BBC & RESEARCH CONSULTING

2022 Disparity Study

Hamilton County

FINAL REPORT

Final Report

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2022 Hamilton County Disparity Study

Prepared for
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CHAPTER ES.
Executive Summary

Hamilton County (The County) spends hundreds of millions of dollars in contracts and procurements each year to procure various construction services, professional services, and goods and other services related to its operations as well as the operations and maintenance of the Metropolitan Sewer District of Greater Cincinnati (MSDGC), which the County owns and operates.[1] The County and MSDGC both have Small Business Enterprise (SBE) Programs in place to encourage the participation of minority- and woman-owned businesses in their work. As part of their programs, the County and MSDGC use *race- and gender-neutral* measures to meet their objectives. Race- and gender-neutral measures are efforts designed to encourage the participation of all businesses in an organization's work, regardless of the race/ethnicity or gender of business owners. In contrast, *race- and gender-conscious* measures are measures specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting and procurement (e.g., goals for minority-and woman-owned business participation on individual contracts). Neither the County nor MSDGC use any race- or gender-conscious efforts as part of their contracting and procurement.

The County retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate whether minority- or woman-owned businesses face any barriers in County contracting and procurement. As part of the study, BBC examined whether there are any *disparities*, or differences, between:

- The percentage of contract and procurement dollars—including construction, professional services, and goods and other services contracts and procurements—the County and MSDGC awarded to minority- and woman-owned businesses during the study period, which was defined as January 1, 2016 through June 30, 2021 (i.e., *utilization*); and
- The percentage of contract and procurement dollars one might expect the County and MSDGC to award to minority- and woman-owned businesses based on the degree to which those businesses are *ready, willing, and able* to perform specific types and sizes of their prime contracts and subcontracts (i.e., *availability*).

The disparity study also provides other quantitative and qualitative information related to:

- The legal framework surrounding small business programs and minority- and woman-owned business programs;

[1] The City of Cincinnati (The City) operates MSDGC, but it does so pursuant to the authority and direction of the Hamilton County Board of County Commissioners. The City cannot use its home rule powers in contracting and procuring goods and services for MSDGC. MSDGC must follow the contracting and procurement laws, rules, and policies to which the County is subject.

- Conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses; and
- Contracting practices and business assistance programs the County and MSDGC have in place or could consider implementing in the future.

The County and MSDGC could use information from the study to help refine the implementations of their respective SBE Programs and refine their contract and procurement policies, as well as various program measures, to further encourage the participation of minority- and woman-owned businesses in their work.

BBC summarizes key information from the 2022 Hamilton County Disparity Study in five parts:

A. Analyses in the Disparity Study;

B. Availability Analysis Results;

C. Utilization Analysis Results;

D. Disparity Analysis Results; and

E. Program Recommendations.

A. Analyses in the Disparity Study

BBC examined extensive information related to outcomes for minority- and woman-owned businesses and the County's and MSDGC's SBE Programs:

- The study team conducted an analysis of regulations, case law, and other information to guide methodology for the disparity study. The analysis included a review of legal requirements related to minority- and woman-owned business programs, including the SBE Programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities, women, and minority- and woman-owned businesses throughout the *relevant geographic market area (RGMA)*.[2] In addition, the study team collected anecdotal evidence about potential barriers that individuals and businesses face in the local marketplace through in-depth interviews, surveys, public meetings, written testimony, and focus groups (see Chapters 3 and 4 and Appendices C and D).
- The study team analyzed the percentage of relevant County and MSDGC contract and procurement dollars minority- and woman-owned businesses are available to perform. That analysis was based on surveys the study team completed with businesses that work in industries related to the specific types of construction, professional services, and goods and

[2] BBC defined the RGMA for the County's contracting and procurement as Hamilton, Butler, Warren, and Clermont Counties in Ohio and Boone, Campbell, and Kenton Counties in Kentucky. BBC made that determination based on the fact that the County and MSDGC award the vast majority of its contract and procurement dollars to businesses located within those geographical areas (approximately 90% of relevant contract and procurement dollars).

other services contracts and procurements the County and MSDGC award (see Chapter 6 and Appendix E).

- The study team analyzed the dollars the County and MSDGC awarded to minority- and woman-owned businesses during the study period on relevant construction, professional services, and goods and other services contracts and procurements (see Chapters 5 and 7).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on construction, professional services, and goods and other services contracts and procurements the County and MSDGC awarded during the study period (see Chapter 8 and Appendix F).
- The study team reviewed measures the County and MSDGC use to encourage the participation of small businesses as well as minority- and woman-owned businesses in their contracts and procurements (see Chapter 9).
- BBC provided guidance related to additional program options and potential changes to current contracting practices for the County's consideration (see Chapter 10).

B. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for County prime contracts and subcontracts—including MSDGC contracts and procurements—which relied on information from surveys the study team conducted with potentially available businesses located in the RGMA as well as information about the contracts and procurements the County and MSDGC awarded during the study period. That approach allowed BBC to develop a representative, unbiased, and statistically valid database of relevant local businesses to estimate the availability of minority- and woman-owned businesses for County and MSDGC work.

1. All contracts and procurements. Figure ES-1 presents dollar-weighted estimates of the availability of minority- and woman-owned businesses for County and MSDGC contracts and procurements considered together. Overall, the availability of minority- and woman-owned businesses for that work is 26.0 percent, indicating that one might expect the County and MSDGC to award 26 percent of their contract and procurement dollars to minority- and woman-owned businesses. White woman-owned businesses (8.8%), Black American-owned businesses (7.2%), and Asian American-owned businesses (7.0%) exhibit the greatest availability for County and MSDGC work considered together.

Figure ES-1.
Availability estimates for County and MSDGC work considered together

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 Figure F-2 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability
All minority- and woman-owned	26.0 %
White woman-owned	8.8 %
Minority-owned	17.1 %
Asian American-owned	7.0 %
Black American-owned	7.2 %
Hispanic American-owned	1.8 %
Native American-owned	1.2 %

Figure ES-2 presents the availability of minority- and woman-owned businesses separately for County and MSDGC work. As shown in Figure ES-2, the availability of those businesses is greater for County work (28.4%) than for MSDGC work (24.5%). The same business groups exhibit the greatest availability for County and MSDGC work: white woman-owned businesses (County = 12.7%; MSDGC = 6.5%), Black American-owned businesses (County = 7.9%; MSDGC = 6.7%), and Asian American-owned businesses (County = 6.6%; MSDGC = 7.2%).

Figure ES-2.
Availability estimates for County and MSDGC work considered separately

Note:

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

For more detail, see Figures F-3 and F-15 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

	Organization	
Business group	County	MSDGC
All minority- and woman-owned	28.4 %	24.5 %
White woman-owned	12.7 %	6.5 %
Minority-owned	15.7 %	18.0 %
Asian American-owned	6.6 %	7.2 %
Black American-owned	7.9 %	6.7 %
Hispanic American-owned	0.9 %	2.3 %
Native American-owned	0.4 %	1.7 %

2. Contract role. Many minority- and woman-owned businesses are small businesses and often work as subcontractors. Thus, it is useful to examine availability estimates separately for prime contracts and subcontracts. Figure ES-3 presents availability estimates for prime contracts and subcontracts separately for the County (top panel) and MSDGC (bottom panel). (Subsequent figures are organized similarly). As shown in Figure ES-3, the availability of minority- and woman-owned businesses is lower for prime contracts than for subcontracts for both County work (prime contracts = 27.8%; subcontracts = 31.9%) and MSDGC work (prime contracts = 24.5%; subcontracts = 25.8%).

Figure ES-3.
Availability estimates for County and MSDGC 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-9. F-10, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Role	
	Prime contracts	Subcontracts
County		
All minority- and woman-owned	27.8 %	31.9 %
White woman-owned	11.1 %	22.1 %
Minority-owned	16.7 %	9.8 %
Asian American-owned	7.0 %	4.0 %
Black American-owned	8.5 %	4.4 %
Hispanic American-owned	0.9 %	0.8 %
Native American-owned	0.3 %	0.6 %
MSDGC		
All minority- and woman-owned	24.5 %	25.8 %
White woman-owned	6.2 %	13.1 %
Minority-owned	18.3 %	12.7 %
Asian American-owned	7.3 %	5.0 %
Black American-owned	6.8 %	5.6 %
Hispanic American-owned	2.4 %	1.3 %
Native American-owned	1.8 %	0.8 %

3. Industry. BBC examined availability analysis results separately for County and MSDGC construction, professional services, and goods and other services work to assess whether the availability of minority- and woman-owned businesses differed by industry. As shown in ES-4, minority- and woman-owned businesses exhibit the greatest availability for professional services work and lower availability for construction and goods and other services work. That pattern exists for both the County (construction = 27.1%; prof. svcs. = 32.7%; goods and other svcs. = 27.8%) and MSDGC (construction = 20.8%; prof. svcs. = 29.7%; goods and other svcs. = 20.5%).

Figure ES-4. Availability estimates for County and MSDGC construction, professional services, and goods and other 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 F6, F-7, F-8, F-16, F-17, and F-18 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Industry		
	Construction	Professional services	Goods and other services
County			
All minority- and woman-owned	27.1 %	32.7 %	27.8 %
White woman-owned	14.5 %	5.6 %	14.0 %
Minority-owned	12.6 %	27.2 %	13.7 %
Asian American-owned	6.5 %	12.3 %	2.9 %
Black American-owned	4.4 %	13.0 %	10.6 %
Hispanic American-owned	1.1 %	1.8 %	0.0 %
Native American-owned	0.6 %	0.1 %	0.2 %
MSDGC			
All minority- and woman-owned	20.8 %	29.7 %	20.5 %
White woman-owned	9.9 %	1.5 %	10.8 %
Minority-owned	10.9 %	28.2 %	9.7 %
Asian American-owned	6.9 %	8.9 %	2.7 %
Black American-owned	2.1 %	11.7 %	6.9 %
Hispanic American-owned	0.7 %	4.8 %	0.0 %
Native American-owned	1.2 %	2.8 %	0.0 %

4. Contract size. BBC examined availability estimates separately for *large prime contracts*—prime contracts worth $100,000 or more—and *small prime contracts*—prime contracts worth less than $100,000—that the County and MSDGC award to examine the relationship between contract size and availability at the prime contract level. As shown in ES-5, minority- and woman-owned business availability is somewhat lower for large prime contracts than for small prime contracts for both the County (large = 27.2%; small = 29.9%) and MSDGC (large = 24.4%; small = 25.7%).

Figure ES-5.
Availability estimates for County and MSDGC 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-11, F-12, F-21, and F-22 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Contract size	
	Large	Small
County		
All minority- and woman-owned	27.2 %	29.9 %
White woman-owned	9.1 %	17.8 %
Minority-owned	18.1 %	12.1 %
Asian American-owned	7.6 %	4.9 %
Black American-owned	9.1 %	6.5 %
Hispanic American-owned	1.1 %	0.3 %
Native American-owned	0.3 %	0.3 %
MSDGC		
All minority- and woman-owned	24.4 %	25.7 %
White woman-owned	6.0 %	13.6 %
Minority-owned	18.4 %	12.0 %
Asian American-owned	7.4 %	5.2 %
Black American-owned	6.8 %	5.7 %
Hispanic American-owned	2.4 %	0.6 %
Native American-owned	1.8 %	0.5 %

5. Time period. In the middle of 2020, the County began requiring prime contractors to submit SBE Plans as part of their bids and proposals to award many of its contracts and procurements. MSDGC required SBE plans to be submitted throughout the entire study period, and as such is not included in the time period analyses. BBC estimated the availability of minority- and woman-owned businesses separately for work the County awarded during the study period prior to requiring SBE Plans (January 1, 2016 through June 30, 2020) and after it started requiring those plans (July 1, 2020 through June 30, 2021). As shown in Figure ES-6, the availability of minority- and woman-owned businesses for work the County awarded before requiring SBE Plans (28.2%) was somewhat lower than for work the County awarded after it began requiring SBE Plans (29.4%).

Figure ES-6.
Availability estimates for County work before and after it began requiring SBE Plans

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 Figure F-4 and F-5 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Time period	
	Before SBE Plans	SBE Plans
All minority- and woman-owned	28.2 %	29.4 %
White woman-owned	12.3 %	14.8 %
Minority-owned	15.9 %	14.6 %
Asian American-owned	6.6 %	6.2 %
Black American-owned	8.1 %	6.9 %
Hispanic American-owned	0.9 %	0.7 %
Native American-owned	0.3 %	0.8 %

C. Utilization Analysis Results

BBC measured the participation of minority- and woman-owned businesses in County and MSDGC contracts and procurements in terms of *utilization*—the percentage of dollars the County and MSDGC awarded to those businesses on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority- and woman-owned businesses in County and MSDGC work regardless of whether they were certified as minority-owned or woman-owned business enterprises by certifying agencies.

1. All contracts and procurements. BBC first examined the participation of minority- and woman-owned businesses in all relevant construction, professional services, and goods and other services prime contracts and subcontracts the County and MSDGC awarded during the study period, considered together. As shown in Figure ES-7, the County and MSDGC awarded 8.1 percent of their relevant contract and procurement dollars to minority- and woman-owned businesses. White woman-owned businesses (5.1%), Black American-owned businesses (1.5%), and Asian American-owned businesses (1.3%) exhibited the highest levels of participation.

Figure ES-7.
Utilization results for County and MSDGC work considered together

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization
All minority- and woman-owned	8.1 %
White woman-owned	5.1 %
Minority-owned	3.0 %
Asian American-owned	1.3 %
Black American-owned	1.5 %
Hispanic American-owned	0.1 %
Native American-owned	0.0 %

Figure ES-8 presents the participation of minority- and woman-owned businesses in relevant contracts and procurements separately for the County and MSDGC. As shown in Figure ES-8, the participation of minority- and woman-owned businesses was 14.6 percent in work the County awarded during the study period and 4.1 percent in work MSDGC awarded during the study period. The same business groups exhibit the greatest participation in both County and MSDGC work: white woman-owned businesses (County = 10.9%; MSDGC = 1.6%), Asian American-owned businesses (County = 2.6%; MSDGC = 0.5%), and Black American-owned businesses (County = 0.8%; MSDGC = 1.9%).

