$165	0.05	0.22	23.6
(8) Native American-owned	15	$1,704	0.54	2.18	24.7
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	122	$23,412	7.40		
(11) Non-Hispanic white woman-owned DBE	96	$20,780	6.57		
(12) Minority-owned DBE	26	$2,631	0.83		
(13) Asian Pacific American-owned DBE	7	$1,047	0.33		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	6	$165	0.05		
(16) Native American-owned DBE	13	$1,420	0.45		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.
Agency: MDT **District 4**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	636	$336,947			
(2) Minority and woman-owned businesses	153	$69,524	20.63	6.63	200+
(3) Non-Hispanic white woman-owned	118	$65,939	19.57	3.10	200+
(4) Minority-owned	35	$3,585	1.06	3.54	30.1
(5) Asian Pacific American-owned	13	$1,922	0.57	1.26	45.4
(6) Black American-owned	0	$0	0.00	0.17	0.0
(7) Hispanic American-owned	12	$1,150	0.34	0.21	161.6
(8) Native American-owned	10	$513	0.15	1.90	8.0
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	120	$17,974	5.33		
(11) Non-Hispanic white woman-owned DBE	88	$14,846	4.41		
(12) Minority-owned DBE	32	$3,128	0.93		
(13) Asian Pacific American-owned DBE	10	$1,465	0.43		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	12	$1,150	0.34		
(16) Native American-owned DBE	10	$513	0.15		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.
Agency: MDT **District 5**
Time period: 10/01/2015 - 09/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	821	$365,396			
(2) Minority and woman-owned businesses	193	$44,457	12.17	7.08	171.8
(3) Non-Hispanic white woman-owned	146	$40,660	11.13	3.68	200+
(4) Minority-owned	47	$3,797	1.04	3.40	30.5
(5) Asian Pacific American-owned	13	$2,685	0.73	1.27	57.9
(6) Black American-owned	0	$0	0.00	0.57	0.0
(7) Hispanic American-owned	17	$161	0.04	0.18	24.2
(8) Native American-owned	17	$952	0.26	1.38	18.9
(9) Subcontinent Asian American-owned	0	$0	0.00	0.00	100.0
(10) Minority-owned or woman-owned DBE	168	$29,892	8.18		
(11) Non-Hispanic white woman-owned DBE	122	$26,160	7.16		
(12) Minority-owned DBE	46	$3,732	1.02		
(13) Asian Pacific American-owned DBE	13	$2,685	0.73		
(14) Black American-owned DBE	0	$0	0.00		
(15) Hispanic American-owned DBE	17	$161	0.04		
(16) Native American-owned DBE	16	$886	0.24		
(17) Subcontinent Asian American-owned DBE	0	$0	0.00		