Figure ES-8.
Utilization analysis results for County and MSDGC work considered separately

Note:

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

For more detail, see Figures F-3 and F-15 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Organization	
	County	MSDGC
All minority- and woman-owned	14.6 %	4.1 %
White woman-owned	10.9 %	1.6 %
Minority-owned	3.7 %	2.6 %
Asian American-owned	2.6 %	0.5 %
Black American-owned	0.8 %	1.9 %
Hispanic American-owned	0.3 %	0.1 %
Native American-owned	0.0 %	0.0 %

2. 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 prime contracts and subcontracts the County and MSDGC awarded during the study period. As shown in Figure ES-9, the participation of minority- and woman-owned businesses was greater in County prime contracts (14.8%) than in the organization's subcontracts (13.5%). In contrast, the participation of minority- and woman-owned businesses was substantially lower in MSDGC prime contracts (3.4%) than in its subcontracts (20.4%).

Figure ES-9.
Utilization analysis results for County and MSDGC 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-9. F-10, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Contract role	
	Prime contracts	Subcontracts
County		
All minority- and woman-owned	14.8 %	13.5 %
White woman-owned	11.1 %	9.7 %
Minority-owned	3.7 %	3.8 %
Asian American-owned	2.8 %	1.0 %
Black American-owned	0.6 %	2.3 %
Hispanic American-owned	0.3 %	0.3 %
Native American-owned	0.0 %	0.2 %
MSDGC		
All minority- and woman-owned	3.4 %	20.4 %
White woman-owned	1.3 %	7.9 %
Minority-owned	2.1 %	12.5 %
Asian American-owned	0.3 %	6.1 %
Black American-owned	1.7 %	6.1 %
Hispanic American-owned	0.1 %	0.0 %
Native American-owned	0.0 %	0.3 %

Figure ES-10. Utilization analysis results for County and MSDGC construction, professional services, and goods and other 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 F6, F-7, F-8, F-16, F-17, and F-18 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
County			
All minority- and woman-owned	9.6 %	8.1 %	27.4 %
White woman-owned	4.3 %	5.1 %	26.1 %
Minority-owned	5.4 %	3.0 %	1.3 %
Asian American-owned	4.2 %	1.6 %	0.4 %
Black American-owned	0.7 %	1.1 %	0.9 %
Hispanic American-owned	0.5 %	0.1 %	0.0 %
Native American-owned	0.0 %	0.2 %	0.0 %
MSDGC			
All minority- and woman-owned	2.3 %	5.3 %	6.7 %
White woman-owned	1.2 %	2.1 %	1.3 %
Minority-owned	1.1 %	3.2 %	5.5 %
Asian American-owned	0.3 %	1.0 %	0.0 %
Black American-owned	0.6 %	2.2 %	5.5 %
Hispanic American-owned	0.1 %	0.0 %	0.0 %
Native American-owned	0.0 %	0.0 %	0.0 %

3. Industry. BBC also examined utilization analysis results separately for the construction, professional services, and goods and other services contracts and procurements the County and MSDGC awarded during the study period to determine whether the participation of minority- and woman-owned businesses differed by industry. As shown in Figure ES-10, minority- and woman-owned business participation differed by organization and across industries:

- For the County, minority- and woman-owned business participation was greatest for goods and other services work (27.4%) followed by construction work (9.6%) and professional services work (8.1%).
- For MSDGC, minority- and woman-owned business participation was greatest for goods and other services work (6.7%) followed by professional services work (5.3%) and construction work (2.3%).

4. Contract size. BBC examined utilization analysis results separately for large prime contracts and small prime contracts the County and MSDGC awarded during the study period to examine whether contract size was related to the participation of minority- and woman-owned businesses in that work, at least at the prime contract level. As shown in Figure ES-11, minority- and woman-owned business participation was greater in large prime contracts the County awarded (16.2%) than in small prime contracts the organization awarded (10.4%). In contrast, minority- and woman-owned business participation was lower in large prime contracts MSDGC awarded (3.2%) than in small prime contracts it awarded (10.9%).

Figure ES-11.
Utilization analysis results for County and MSDGC 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-11, F-12, F-21, and F-22 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Contract size	
	Large	Small
County		
All minority- and woman-owned	16.2 %	10.4 %
White woman-owned	12.5 %	6.7 %
Minority-owned	3.7 %	3.8 %
Asian American-owned	3.0 %	2.3 %
Black American-owned	0.3 %	1.4 %
Hispanic American-owned	0.4 %	0.0 %
Native American-owned	0.0 %	0.0 %
MSDGC		
All minority- and woman-owned	3.2 %	10.9 %
White woman-owned	1.1 %	6.6 %
Minority-owned	2.0 %	4.4 %
Asian American-owned	0.3 %	1.1 %
Black American-owned	1.7 %	3.1 %
Hispanic American-owned	0.1 %	0.0 %
Native American-owned	0.0 %	0.2 %

5. Time period. BBC calculated the participation of minority- and woman-owned businesses separately for work the County awarded during the study period prior to requiring SBE Plans and after it started requiring those plans. As shown in Figure ES-12, minority- and woman-owned business participation in work the County awarded before requiring SBE Plans (15.2%) was greater than in work the County awarded after it began requiring SBE Plans (11.5%).

Figure ES-12.
Utilization analysis results for County work before and after it began requiring SBE Plans

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 Figure F-4 and F-5 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Time period	
	Before SBE Plans	SBE Plans
All minority- and woman-owned	15.2 %	11.5 %
White woman-owned	11.5 %	7.6 %
Minority-owned	3.7 %	3.9 %
Asian American-owned	2.5 %	2.8 %
Black American-owned	0.8 %	0.9 %
Hispanic American-owned	0.3 %	0.2 %
Native American-owned	0.0 %	0.0 %

D. Disparity Analysis Results

Although information about the participation of minority- and woman-owned businesses in County and MSDGC contracts and procurements is useful on its own, it is even more useful when it is compared with the level of participation one might expect based on those businesses' availability for County and MSDGC work. As part of the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in the County and MSDGC prime contracts and subcontracts with the percentage of contract dollars one might expect each organization to award to those businesses based on their availability for the organizations' work. We calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular contract set (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a *substantial* disparity between participation and availability.

1. All contracts and procurements. Figure ES-13 presents disparity indices for all relevant prime contracts and subcontracts the County and MSDGC awarded during the study period considered together. As shown in Figure ES-13, minority- and woman-owned businesses exhibited a substantial disparity (disparity index of 31) for all relevant contracts and procurements the County and MSDGC awarded during the study period. Moreover, all individual business groups also exhibited substantial disparities for County and MSDGC work considered together.

Figure ES-13. Disparity analysis results for County and MSDGC work considered together

Note:

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

Source:

BBC Research & Consulting disparity analysis.

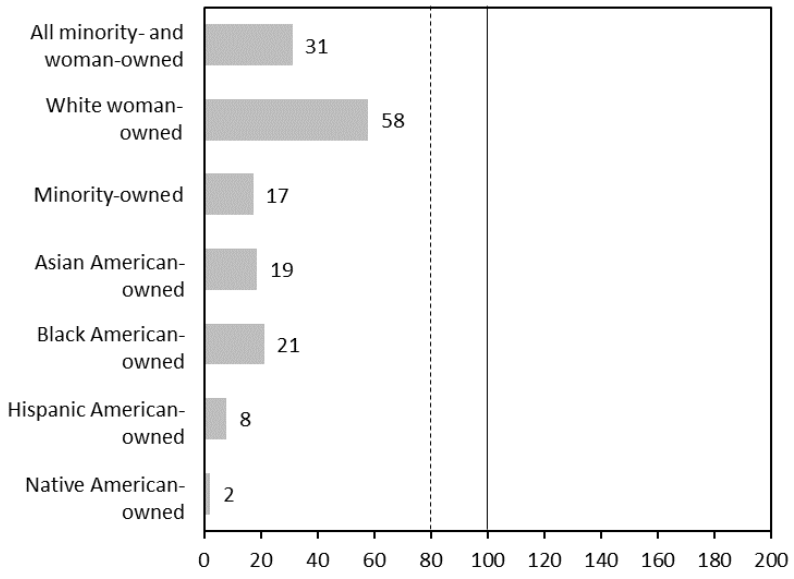


Figure ES-14 presents disparity indices separately for the relevant contracts and procurements the County and MSDGC awarded during the study period. As shown in Figure ES-14, minority- and woman-owned businesses exhibited a disparity index of 52 for County work and a disparity index of 17 for MSDGC work, both of which are substantial disparities. Nearly all individual business groups exhibited substantial disparities for both County and MSDGC work. The only exception is that white woman-owned businesses showed a disparity for County work, but that disparity did not reach the threshold for being considered substantial (disparity index of 86).

Figure ES-14. Disparity analysis results for County and MSDGC work considered separately

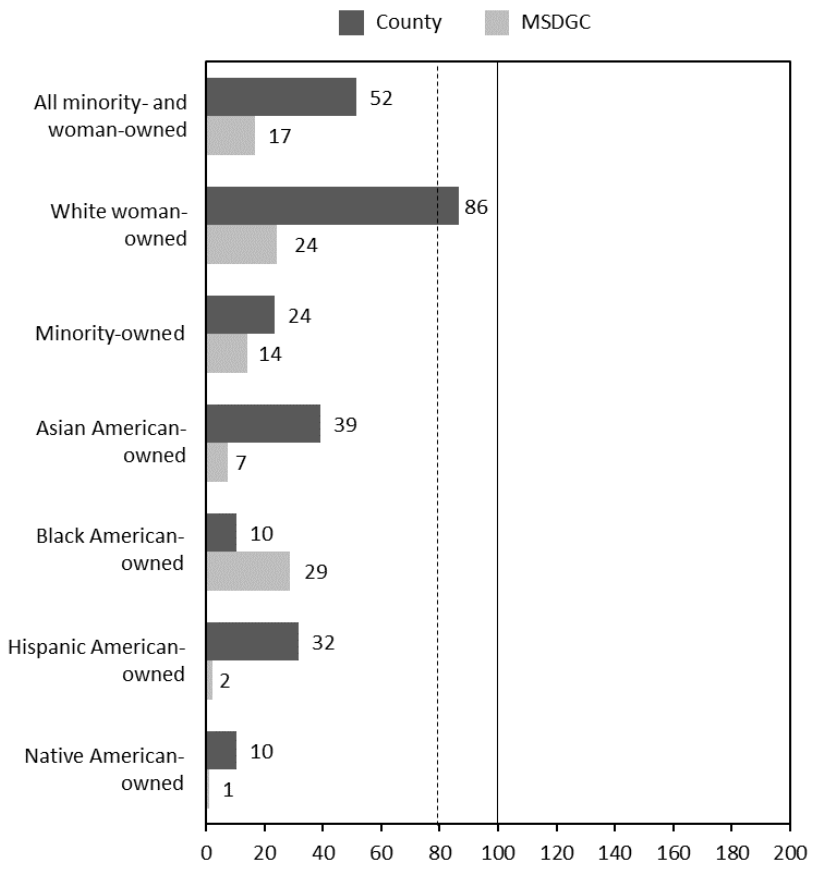
Note:

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

For more detail, see Figures F-3 and F-15 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



2. Contract role. BBC examined disparity analysis results separately for prime contracts and subcontracts the County and MSDGC awarded during the study period. As shown in Figure ES-15, minority- and woman-owned businesses exhibited substantial disparities for prime contracts and subcontracts for both the County (disparity index of 53 for prime contracts; disparity index of 42 for subcontracts) and MSDGC (disparity index of 14 for prime contracts; disparity index of 79 for subcontracts). However, disparity analysis results differed for individual business groups by organization and contract role:

- All business groups exhibited substantial disparities for County prime contracts with the exception of white woman-owned businesses (disparity index of 100).
- All business groups exhibited substantial disparities for County subcontracts.
- All business groups exhibited substantial disparities for MSDGC prime contracts.
- White woman-owned businesses (disparity index of 60), Hispanic American-owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 39) exhibited substantial disparities for MSDGC subcontracts.

Figure ES-15. Disparity analysis results for County and MSDGC prime contracts and subcontracts

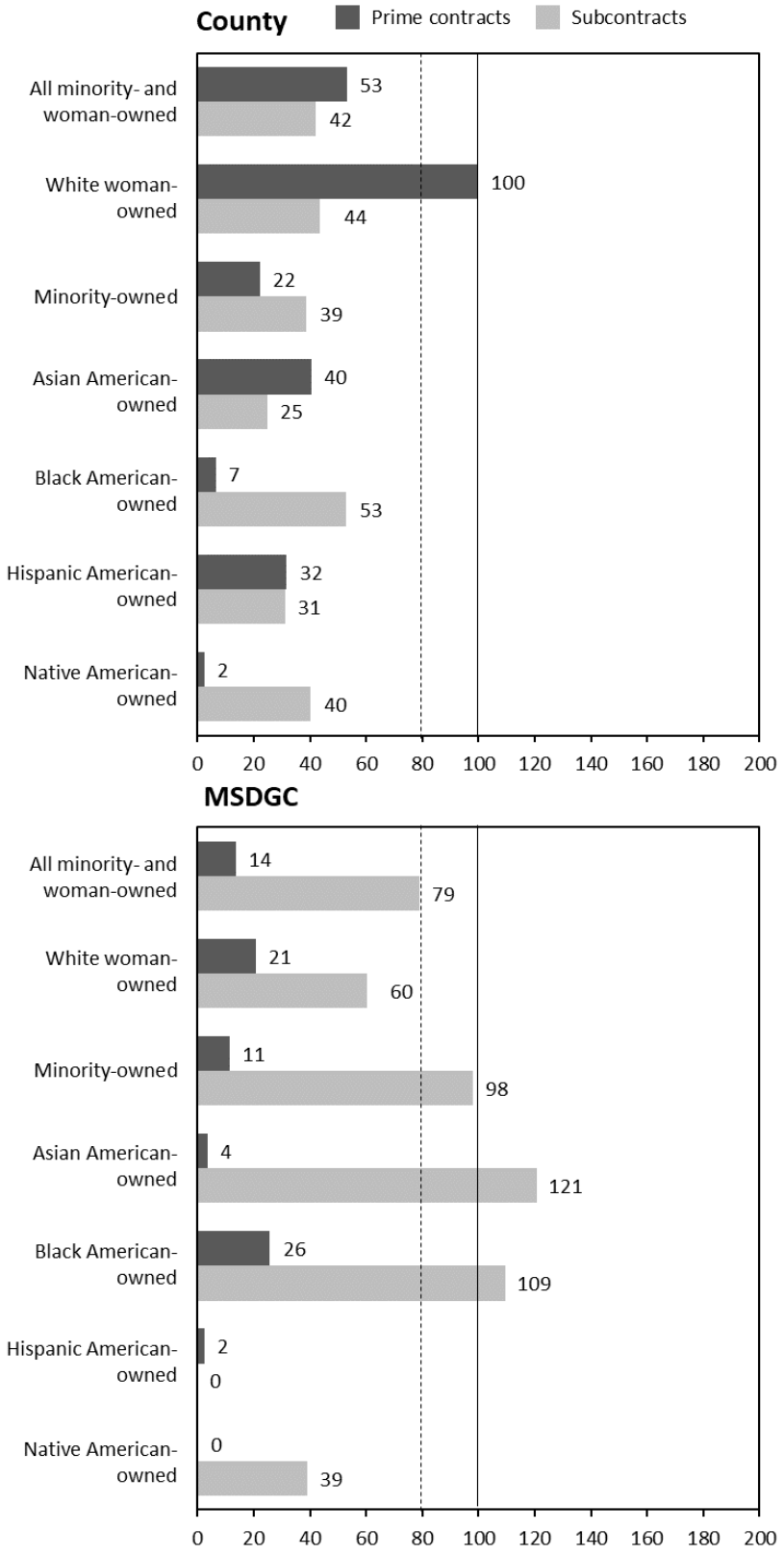
Note:

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

For more detail, see Figures F-9. F-10, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



3. Industry. BBC also examined disparity analysis results separately for the County's and MSDGC's construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by industry. As shown in Figure ES-16, minority- and woman-owned businesses exhibited substantial disparities for County construction (disparity index of 36) and professional services work (disparity index of 25) but not for goods and other services work (disparity index of 99). As shown in the bottom panel of the figure, minority- and woman-owned businesses exhibited substantial disparities for MSDGC construction (disparity index of 11), professional services (disparity index of 18), and goods and other services work (disparity index of 33). Disparity analysis results differed for individual business groups by organization and contract role:

- All business groups exhibited substantial disparities for County construction work.
- Asian American-owned businesses (disparity index of 13), Black American-owned businesses (disparity index of 8), and Hispanic American-owned businesses (disparity index of 4) exhibited substantial disparities for County professional services work.
- All business groups exhibited substantial disparities for County goods and other services work with the exception of white woman-owned businesses (disparity index of 186).
- All business groups exhibited substantial disparities for MSDGC construction work.
- All business groups exhibited substantial disparities for MSDGC professional services work with the exception of white woman-owned businesses (disparity index of 136).
- All business groups exhibited substantial disparities for MSDGC goods and other services work.

Figure ES-16.
Disparity analysis results for County and MSDGC construction, professional services, and goods and other services work

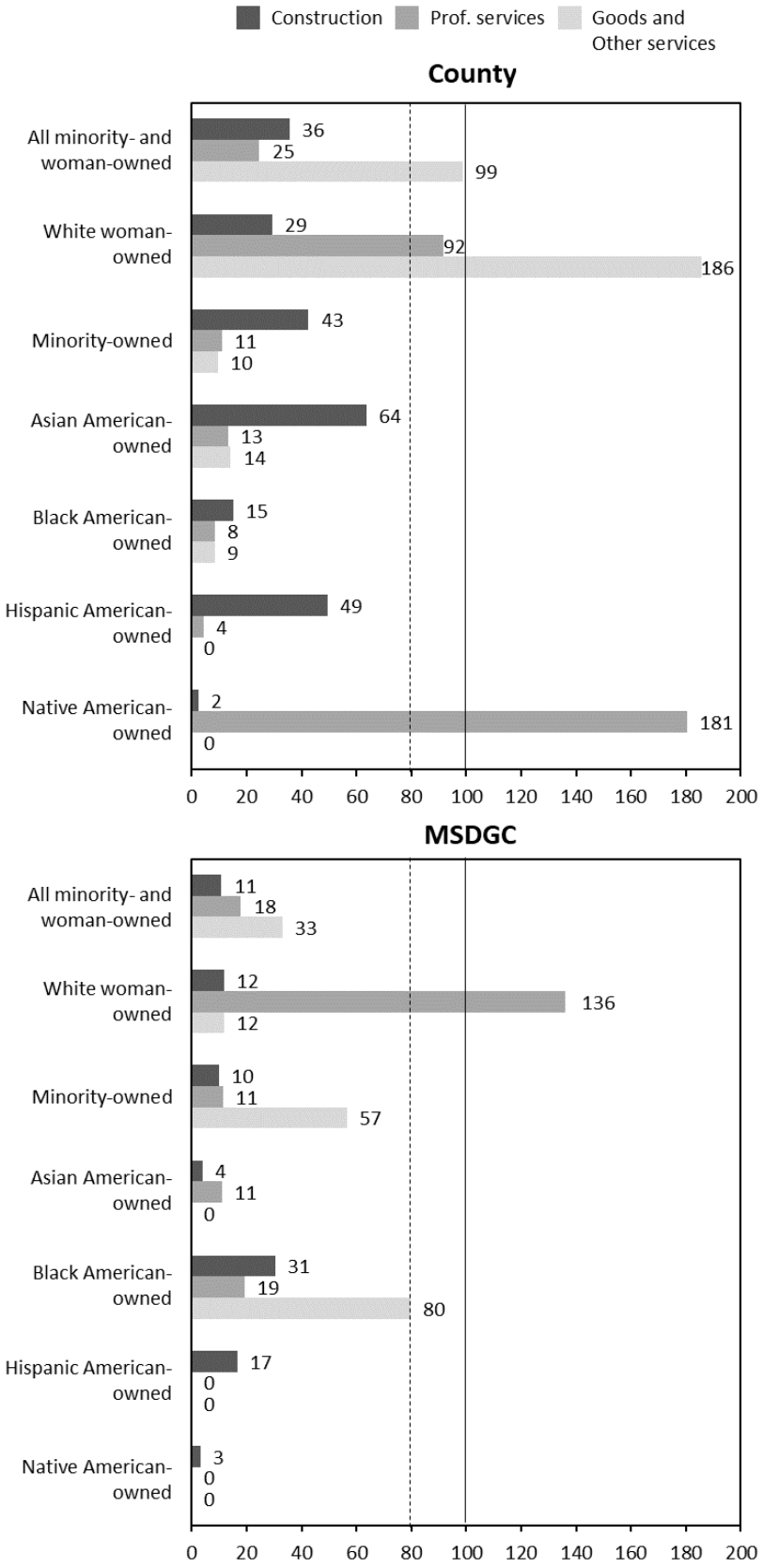
Note:

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 F6, F-7, F-8, F-16, F-17, and F-18 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



4. Contract size. BBC examined disparity analysis results separately for large prime contracts and small prime contracts the County and MSDGC awarded during the study period to examine whether contract size was related to disparities between participation and availability, at least at the prime contract level. As shown in Figure ES-17, minority- and woman-owned businesses exhibited substantial disparities for both large and small prime contracts for both the County (disparity index of 59 for large; disparity index of 35 for small) and MSDGC (disparity index of 13 for large; disparity index of 43 for small). Nearly all individual business groups exhibited substantial disparities for both large and small prime contracts and for both the County and MSDGC. The only exception is that white woman-owned businesses did not show a disparity for large prime contracts the County awarded (disparity index of 137).

Figure ES-17. Disparity analysis for County and MSDGC large and small prime contracts

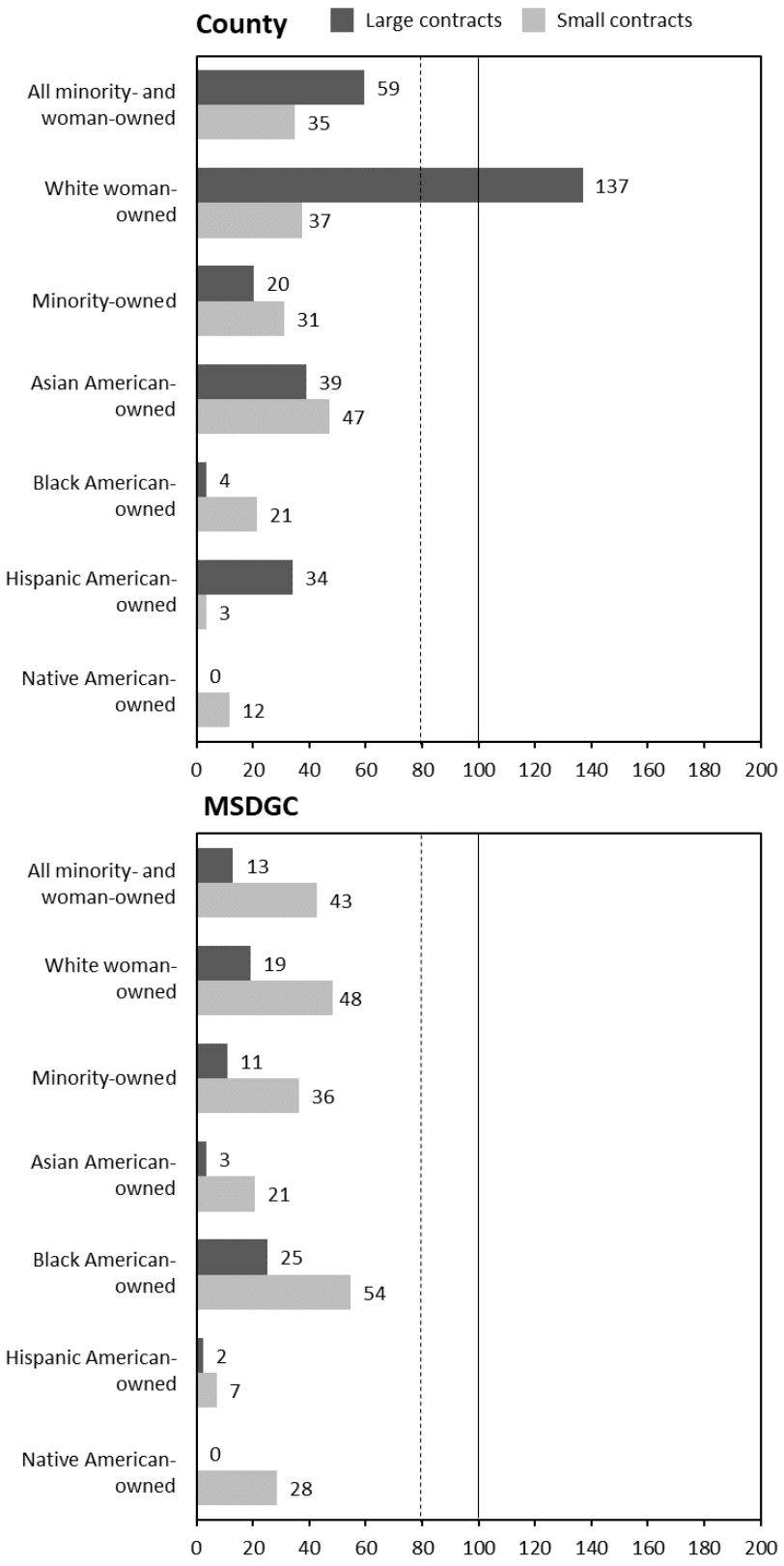
Note:

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

For more detail, see Figures F-11, F-12, F-21, and F-22 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



5. Time period. BBC examined disparity analysis results separately for work the County awarded during the study period prior to requiring SBE Plans and after it started requiring those plans. As shown in Figure ES-18, minority- and woman-owned businesses exhibited substantial disparities for work the County awarded before it began requiring SBE Plans (disparity index of 54) as well as after it began requiring them (disparity index of 39). Nearly all individual business groups exhibited substantial disparities for work the County awarded before and after it began requiring SBE Plans. The only exception is that white woman-owned businesses did not show a substantial disparity for County work before it began requiring SBE Plans (disparity index of 94).

Figure ES-18. Disparity analysis results for County work before and after it began requiring SBE Plans

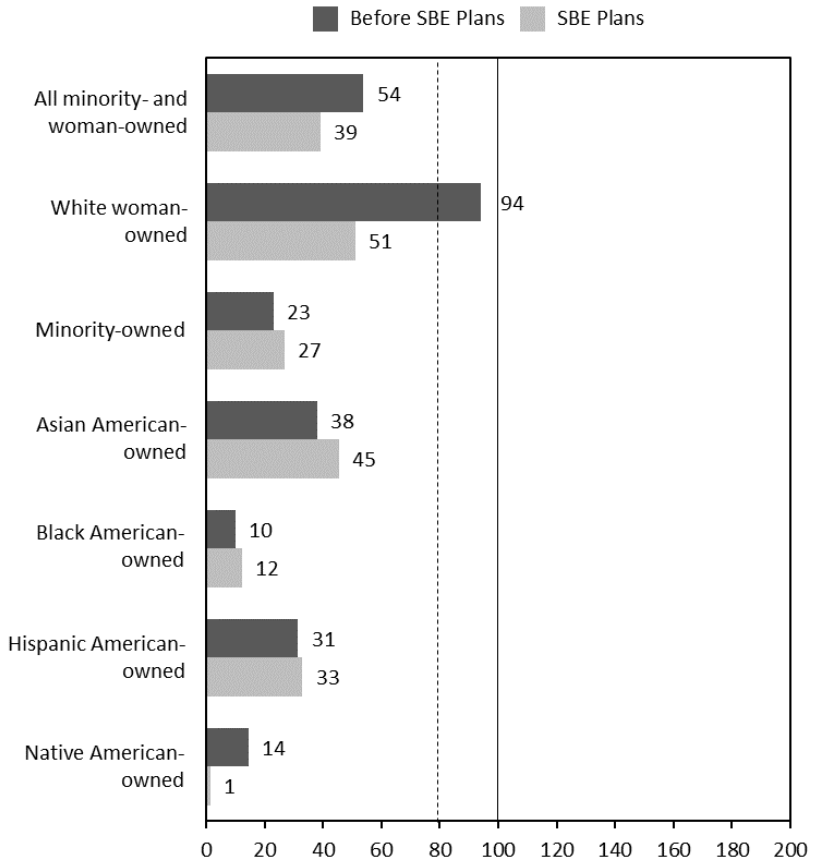
Note:

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

For more detail and results by group, see Figure F-4 and F-5 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



E. Program Recommendations

The County should review study results and other relevant information related to its efforts to encourage the participation of minority- and woman-owned businesses in its work, including its and MSDGC's operations of the SBE Programs. BBC presents key recommendations the County and MSDGC should consider based on disparity study results. When making those considerations, the organization should assess whether additional resources, changes in internal policy, or changes in state law might be required for implementation. For additional details about program implementation, see Chapter 9.

1. Overall aspirational goal. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the County in establishing overall aspirational goals for the participation of minority- and woman-owned business in County and MSDGC contracting and procurement. The availability analysis

indicated that minority- and woman-owned businesses are potentially available to participate in 28.4 percent of the County's contracting and procurement dollars and 24.5 percent of MSDGC's contracting and procurement dollars, which the County and MSDGC could consider as the *base figures* for their respective overall aspirational goal. In addition, the disparity study provides information about factors the County and MSDGC should review in considering whether an adjustment to its base figure is warranted, particularly information about the volume of work in which minority- and woman-owned businesses have participated in the past; barriers in the local marketplace related to employment, self-employment, education, training, and unions; barriers in the marketplace related to financing, bonding, and insurance; and other relevant information.

2. Contract-specific goals. Disparity analysis results indicate that all racial/ethnic and gender groups—white woman-owned businesses, Asian American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, and Native American-owned businesses—exhibited substantial disparities on various sets of County and MSDGC contracts and procurements. Because the County and MSDGC use myriad race- and gender-neutral measures to encourage the participation of minority- and woman-owned businesses in its work, and because those measures have not sufficiently addressed disparities for all groups, the County and MSDGC might consider using minority- and woman-owned business goals to award individual contracts in the future (i.e., *contract-specific goals*). To do so, the organizations would set participation goals on individual contracts and procurements based on the availability of minority- and woman-owned businesses for the types of work involved as well as on current marketplace conditions. As a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with certified minority- and woman-owned business enterprises as part of their bids or demonstrating sufficient good faith efforts (GFEs) to do so. Because the use of such goals would be a race- and gender-conscious measure, the County and MSDGC would need to ensure that their use meets the *strict scrutiny standard* of constitutional review.

3.Subcontract minimums. Subcontracts often represent accessible opportunities for small businesses—including many minority- and woman-owned businesses—to become involved in contracting. The County could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each eligible contract or procurement, the County and MSDGC would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the project would be required to subcontract a corresponding percentage of the work for their bids to be responsive. If the County were to implement such a program, it should include flexibility provisions such as a GFEs process that would require prime contractors to document their efforts to identify and include potential subcontractors in their proposals for County and MSDGC contracts and procurements.

4. New businesses. Disparity study results indicate that a substantial portion of the contract and procurement dollars the County and MSDGC awarded to minority- and woman-owned businesses during the study period went to a relatively small number of businesses. To expand the number of minority- and woman-owned businesses that participate in County and MSDGC work, the County could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked in the past.

For example, as part of the bid process, the County and MSDGC might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past. In addition, the County could consider efforts to expand its base of minority- and woman-owned businesses through additional outreach.

5. Competitive bidding for certain professional services. The County's procurement manual specifies that competitive bidding is not required when contracting for certain types of professional services, including accountants, architects, attorneys, physicians, professional engineers, construction project managers, consultants, surveyors, or appraisers. To ensure broader competition among local businesses, the County could consider enforcing competitive bidding procedures for those types of contracts, which represent contracting opportunities that the County and MSDGC could award to small businesses, including many minority- and woman-owned businesses.

6. Data collection. Although the County and MSDGC maintain comprehensive and complete information about prime contracts and procurements they award, they do not do so for subcontracts. The County and MSDGC should consider collecting comprehensive data on *all* subcontracts, regardless of the type of businesses that perform those subcontracts. The County and MSDGC should consider collecting subcontract data at the time of award and requiring prime contractors to submit data on the payments they make to all subcontractors as part of monthly invoicing.

7. Subcontractor commitments. Anecdotal evidence suggests prime contractors often do not use subcontractors to the full extent of their subcontracts or eliminate their subcontracts altogether on projects. The County should consider implementing an approval process for any changes to subcontracts or subcontractors on projects, as well as an electronic system to track subcontract participation to ensure prime contractors use subcontractors to the full extent of their subcontracts. In addition, the County should consider establishing direct points-of-contact between subcontractors and the County to address any issues they are experiencing with prime contractors or projects on which they are working.

8. Prompt payment. As part of in-depth interviews and surveys, several businesses reported difficulties receiving payment in a timely manner on government work, particularly when they work as subcontractors and suppliers. The County should consider establishing and enforcing prompt payment processes to ensure timely payment to prime contractors and from prime contractors to subcontractors and suppliers, ideally within a specified maximum number of days after approving invoices. MSDGC has policies in place surrounding prompt payment, as outlined in Chapter 9.

9. Bonding assistance. County purchasing policies require bid deposits and bonding for construction projects worth more than $50,000. Projects of that size are relatively accessible to small businesses, including many minority- and woman-owned businesses, but bid deposit and bonding requirements can present a substantial barrier for such businesses. The County should consider conducting a risk assessment of raising the dollar thresholds for its bid deposit and bonding requirements to determine whether raising those thresholds might result in an acceptable tradeoff between increased small business competition on such work and

organizational risk. The County should also consider offering bid deposit and bonding assistance to small businesses pursuing County and MSDGC work.

10. Staffing. The County employs dedicated staff members within the Office of Economic Inclusion (OEI) to implement the SBE Program and monitor the participation of SBEs in its work, among other responsibilities. However, conversations with County staff and anecdotal evidence from business owners indicated that OEI does not have a large enough staff to fully implement various aspects of the SBE Program, including monitoring activities and supportive services programs. The County should consider expanding the OEI staff to carry out essential program functions as well as implement additional program measures.

CHAPTER 1.
Introduction

Hamilton County (The County) is located in southwestern Ohio and is the third-most populous county in the state with more than 800,000 residents. Its largest city is Cincinnati, which also serves as the county seat. Each year, the County approves hundreds of millions of dollars in contracts and procurements for goods and services related to its operations as well as the operations and maintenance of the Metropolitan Sewer District of Greater Cincinnati (MSDGC), which is managed and operated by the City of Cincinnati subject to the County's authority under Ohio law.[1]

The County retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate whether minority- or woman-owned businesses have faced any barriers as part of its contracting and procurement processes and, if they have, to evaluate measures that might better encourage the participation of those businesses in County and MSDGC contracts and procurements. As part of the disparity study, BBC examined whether there are any *disparities*, or differences, between:

- The percentage of contract and procurement dollars—including construction, professional services, and goods and other services contracts and procurements—the County and MSDGC awarded to minority- and woman-owned businesses during the study period, which was defined as January 1, 2016 through June 30, 2021 (i.e., *utilization*); and
- The percentage of contract and procurement dollars one might expect the County and MSDGC to award to minority- and woman-owned businesses based on the degree to which those businesses are *ready, willing, and able* to perform specific types and sizes of their prime contracts and subcontracts (i.e., *availability*).

The disparity study also provides other quantitative and qualitative information related to:

- The legal framework surrounding small business programs, minority- and woman-owned business programs, and disparity studies;
- Conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses; and
- Contracting practices and business assistance programs the County and MSDGC has in place or could consider implementing in the future.

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[1] Under a County-City agreement effective May 1, 1968 (1968 Agreement) for MSDGC operations, the City of Cincinnati is authorized to manage and operate MSDGC subject to the County Commissioner's authority under Ohio law. The City's authority under the 1968 Agreement specifically includes performing all MSDGC procurement. MSDGC procurement parameters were further defined based upon a June 2014 ruling from the US District Court that held that Ohio procurement laws applicable to the Boards of County Commissioners for county sewer districts apply to MSDGC procurement.

There are several reasons information from the study is useful to the County and MSDGC:

- The disparity study provides information about whether substantial disparities exist between the participation and availability of minority- and woman-owned businesses for County and MSDGC contracts and procurements.
- The study identifies barriers that minorities, women, and minority- and woman-owned businesses face in the local marketplace which might affect their ability to compete for or perform County or MSDGC work.
- The study provides an evaluation of how effective various efforts are in encouraging minority- and woman-owned business participation in County and MSDGC work.
- The study provides insights into how the County and MSDGC could refine their contracting processes and program measures to better encourage the participation of minority- and woman-owned businesses in their work and help address marketplace barriers.
- An independent review of the participation of minority- and woman-owned businesses is valuable to internal or external groups that may be monitoring the County and MSDGC's contracting and procurement practices.

BBC introduces the 2022 Hamilton County Disparity Study in three parts:

A. Background;

B. Study Scope; and

C. Study Team Members.

A. Background

The County and MSDGC both have Small Business Enterprise (SBE) Programs in place to encourage the participation of small businesses—including many minority- and woman-owned businesses—in their work. In addition, the County and the City of Cincinnati (the City) developed a separate SBE Program for the Banks Project, a multiphase, multiuse development project in downtown Cincinnati.

1. County SBE Program. The County's SBE Program is designed to help ensure the inclusion of different types of individuals and businesses in its operations as well as in its contracting and procurement. In 2020, policies were developed directing BOCC departments to provide support to small businesses to increase their ability to compete for County work. The SBE Program comprises various *race- and gender-neutral* efforts to help meet that objective. Race- and gender-neutral efforts are designed to encourage the participation of small businesses in an organization's contracting, regardless of the race/ethnicity or gender of business owners. The SBE Program includes many such efforts:

- Training and support programs for department staff focused on increasing inclusion;
- Monitoring of and reporting on the participation of small businesses as well as minority- and woman-owned businesses in County contracts and procurement;
- SBE Plan requirements as part of all bids, quotes, and proposals the County solicits;

- Referrals to educational workshops for businesses on how to do business with the County;
- Referrals to small business training related to bonding, financing, business planning, business technology, and business partnerships;
- Referrals to presentations by large contractors and prime contractors on their expectations of subcontractors, how their business processes work, and how to effectively respond to their solicitations for subcontract opportunities;
- Referrals to "match-maker" events during which prime contractors can meet and get to know potential subcontractors in the region; and
- A "Building Opportunities by Leveraging Diversity Contractors Directory" made up of businesses interested in working with the County.

In contrast to race- and gender-neutral efforts, *race- and gender-conscious* efforts are designed to encourage the participation of minority- and woman-owned businesses in government contracting (e.g., goals for minority- and woman-owned business participation on individual contracts or procurements). The County does not use any race- or gender-conscious efforts as part of its contracting and procurement. Importantly, it has a policy in place stating it will make hiring and purchasing decisions without consideration to race, sex, sexual orientation, gender, age, religion, color, national origin, ancestry, disability, or other non-job related criteria, potentially limiting its use of race- and gender-conscious measures.

2. MSDGC SBE Program. MSDGC also operates an SBE Program to increase the participation of small businesses—including many minority- and woman-owned businesses—in its construction, professional services, and goods and other services contracts and procurements. The program comprises various race- and gender-neutral efforts, including:

- SBE contracting goals;
- Prompt payment policies;
- Technical assistance;
- Joint venture policies; and
- Outreach efforts.

MSDGC does not use any race- or gender-conscious efforts as part of its contracting and procurement.

3. Banks Project SBE Program. The Banks is a large, multiphase, multiuse development project on the banks of the Ohio River, which runs through downtown Cincinnati. The public/private partnership project was approved by the County and the City in 2007. Phase I of the project began in 2008, Phase II began in 2014, and Phase III began in 2016. Ultimately, the Banks is expected to include 2.4 million square feet of residential buildings, office space, shopping and dining locations, and leisure and entertainment venues. The total cost of the project could reach $1 billion.

To help ensure the inclusion of different types of business in the Banks Project, the County and City developed the Banks Project SBE Program. The primary component of the program is the

use of SBE participation goals on contracts and procurements associated with the Banks Project worth more than $5,000. As part of the program, the County and City encourage prime contractors to subcontract with SBEs that have been certified by the City, and, as a matter of responsiveness, prime contractors must submit documentation about the efforts they made to do so. The Banks Project SBE Program does not include any race- or gender-conscious efforts.

B. Study Scope

The crux of the disparity study was to examine whether any disparities exist between the participation and availability of minority- and woman-owned businesses for County and MSDGC contracts and procurements, including the County departments, boards, offices, and other entities for which the Hamilton County Board of County Commissioners (BOCC) has full or shared authority—including MSDGC—as well as elected offices for which the BOCC does not have authority. Figure 1-1 presents a list of all the entities that were included in the disparity study.[2] Because of the relatively large volume of contracting and procurement dollars MSDGC awards, and because of its relationship with the City, BBC often presents disparity study results for MSDGC contracts and procurements separate from those of all other County departments, boards, offices, and other entities for which the BOCC has full or shared authority, which we continue to refer to collectively as the County.

1. Definitions of minority- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how BBC defined minority- and woman-owned businesses and other businesses in its analyses.

a. Minority-owned businesses. BBC defined minority-owned businesses as businesses that were at least 51 percent owned and controlled by men or women who identified as being members of one of the following racial/ethnic groups: Asian Americans, Black Americans, Hispanic Americans, or Native Americans. BBC aggregated results for businesses owned by minority men and minority women of the same race/ethnicity. For example, we combined results for businesses owned by Black American men with results for businesses owned by Black American women to represent outcomes for all Black American-owned businesses in general. We considered businesses to be minority-owned based on the known races/ethnicities of business owners, regardless of whether the businesses were certified as such by relevant organizations.

b. Woman-owned businesses. Because the study team classified businesses owned by minority women according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *white woman-owned businesses*. Similar to our definition of minority-owned businesses, BBC defined woman-owned businesses as businesses that were at least 51 percent owned and controlled by individuals who identify as women, regardless of whether the businesses were certified as such by relevant organizations.

[2] The BOCC has shared or full authority over additional entities—such as Environmental Services, Human Resources, and the Cincinnati Metropolitan Housing Authority—that either did not award any relevant contracts or procurements during the study period or whose contracts and procurements were processed through other entities whose data are already included in the disparity study, such as the Administrator, Purchasing, or the Engineer.

Figure 1-1.
Entities included in the disparity study

Entities and offices	
County entities	
Administrator	Law Library Resources Board
Board of County Commissioners	Mental Health & Recovery Services
Board of Elections	Metropolitan Sewer District of Greater Cincinnati
Cincinnati Zoo and Botanical Gardens	Planning and Development
Communications Center	Public Defender Commission
County Law Enforcement Applied Regionally	Public Health District
Elderly Services Program Advisory Council	Regional Planning Commission
Emergency Management Agency	River City Correctional Facility
Environmental Services	Soil and Water Conservation District
Facilities	Stadiums and Parking Operations
Family and Children First Council	Transportation Improvement District
Hamilton County Development Corporation	Veterans Service Commission
Job and Family Services	
Elected offices	
Auditor	Juvenile Court
Clerk of Courts	Municipal Court
Court of Appeals	Probate Court
Court of Common Pleas	Prosecuting Attorney
Court of Domestic Relations	Recorder
Coroner	Sheriff
Engineer	Treasurer

Note: All of the above elected offices were included, because their contract and procurement data came from Hamilton County's Purchasing Department.

c. Minority-owned business enterprises (MBEs) and woman-owned business enterprises (WBEs). In the context of the disparity study, *MBE and WBE* refers specifically to local minority- and woman-owned businesses, respectively, certified as such by any credible or recognized certifying organizations, including the City of Cincinnati, the State of Ohio, and the Ohio Department of Transportation (ODOT).

d. Disadvantaged business enterprises (DBEs). *DBEs* refer to minority- and woman-owned businesses specifically certified as such by ODOT. To be certified as a DBE, a business must be a for-profit business that is at least 51 percent owned and controlled by socially or economically disadvantaged individuals. Businesses must also meet federal requirements related to their gross revenues and their owners' personal net worth.

2. Analyses in the disparity study. Analyses related to outcomes for minority- and woman-owned businesses in the County's and MSDGC's contracting and procurement, as well as throughout the marketplace, are organized in this report in the following manner:

a. Legal framework and analysis. The study team conducted a detailed analysis of relevant laws, legal decisions, and other information to guide the methodology for the disparity study and inform program refinements. The legal framework and analysis for the study is presented in **Chapter 2** and **Appendix B.**

b. Marketplace conditions. BBC conducted extensive quantitative analyses of conditions and potential barriers in the local marketplace for minorities, women, and minority- and woman-owned businesses. In addition, the study team collected anecdotal evidence about potential barriers those individuals and businesses face in the region through in-depth interviews, focus groups, public meetings, and written testimony. Information about marketplace conditions is presented in **Chapter 3, Chapter 4, Appendix C,** and **Appendix D.**

c. Data collection. The study team collected and analyzed contract and vendor data from multiple County and MSDGC sources as well as directly from prime contractors to complete the utilization and availability analyses. The scope of the study team's contract and vendor data collection is presented in **Chapter 5**.

d. Availability analysis. BBC analyzed the percentage of contract and procurement dollars minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of County and MSDGC work. The analysis was based on agency data and surveys the study team conducted with hundreds of local businesses that work in industries related to the types of contracts and procurements the County and MSDGC award. Results from the availability analysis are presented in **Chapter 6** and **Appendix E**.

e. Utilization analysis. BBC also analyzed contract and procurement dollars the County and MSDGC awarded to minority- and woman-owned businesses during the study period. Results from the utilization analysis are presented in **Chapter 7**.

f. Disparity analysis. BBC assessed whether there were any disparities between the participation and availability of minority- and woman-owned businesses on contracts and procurements the County and MSDGC awarded during the study period. The study team 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 the County and MSDGC use to encourage the participation of small businesses, as well as minority- and woman-owned businesses, in their contracting and procurement. That information is presented in **Chapter 9**.

h. Program recommendations. BBC provided guidance related to additional program options and changes to current contracting practices the County and MSDGC could consider, including setting overall aspirational goals for the participation of minority- and woman-owned businesses in their contracts and procurements. The study team's review and guidance for program implementation is presented in **Chapter 10**.

C. Study Team Members

The disparity study was conducted by a team of five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with minority- and woman-owned business programs.

1. BBC Research & Consulting (BBC). BBC is a disparity study and economic research firm based in Denver, Colorado. We had overall responsibility for the study and performed all quantitative and qualitative analyses.

2. The Voice of Your Customer (VOYC). VOYC is a Black American woman-owned marketing consulting and communications firm based in Cincinnati, Ohio. The firm conducted in-depth interviews with business owners and trade association representatives and helped facilitate community engagement efforts in the region.

3. Scale Strategic Solutions (Scale). Scale is a Black American woman-owned program evaluation and diversity policy firm based in Cincinnati, Ohio. The firm conducted in-depth interviews with business owners and trade association representatives.

4. Holland & Knight. Holland & Knight is a law firm with offices across the country. The firm developed the legal framework that provided the basis for the study.

5. Davis Research. Davis Research is a survey fieldwork firm based in Calabasas, California that has conducted tens of thousands of surveys as part of disparity studies across the country. The firm conducted telephone and online surveys with more than 1,000 local businesses in connection with the availability and utilization analyses.

CHAPTER 2.
Legal Analysis

Hamilton County (The County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) both operate Small Business Enterprise (SBE) Programs to encourage the participation of small businesses—including many minority- and woman-owned businesses—in their contracts and procurements. In addition, the County and the City of Cincinnati operate the Banks Project SBE Program to ensure the inclusion of different types of business in the Banks Project specifically. All three programs are made up exclusively of *race- and gender-neutral* measures. In the context of contracting and procurement, race- and gender-neutral measures are measures designed to encourage the participation of small businesses in an organization's contracting, regardless of the race/ethnicity or gender of businesses' owners. In contrast, race- and gender-conscious measures are measures designed to encourage the specific participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned businesses on individual contracts or procurements).

Legal standards related to race- and gender-neutral and race- and gender-conscious measures are substantially different. It is instructive to review information regarding both types of measures to ensure the County and MSDGC are operating their programs in a legally-defensible manner and to allow both organizations to make informed decisions about the potential use of race- and gender-conscious measures in the future. 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 in the Disparity Study.

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 include only 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 organizations that implement minority- and woman-owned business programs that rely only on race- and gender-neutral measures—like the County's and MSDGC's SBE Programs—must show a *rational basis* for their programs. Showing a rational basis requires organizations to demonstrate 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. When courts review programs on a rational basis, only the most egregious violations lead to courts deeming them unconstitutional.

2. Programs that include race- and gender-conscious measures. Minority- and woman-owned business programs that also include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.[1] In contrast to a rational basis, strict scrutiny presents the highest threshold for evaluating the legality of government programs that could impinge on the rights of others. Under strict scrutiny, government organizations must show a *compelling governmental interest* in using race- and gender-conscious measures and ensure the use of such measures is *narrowly tailored*.

a. Compelling governmental interest. Government organizations using race- and gender-conscious measures have the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Organizations cannot rely on national statistics of discrimination to draw conclusions about market conditions in their own regions. Rather, they must assess discrimination within their own relevant geographic market areas (RGMAs).[2] Moreover, it is not necessary for government organizations themselves to have discriminated against minority- or woman-owned businesses for them to take remedial action. They are permitted to take remedial action if evidence demonstrates they are *passive participants* in race- or gender-based discrimination that exists in their RGMAs.

b. Narrow tailoring. In addition to demonstrating a compelling governmental interest, government organizations must also demonstrate their use of race- and gender-conscious measures is *narrowly tailored* to address any barriers impacting their contracting and procurement. There are a number of factors courts consider when determining whether the use of such measures is narrowly tailored, including:

- The necessity of such measures and the efficacy of alternative race- and gender-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 waiver 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.[3]

B. Seminal Court Decisions

Two United States Supreme Court cases established the strict scrutiny standard for evaluating the constitutionality of minority- and woman-owned business programs that include race- and gender-conscious measures:

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[1] Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs, which is described in detail in Appendix B.

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

[3] See, e.g., *AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; and *Eng'g Contractors Ass'n*, 122 F.3d at 927.

- *City of Richmond v. J.A. Croson Company (Croson)*;[4] and
- *Adarand Constructors, Inc. v. Peña (Adarand)*.[5]

Many subsequent decisions in district courts and federal courts have expanded requirements for the use of race- and gender-conscious measures as part of minority- and woman-owned business programs, including several cases in the Sixth Circuit, the jurisdiction in which the County and MSDGC operate. BBC briefly summarizes the United States Supreme Court's decisions in *Croson* and *Adarand* as well as the Sixth Circuit Court of Appeals' decision in *Associated General Contractors of America, Ohio v. Drabik (AGC, Ohio v. Drabik)*, which is also instructive to the use of race- and gender-conscious measures.[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- and gender-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 government organizations must meet when considering the use of race-conscious measures as part of their contracting:

- Organizations' 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, organizations 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.
- If organizations 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 that include race-conscious measures, requiring that those programs must also meet the strict scrutiny standard.

2. AGC, Ohio v. Drabik. In *AGC, Ohio v. Drabik*, the Sixth Circuit Court of Appeals enjoined the State of Ohio's use of minority-owned business *set asides* on construction contracts, because the state's use of such set asides failed to meet the strict scrutiny standard of constitutional review. Set asides are contracting measures in which a government organizations reserve certain contracts or procurements for exclusive competition among certain types of business – in this

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

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

[6] A*ssociated Gen. Contractors v. Drabik,* 214 F.3d 730 (6th Cir. 2000).

case among certified *minority-owned business enterprises* (*MBEs*). The court concluded the state could not establish a compelling governmental interest for its use of set asides on construction contracts nor was the state's use of them narrowly tailored. Specifically, the court held that:

- The state's comparison of the percentage of contracts it awarded to MBEs to the percentage of Ohio businesses that were minority-owned was insufficient to show a compelling governmental interest for its use of set asides on construction contracts, because such a comparison did not take into account how many of those businesses performed work relevant to the state's construction contracting or how many were ready, willing, and able to perform that work; and
- The state's use of set asides on construction contracts was not narrowly tailored for several reasons:
  - The state did not consider the efficacy of race-neutral efforts before using race-conscious set asides.
  - The state's use of set asides was not tailored specifically to those groups for which evidence of barriers existed, resulting in a program that was simultaneously overinclusive and underinclusive.
  - The state's evidence of barriers relied on information about only certified MBEs rather than all minority-owned businesses regardless of whether they made the decision to become certified.
  - The state's use of set asides on construction contracts had been in effect for nearly 20 years with no sunset or expiration provisions to ensure it did not last longer than the discriminatory effects the program was designed to ameliorate.

C. Addressing Requirements in the Disparity Study

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 is narrowly tailored. Various aspects of the disparity study specifically address requirements the United States Supreme Court, the Sixth Circuit Court of Appeals, 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 the County or MSDGC are actively or passively participating in that discrimination.
- The study accounts for various characteristics of the prime contracts and subcontracts the County and MSDGC award as well as specific characteristics of businesses working in the RGMA, resulting in 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 the County's and MSDGC's contracts and procurements, indicating whether any inferences of discrimination exist for individual groups.

- The study includes specific recommendations to help ensure the County's and MSDGC's potential use of any race- or gender-conscious measures is narrowly tailored in remedying identified discrimination, including recommendations related to:
  - Identifying which racial/ethnic and gender groups exhibit substantial barriers;
  - Maximizing the use of race- and gender-neutral measures to address any barriers;
  - Ensuring race- and gender-conscious measures are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
  - Setting overall aspirational goals for the participation of minority- and woman-owned businesses in County and MSDGC work that are consistent with federal, state, and local regulations as well as relevant case law.

CHAPTER 3.
Marketplace Conditions

Historically, at a national level there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to own 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] Minorities and women in Ohio have faced similar barriers. For example, Black Americans and Hispanic Americans are incarcerated at high rates than non-Hispanic white Americans in Ohio.[6] Black children and Hispanic children in Ohio are much more likely to grow up in poverty than non-Hispanic white children.[7] In addition, Black Americans and Hispanic Americans have substantially higher poverty rates than non-Hispanic white Americans in Ohio.[8]

In the middle of the 20th century, many reforms opened up 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 that 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. 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 quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in Hamilton County's (the County's) *relevant geographic market area* (*RGMA*). The study team also examined the potential effects any such barriers have on the formation and success of businesses and their participation in, and availability for, contracts and procurements the County awards. 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 defined the RGMA for the County as Hamilton, Butler, Warren, and Clermont Counties in Ohio and Boone, Campbell, and Kenton Counties in Kentucky. The study team made that determination based on the fact that the County awards the vast majority of its contract and procurement dollars to businesses located within those geographical areas (approximately 90% of relevant contract 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 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 have both been shown to be related to business formation and success.[28, 29] Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.[30, 31] Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.[32] Moreover, Black American students are more than three times as likely as non-Hispanic whites to be expelled or suspended from high school.[33] For those and

other reasons, minorities are far less likely than non-Hispanic whites to attend college, enroll at highly or moderately selective four-year institutions, or earn college degrees.[34]

Disparities in educational outcomes seem to exist in Ohio as well. For example, Black Americans, Hispanic Americans, and Native Americans are less prepared for college than non-Hispanic white Americans in Ohio.[35] BBC's analyses of the local labor force also indicate that certain groups are far less likely than others to earn college degrees. Figure 3-1 presents the percentage of local workers who have earned four-year college degrees by race/ethnicity and gender. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers are substantially less likely than non-Hispanic white workers to have four-year college degrees.

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

Notes:

*, ** Denotes the difference in proportions between the racial/ethnic group and non-Hispanic whites or between women and men is statistically significant at the 90% and 95% confidence levels, respectively.

Source:

BBC Research & Consulting 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/.

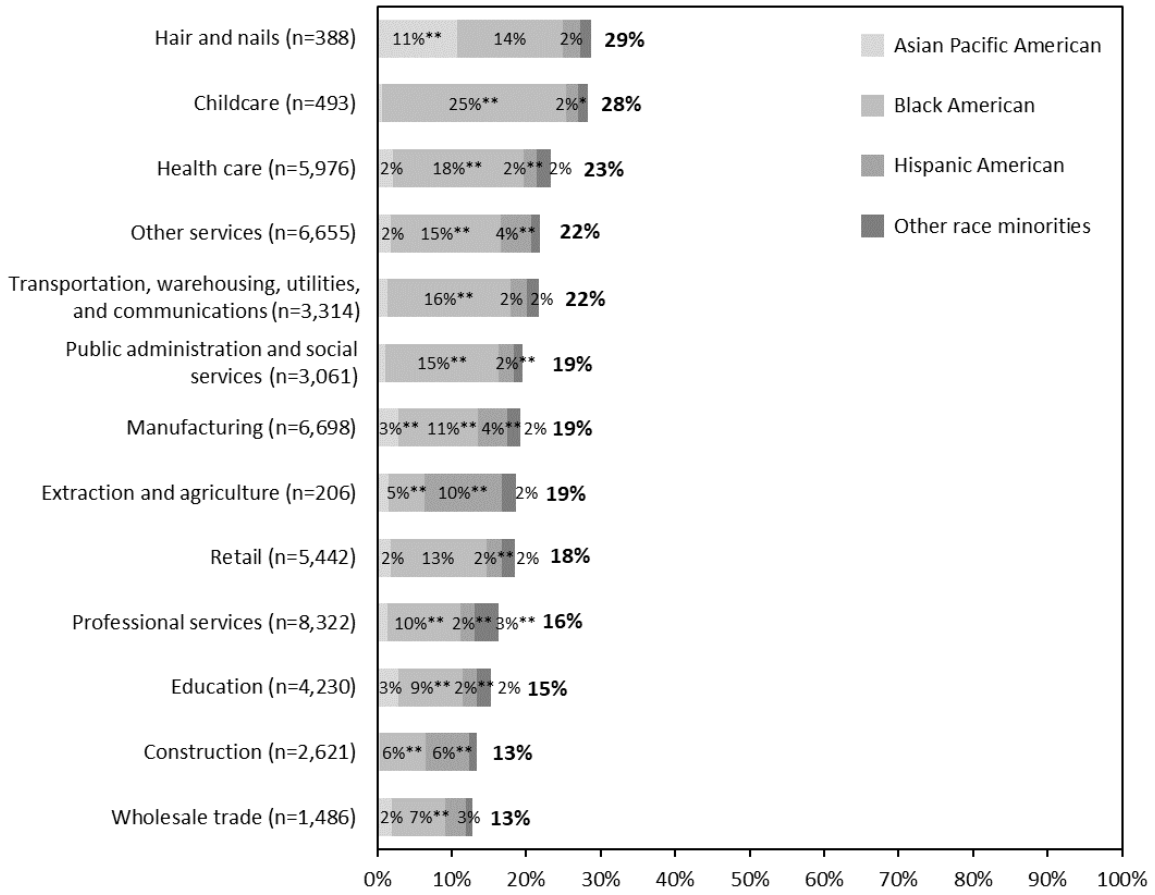
Hamilton County	2015-2019	
Race/ethnicity		
Asian Pacific American	56.1 %	**
Black American	23.7	**
Hispanic American	32.7	**
Native American	32.6	**
Subcontinent Asian American	84.6	**
Other race minorities	55.4	
Non-Hispanic white	40.9	
Gender		
Women	40.8 %	**
Men	38.1	

2. Employment and management experience. Another 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.[36, 37, 38] 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.[39, 40, 41, 42, 43] In addition, Black Americans and Hispanic Americans are incarcerated at higher rates than non-Hispanic whites in Ohio and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.[44, 45, 46, 47]

BBC's analyses of the labor force in the RGMA are largely consistent with nationwide findings. Figure 3-2 presents the representation of minority workers in various local industries. The industries with the highest representations of minority workers are hair and nails, childcare, and healthcare. The local industries with the lowest representations of minority workers are education, construction, and wholesale trade.

Figure 3-2.
Percent representation of minorities in various industries in the RGMA, 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 local workers is 2% for Asian Pacific Americans, 13% for Black Americans, 3% for Hispanic Americans, 2% for other race minorities and 19% for all minorities considered together.

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.

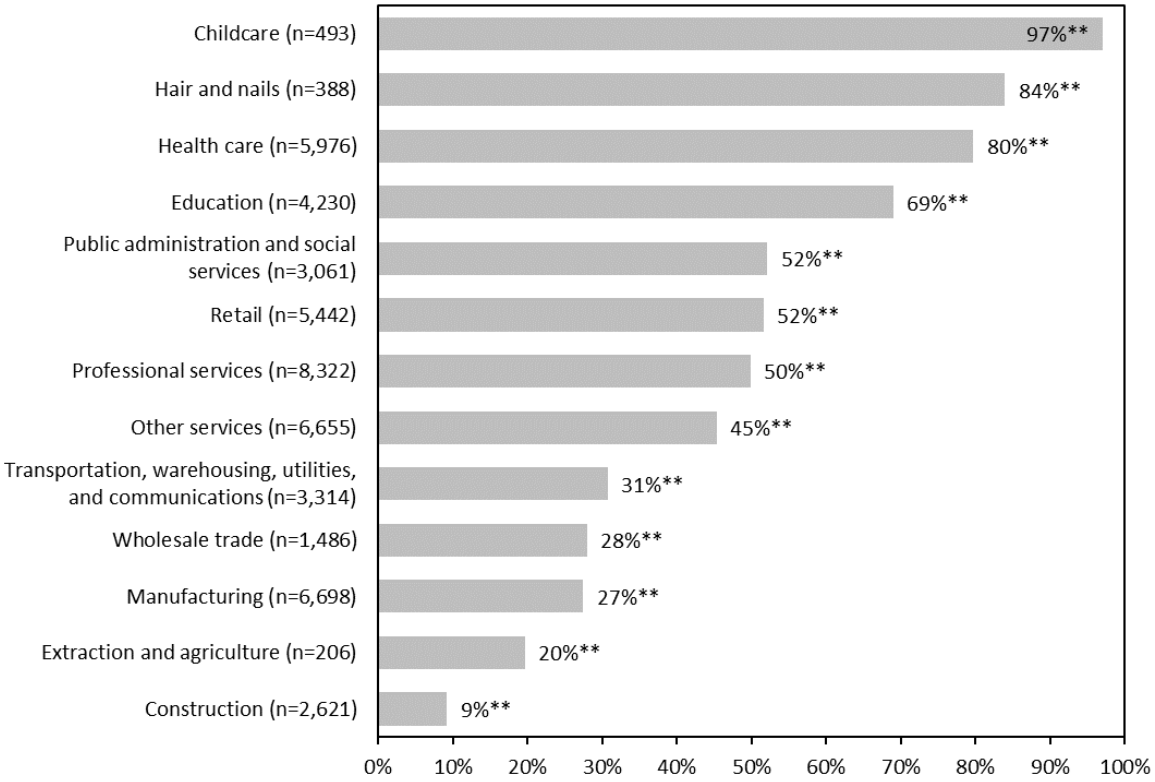
Workers in barber shops, beauty salons, nail salons, and other personal were combined into one category of hair and nails.

All labels lower than 2% were removed due to poor visibility.

Source: BBC Research & Consulting 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 industries in the RGMA with the highest representations of women workers are childcare, hair and nails, and health care. The industries with the lowest representations of women workers are manufacturing, extraction and agriculture, and construction.

Figure 3-3.
Percent representation of women in various industries in the RGMA, 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 local workers is 48%.

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 Research & Consulting 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.[48, 49, 50] Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.[51, 52] Similar outcomes appear to exist for minorities and women in the RGMA as well. BBC examined the concentration of minorities and women in management positions in the local construction, professional services, and goods and other services industries. As shown in Figure 3-4:

- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the construction industry. Compared to men, a smaller percentage of women work as managers in the construction industry.
- Compared to non-Hispanic whites, A smaller percentage of Black Americans work as managers in the professional services industry.

- Compared to non-Hispanic whites, a smaller percentage of Black Americans work as managers in the goods and other services industry.

Figure 3-4.
Percent of non-owner workers in the RGMA who work as managers in study-related industries

Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	0.0 % †	13.1 % †	0.0 % †
Black American	5.2 % *	3.3 % **	1.1 % **
Hispanic American	3.0 % **	10.9 %	0.0 %
Native American	0.0 % †	0.0 % †	0.0 % †
Subcontinent Asian American	0.0 % †	0.0 % †	0.0 % †
Other race minorities	0.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	9.2 %	10.3 %	5.0 %
Gender			
Women	5.9 % *	11.3 %	3.2 %
Men	8.8 %	8.6 %	4.4 %
All individuals	**8.5 %**	**9.7 %**	**4.0 %**

Note:

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

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

Source:

BBC Research & Consulting 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/.

3. Intergenerational business experience. Having family members who own and work in businesses is a 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 than whites. In addition, both minorities and women have fewer opportunities to be involved with those businesses than whites and men, respectively.[53, 54] That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.[55, 56, 57] Individuals can acquire financial capital through many sources, including employment wages, personal wealth, homeownership, and loans. 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 non-Hispanic whites and between women and men exist throughout the country, even when researchers have statistically controlled for various personal factors ostensibly unrelated to race and gender.[58, 59, 60] For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.[61, 62] 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.[63]

BBC observed wage gaps in the RGMA consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for local workers by race/ethnicity and gender. As shown in Figure 3-5:

- Black Americans, Hispanic Americans, and Native Americans earn substantially less than non-Hispanic whites; and
- Women earn substantially less than men.

Figure 3-5. Mean annual wages in the RGMA

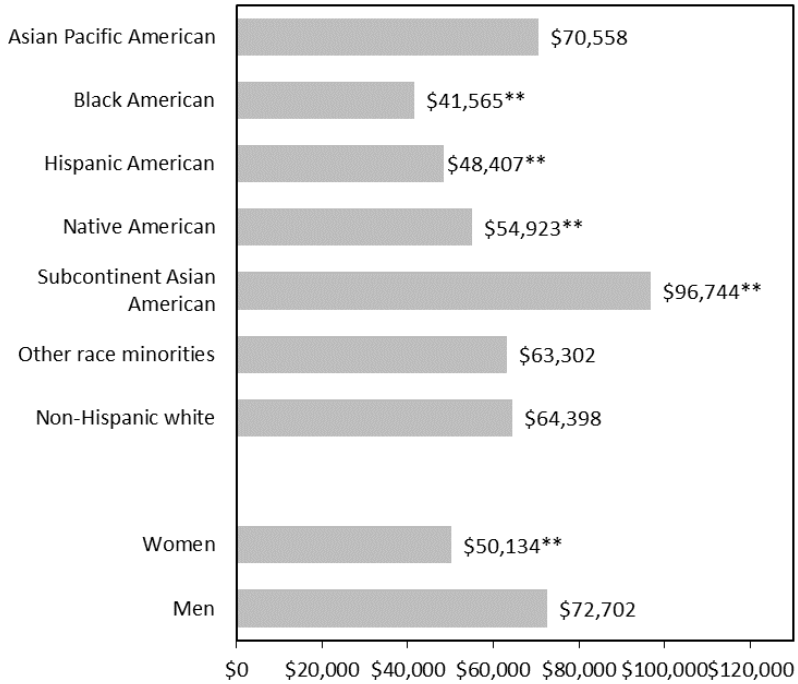
Note:

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 racial groups) and from men (for women) at the 95% confidence level.

Source:

BBC Research & Consulting 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 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 Black American or Hispanic American was associated with substantially lower earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower earnings than being a man (for details, see Figure C-9 in Appendix C).

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 non-Hispanic whites and between women and men in terms of personal wealth.[64, 65] 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 non-Hispanic whites, respectively.[66] In addition, approximately 20 percent of Black Americans and 17 percent of Hispanic Americans in the United States are living in poverty, compared to less than 10 percent non-Hispanic whites.[67] 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.[68]

3. Homeownership. Homeownership and home equity have also been shown to be key sources of business capital.[69, 70] 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 non-Hispanic whites.[71] Discrimination appears to be 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.[72, 73] 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.[74, 75] Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to depressed property values that tend to exist in racially-segregated neighborhoods.[76, 77]

Minorities appear to face homeownership barriers in the RGMA similar to those observed nationally. As shown in Figure 3-6, all relevant racial/ethnic groups in the RGMA exhibit homeownership rates substantially lower than that of non-Hispanic whites.

Figure 3-6. Home ownership rates in the RGMA

Note:

The sample universe is all households.

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

Source:

BBC Research & Consulting 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/.

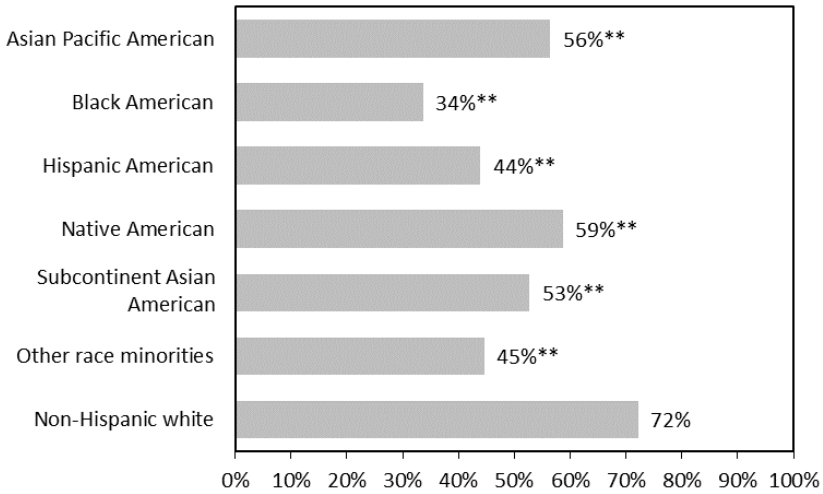


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in the RGMA. Those data indicate that local homeowners who identify as Black Americans, Hispanic Americans, Native Americans, and other race minorities own homes that, on average, are worth less than those of non-Hispanic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

4. Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.[78, 79, 80, 81, 82, 83] BBC assessed difficulties minorities and women face in home credit and business credit markets in the RGMA.

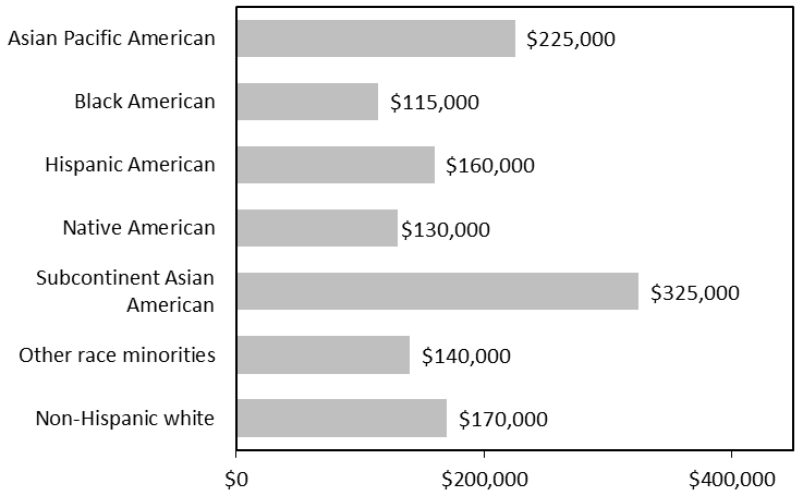
Figure 3-7.
Median home values in the RGMA

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting 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/.



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 minorities and women borrowers for subprime home loans.[84, 85, 86, 87, 88] Race- and gender-based barriers in home credit markets have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.[89, 90, 91, 92] To examine how minorities fare in the home credit market relative to non-Hispanic whites, BBC analyzed home loan denial rates for high-income households by race/ethnicity in the RGMA. As shown in Figure 3-8, high-income Asian American and Black American households in the RGMA appear to have been denied home loans at higher rates than non-Hispanic white households. In addition, the study team's analyses indicate Black Americans, Hispanic Americans, and Native Hawaiian or Other Pacific Islanders in the RGMA are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

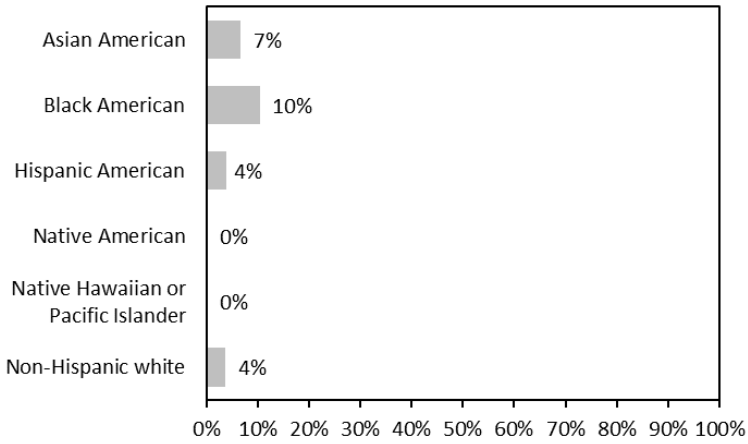
Figure 3-8.
Denial rates of conventional purchase loans for high-income households in the RGMA

Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). For 2012 and forward, the MFI data are calculated by the FFIEC. For years 1998 through 2011, the MFI data were calculated by HUD.

Source:

FFIEC HMDA data 2019. The raw data was 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, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.[93] Researchers have also shown that Black American-owned businesses and Hispanic American-

owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.[94, 95, 96] In addition, women are less likely to apply for credit than men and receive loans of less value when they do.[97, 98] Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.[99, 100, 101, 102]

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.[103, 104] Despite the progress minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.[105, 106, 107, 108] 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 already include large concentrations of individuals from disadvantaged groups.[109, 110, 111] The study team examined rates of business ownership in relevant local industries by race/ethnicity and gender. As shown in Figure 3-9, women own construction businesses at a lower rate than men.

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

Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	22.0 % †	11.1 % †	24.1 % †
Black American	23.7 %	11.1 %	6.9 %
Hispanic American	18.0 %	13.3 %	11.8 %
Native American	22.0 % †	45.0 % †	20.5 % †
Subcontinent Asian American	14.6 % †	29.6 %	0.0 % †
Other race minorities	77.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	21.4 %	17.2 %	11.1 %
Gender			
Women	15.2 % **	16.8 %	12.3 %
Men	22.1 %	17.2 %	9.6 %
All individuals	**21.5 %**	**17.1 %**	**10.5 %**

Note:

*, ** Denotes that the difference in proportions between minorities 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 assessed due to small sample size.

Source:

BBC Research & Consulting 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 even after statistically controlling for various personal factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. As shown in Figure 3-10, even after accounting for various personal factors, being a woman is associated with a lower likelihood of owning a construction business compared to being a man.

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

Industry and Group	Coefficient
Construction	
Women	-0.39
Professional Services	
Native American	1.26

Note:

The regression included 2,373 observations.

Source:

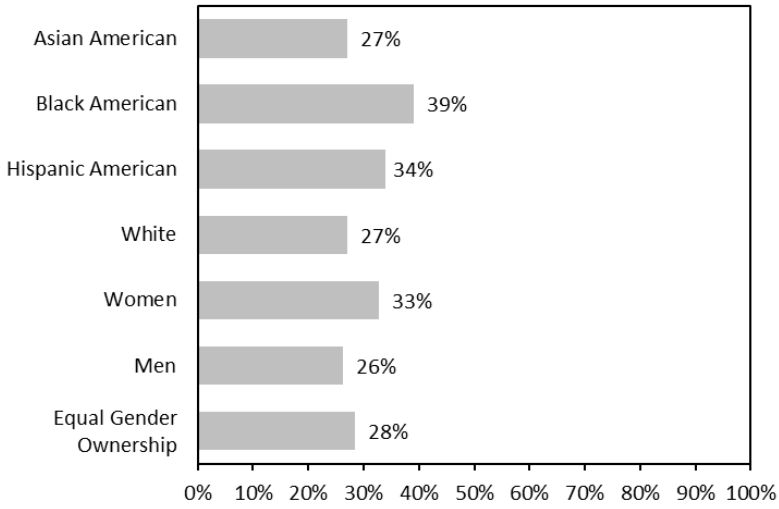
BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

D. Business Success

Much research indicates that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, and Hispanic Americans exhibit higher rates of business closures than non-Hispanic whites. In addition, women exhibit higher rates of business closures than men. Minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, using a number of different indicators such as profits and business size (but also see Robb and Watson 2012).[112, 113, 114] BBC examined data on business closures, business receipts, and business owner earnings to further explore business success in the RGMA.

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

Figure 3-11.
Rates of business closure in Ohio



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 Ohio earn as much as businesses owned by whites or men, respectively. Figure 3-12 shows mean annual receipts for businesses in Ohio by the race/ethnicity and gender of owners. Those results indicate that, in 2018, all relevant minority-

groups in Ohio showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses showed lower mean annual business receipts than businesses owned by men.

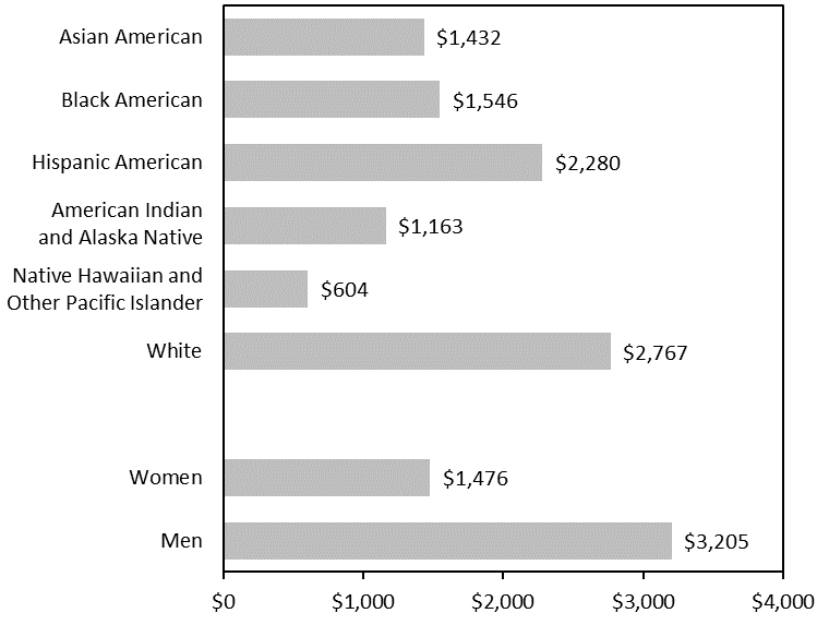
Figure 3-12.
Mean annual business receipts (in thousands) in Ohio

Note:

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

Source:

BBC Research & Consulting from 2018 Annual Business Survey.



3. Business owner earnings. BBC also analyzed business owner earnings to assess whether minorities and women in the RGMA earn as much from the businesses they own as non-Hispanic whites and men do. As shown in Figure 3-13:

- Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race minorities earn less on average from their businesses than non-Hispanic whites earn from their businesses; and
- Women earn less from their businesses than men earn from their businesses.

BBC also conducted regression analyses to determine whether race- or gender-based differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Black American was associated with substantially lower business owner earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure C-25 in Appendix C).

Figure 3-13.
Mean annual business owner earnings in the RGMA

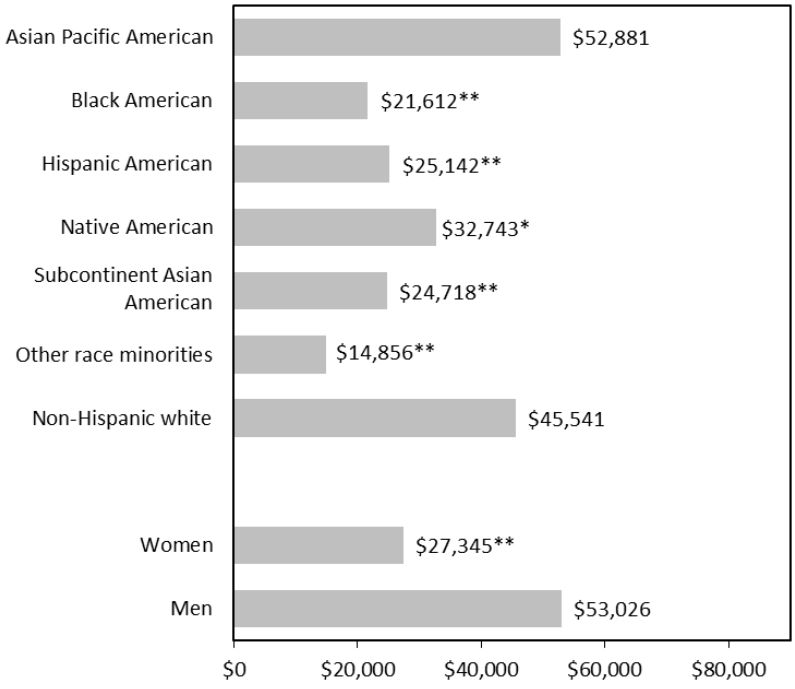
Note:

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

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

Source:

BBC Research & Consulting 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/.



E. Summary

BBC's analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face certain barriers in the RGMA. 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 appear to be due—at least, in part—to discrimination.

Barriers in the marketplace likely have important effects on the ability of minorities and women to start and successfully operate businesses in construction, professional services, and goods and other services. 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 that work. In addition, the existence of barriers in the marketplace indicates that the County may be passively participating in discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for its contracts and procurements. Many courts have held that passive participation in any such discrimination establishes a compelling governmental interest for agencies to take remedial action to address it.

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[20] *Adarand VII* at 1170-72; *see DynaLantic, 885* F.Supp.2d 237; *Geyer Signal,* 2014 WL 1309092 at *14.

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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 Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC). BBC Research & Consulting (BBC) documented those insights and identified key themes about conditions in the local marketplace for minority- and woman-owned businesses. We 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 County and MSDGC contracting and procurement. Chapter 4 describes the anecdotal evidence collection process and key themes the study team identified from that information. We present 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 the County and MSDGC, and recommendations for program implementation through various means between November 2021 and April 2022.

1. Public forums. The County, MSDGC, and the study team solicited various stakeholders for written and verbal insights at two public forums that we held in Cincinnati, with an option for virtual participation, on August 30 and 31, 2021. Those insights were compiled and analyzed as part of the anecdotal evidence process.

2. In-depth interviews. The study team conducted 44 in-depth interviews with owners and representatives of local businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, working or attempting to work with government organizations in the local marketplace, the County's and MSDGC's SBE Program, and other relevant topics. Interviewees included individuals representing construction, professional services, and goods and other services businesses. 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 manager of each business.

3. Availability surveys. BBC conducted availability surveys with 932 businesses between October 2021 and March 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 their businesses, obtaining work in the local marketplace, or working with government organizations in the region. Two hundred thirty-five business owners and representatives shared such information.

4. Focus groups. The study team conducted two focus groups with minority- and woman-owned business representatives on February 23 and 24, 2022. During each focus group, participants engaged in group discussions and shared their insights about working in the local marketplace and with public sector 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. Although the public had the opportunity to share written comments for the duration of the study, BBC received no such comments.

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, along with illustrative quotations. In order to protect the anonymity of individuals and businesses, BBC coded the source of each quotation with prefixes that represent the method by which we collected the information and random numbers and that represent the individual who submitted the comments.[1] 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 minority- or woman-owned business enterprise (MBE/WBE); a small business enterprise (SBE); a disadvantaged business enterprise (DBE); or an Encouraging Diversity, Growth and Equity (EDGE) business.

1. Marketplace conditions. Many businesses noted the volatility in pricing, tariffs, and supply chain access, leading to uncertainty about future work in most relevant markets.

> *A representative of a majority-owned professional services firm stated, "There's too much volatility right now in general in the market and there's too many determinants beyond just COVID that are causing our client base to give more orders out … So, I'm seeing a lot of unknowns … about what's going to happen exactly. … Most of our business is in the heavy industry, steel mills and things like that are a big part of it. So, I track those heavy industries and I talk to those clients about what they're projecting and I probably have 65, 70 that are fairly optimistic for this next year and not optimistic then starting in 2023. And their reasons are all different from inflation to tariff potentials to incentive packages. They're all over the map." [#24]*

2. Doing business with the County, MSDGC, and other government organizations. Business owners and representatives find the use of boiler plate insurance language in contracts, regardless of the size of the contract or type of work performed, as a barrier. In addition, boiler plate contract language in government contracts leave no room for negotiation if elements of the contract are seen as restrictive or prohibitive for a business.

> *A representative of a majority-owned professional services company stated, "As far as the insurance goes, there has been a little bit of an issue at times with different clients in terms*

[1] 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.

of appreciating risk-reward benefits on how much insurance we have and that kind of thing. There are a lot of clients … that use boiler plate requirements for projects. And I always push back very heavily on that. We've walked away from a number of deals simply because I felt like the other side was not being reasonable on their expectations. We had a little bit of that with [local county]… to put it bluntly, you want to pay me $1,000 to look at a building. You want me to take a million dollars of liability on for that. And I mean, how is that possibly equitable? … We find that a lot of times insurance requirements … are onerous for the sizes of projects. … It really isn't realistic to expect everything from a hundred million dollar downtown development project to a $5,000 sidewalk repair has to have the same insurance coverage." [#8]

A representative of a majority-owned professional services firm stated, "We go through it, a lot of it is just terms and conditions that don't really mean a lot, [it's] boiler plate, but you have to go through this whole thing … ." [#24]

Although some interviewees found the County's procurement processes straightforward, others cited confusion over bid pricing and the lack of feedback for bidders that are not selected. Interviewees expressed a desire for feedback on their bids, so they are able to adjust future submissions to meet the agency requirements.

The co-owner of a majority-owned construction company stated, "As I mentioned, [the County is] probably about the easiest, as far as getting the work out. Their engineering department [is] very responsive as far as answering technical questions. … If they think you're too low or too high, they'll bring us in and ask why our numbers are where they are. Conversely, as soon as they got a comfort level, they turn the contracts around very quickly, and they're easy to work for." [#2]

A representative of a Black American-owned, MBE-certified professional services company stated, "We partnered on a bid that Hamilton County had put in for some work. We were not awarded the work. I don't know what the regulations are with regard to feedback. I think when the work is awarded, when it is finally awarded, and one of the bidders comes back and says, 'Can you provide us feedback,' I think there ought to be a feedback mechanism. … But I think there should be ways that you get feedback in understanding how you as a bidder did, not necessarily in comparison to how it was awarded or other bidders. But here are some areas by which we thought you could have been stronger, or your pricing was out of line. … You see the rubric in terms of, here's how we are going to score everybody. What we don't get is the feedback of, here are your scores." [#3]

The Black American owner of an MBE- and EDGE-certified goods and services company stated, "I bid on a couple of things with the County … It just wasn't as clear as working with some other agencies. … It's just their process is a little confusing. And some of the ways, the one about submitting your bid pricing was challenging and confusing. … I know I didn't get any feedback as to what might have happened, or why I didn't win besides my pricing was not low enough. So, … that was a bit frustrating in terms of how do you go about doing things and ensuring that you've done it the right way." [#21]

The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "[Hamilton County has] been wonderful to work with. I mean, they have to follow public rules or higher revised code or their guidelines for getting publicly, but we do so

much work with them and they have been so wonderful clients to deal with. They have been very honorable. They pay on time. They're very fair in their treatment of the subcontractors. So, we love working with them. Hamilton County again, they have a wonderful team. Their staff are highly qualified. They know what they want. They have a very good engineering support." [#41]

A representative from a Subcontinent Asian American-owned professional services company stated, "[The] wait [for what????] is way too long, and there is a lot of red tape to go through. I think Hamilton County should look at how Columbus is handling their county. Hamilton County is backwards and [has] too much politics." [#AV237]

Multiple interviewees mentioned the difficulties they experience trying to find information about upcoming contracting opportunities with the County or for MSDGC. Although some know where to look to find solicitations, they mentioned that there does not seem to be a comprehensive source for all County opportunities. Communication around solicitations seems to be disjunct with no centralized communication channel. Other interviewees expressed concern over the cost to see solicitations that prime contractors post online to build teams for projects. Multiple interviewees noted that they do not know how to navigate MSDGC's online procurement process.

A representative of a Black American-owned, MBE-certified professional services company stated, " I'm not sure that all of Hamilton County [communications]... they're not universally linked. So different departments will use different communication channels to convey [opportunities]." [#3]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "You know, you don't know what you don't know. I see advertisements and RFPs and all that. RFQs from the County. I see a few of them, but I'm sure there's more going on than that. So, I don't think I get a full regimen of RFPs or RFQs or invites from the County. The point is that you look around … County facilities, and you know it's much more going on you just don't hear about." [#23]

The president of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Well, I know for the City, for example, I get the emails from them, but I think, at the County level, I haven't quite navigated that. I'm not sure what the process is for getting more engaged with, at the County level...." [#33]

The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "When I first started out, it was very difficult getting access. Access … one of the most important factors in being able to be successful, because if you're not at the table, when the contracts or the opportunities are being discussed, then most likely you do not have the ability to be able to speak to that opportunity, address that opportunity, or just to talk about your capabilities, to facilitate that particular contract." [#FG2]

A participant from a public meeting stated, "The Periscope site is the site that Hamilton County uses to post [invitation to bids]. It's free to register, but they charge $149 per month to view any solicitation posted by a prime." [#PT2]

A representative of a WBE- and SBE-certified goods and services company stated, "I don't know how to know where the [requests for proposals] are. I am versed in the City of

Cincinnati, where we can go out and get them. But Hamilton County or the Metropolitan Sewer District, so it's more if they happen to knock on my door rather than me being able to go out and seek them out." [#22]

The owner of an SBE-certified construction company stated, "I don't think in the last 20 years we've done a job for MSD, because they basically stopped me or blocked me one way or the other. Their permitting and their licensing and stuff." [#28]

A representative from a Black American-owned professional services company stated, "I've experienced more barriers with MSD versus Hamilton County], and I think the barriers are accessibility and transparency. The process of winning work is not evident, consistent, or clear." [#AV32]

A representative from a majority-owned construction company stated, "We've had a fair number of difficulties with the procurement department with the City for jobs we bid on with the MSD. They have a fairly outdated system for online bidding that cost us an $11M job." [#AV48]

A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "With the City that they just have a whole lot of paperwork getting onto their website and I still have not mastered their website. I think that that's the most confusing, the username and password. I've gotten new ones I don't know how many times and they're just never same too." [#1]

A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think I could probably get more business if I knew how to get in. It probably took us six years to get the City of Cincinnati to be able to work with us outside that system. They just did everything outside the system because we could never get the system to work. We're not stupid. So, I would think that if we can't do it, neither can others. I would say training, except problem with the bigger issue is how are you going to get people to show up for the training." [#22]

For those who successfully contract with MSDGC, the agency is seen as responsive and easy to work with.

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "[The gentleman who was running MSD met with us, and he talked to us, and I think he was sincere, but nothing ever happened. I don't know that he had roadblocks or whatever, but I can't blame him. At least he sat down, talked to us on several occasions." [#23]

The co-owner of a WBE-certified construction company stated, "I guess I would say of the city contracts I have, probably MSD's, I would say probably is the easiest … just easier to deal with, to get answers [from], you know, that kind of thing." [#27]

Multiple interviewees discussed challenges accessing permits, licenses, and inspections for County work, indicating that the organization that manages those processes is unresponsive and that the processes are unnecessarily complicated and a barrier to doing business with the County.

The male co-owner of a WBE-certified construction firm stated, "For us and every other tradesperson I know, customers that we talk to, it's not really the County, it's the inspection firm […] that they give the inspection work to. And that place is utter insanity to try to work with. … their attitudes are horrible. … The problem is with that, those people, they don't work for the city. They are a sanctioned third-party, for-profit organization, and their fees are outrageous. … You know, their customer service is horrific, their website is very antiquated and dated. … I mean, I've had customers just stand in front of me and cry, because they're trying to deal with [the organization. ... If the job is in Hamilton County, the price difference is going to be almost an automatic 20percent higher for Hamilton County, just because of the headaches of dealing with [the organization] or else for me, it's not worth it." [#11]

A representative from a woman-owned construction company stated, "Working with Hamilton County is atrocious. Working with their third-party inspectors […] is horrible. Awful experience for anyone dealing with them. … The County should resume control over their own inspections instead." [#AV259]

A representative from a majority-owned construction company stated, "The inspection bureau is awful. You can't reach anybody and when you leave messages you get no answers." [#AV296]

Small, minority- and woman-owned firms identified multiple best practices in public contracting, such as breaking up projects into smaller, more manageable units; regular forecasting meetings; streamlined bid and registration paperwork; regular communication between agencies and contractors regarding necessary documentation; and opportunities to provide feedback and recommendations to agencies regarding their procurement processes.

The co-owner of a majority-owned construction company stated, "I think both [Allied Construction Industries] and definitely [Ohio Contractors Association], they have an early in the season meeting for whoever wants to attend, where the owners, all municipalities, they'll come and present the program to the contractors. 'Here's what we're going to do. Here's the jobs we're going to do this year. Here's our plan. We're going to [put] these six jobs, they're worth X amount of dollars [out to bid], et cetera.'"[#2]

The co-owner of a WBE-certified construction company stated, "I would say a lot of [contracts] are too large. I've gotten together with a couple other smaller companies, and tried to team up, and bid on things. But I would definitely say some of the [requests for proposals] … are way too large for smaller businesses." [#27]

The Black American owner of an MBE- and EDGE-certified goods and services company stated, "We just recently won an opportunity with another government agency. And I would have to say, if they hadn't broken it up, then I wouldn't have done any portions of it." [#21]

The owner of a WBE-certified construction company stated, "They were making strides on … our minority women goals. But then soon thereafter, they changed the way they were doing things and their projects were much bigger. And so, for myself and other smaller MBEs and WBEs, the projects were too big for them to be able to get bonding … figuring out a way to break some of these projects down, to where you have multiple primes, rather

than just some giant prime, and then they have goals underneath them. We need more prime opportunities." [#PT2]

A representative of a WBE- and SBE-certified goods and services company stated, "The City of Cincinnati's [bid processes] are very easy. They tend to be very well-laid out with the information organized. They've done the research, so it's not vague. It's pretty specific information. … Hamilton County is the same way in terms of the ones that we work with. They're all very knowledgeable. … I would say [Jobs and Families Services] is super easy. They don't demand. They know what they want to accomplish, and they allow us to give input into how we can make it better or more cost effective for them. So, they're easy to work with, because they put out the information, but then they allow you to make it better." [#22]

When discussing the worst practices interviewees have encountered in public contracting, interviewees identified various difficulties with public contracting, such as weak or nonexistent small business or minority- and woman-owned business programs, unresponsive and unknowledgeable procurement offices, and complicated bid processes.

A representative of a woman-owned professional services company stated, "Not all of the Hamilton County Departments have [minority- or woman-owned business] inclusion on their contracts, so that is a barrier." [#AV9]

The male co-owner of a Hispanic and Native American woman-owned construction firm stated, "Hamilton County is probably one of the worst [organizations] I've ever tried to get a contract from, because you never know what's going on, you never know what's going up. …You can never seriously get somebody on the phone all the time to know what's coming up." [#17]

The president of a SBE- and WBE-certified professional services company stated, "I'd say Hamilton County's [process[was the hardest. Just required the most paperwork. You have to fill out a cost sheet for a lot of things, which you never use in the job. … It was just like pulling teeth just to do those projects. Cincinnati Public Schools is another big entity that doesn't really reach out to SBE firms or give them any kind of advantage or try to be inclusive with SBE." [#32]

3. Doing business as a prime contractor or subcontractor. Prime contractors noted that although there are many certified firms available with which to partner, many do not have the capacity to perform on larger projects. They said they have taken steps to mentor certified subcontractors, focusing on building strong business practices to complement their talents, and build a strong contracting base to meet contract goals. Other prime contractors note what businesses are included on project teams and seek out those subcontractors to help meet goals on other projects. Minority- and woman-owned prime contractors also shared that they often pull in certified subcontractors for work, noting a sense of responsibility to build up the capacity of other certified firms.

The co-owner of a majority-owned construction company stated, "Frankly, the other driver of [subcontractor selection] is all the preference programs that are currently in place for the city, state, County, et cetera. … So now we're really developing [them] more and more, because the biggest challenge we currently see is … the folks that can really do work, and

do the work in our arena, they're a bit few and far between. … The [certified] contractor in town [we use, , he came from really just doing asphalt driveway, little driveway jobs. We need him to do roadways. … We would just put him in with our crew. … From there, then he ended up buying his own paver and his own stuff. [#2]

The president of a Black American-owned construction firm stated, "I have used lists [of qualified businesses] before in the past, but that list seems to get smaller and smaller. … Years ago, I could probably rattle off 10, 15, 20 minority companies. … It's different in a sense [working with certified businesses]. It's more, I guess, personal. You kind of build more of a relationship with somebody that tends to look like you and is an entrepreneur and small business as well." [#39]

The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "There are some pressures as far as inclusions or all of it, which I love to do, which I'm glad they do. But unfortunately, some of those [businesses] are not qualified. So then [that] causes us problem, because we cannot find quality subcontractors to do the work." [#41]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "Birds of a feather flock together, whatever it is, and I feel it is my responsibility, especially since I get older, I had people who helped me throughout my career. … They looked out for me, 'You need help. Let's help you out, boy,' … I do the same thing. My experience has been [to] keep a closer eye on the minorities, the small businesses, keep a close eye. You don't want them to mess up. … I take pleasure, and it's my commitment to myself, to the Black race, to all minorities, period, to help out as much as I can." [#23]

Subcontractors report spending a substantial amount of time developing relationships with other companies through sales calls, co-sponsorships, and networking. In addition, some businesses reported trying to createunique niches that can be effectively leveraged as part of project teams. Subcontractors also use information that large prime contractors post on their websites or bidder exchange platforms about upcoming projects to look for teaming opportunities. In addition, subcontractors noted the value in being listed on the County's list of certified vendors as many prime contractors use the list to find new subcontractors with which to partner.

The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "I work really hard at [relationship building with prime contractors]. Probably 15 percent of my time is focused on those partnership opportunities. … We partner on outreach things, we partner on clients, we partner on social service things, volunteering time. … Others, where I may not be in their office on a regular basis, but we are constantly in contact on sales meetings to make sure their team understands what our capabilities are, where we can add value to their team but also to their clients. … so they know who we are and that when they have an opportunity, that they're calling us before they call someone else." [#5]

The male co-owner of a Hispanic and Native American woman-owned construction firm stated, "City of Cincinnati holds meetings and conferences. I go to those, or I used to go to those, a lot. I still get the emails of who's soliciting stuff. Also, you go, and you sign up for their vendor list. A lot of those construction companies, you just sign up for their vendor

list, and anytime they have a project coming up, or a solicitation coming up, you sign up for it." [#17]

A representative of a majority-owned professional services firm stated, "The City of Cincinnati has, I think in their website, they have a list of contractors that are classified and what they're classified as. So, I've used that before too for local jobs." [#24]

Subcontractors find great value in partnerships with prime contractors that are considered experts in their fields, as those teaming opportunities are great learning experiences. Once they develop those relationships, many subcontractors rely on them to get future work. Positive past performance often plays a key role in a prime contractor's selection of subcontractors, meaning that they are more likely to reach out to subcontractors with which they have previously worked. They develop some relationships through project work and others through referrals or past employment experiences.

A representative of a Black American-owned, MBE-certified professional services firm stated, "My preferences for certain primes is they have a skillset that's stronger than ours. So, we learn, or we add value to the overall deliverable that we're servicing our client with when they're in the room, and it's really gratifying to work with a planner that actually has more housing experience than you do. … You want to sub with someone that actually has a higher level of excellence." [#7]

A representative of a majority-owned professional services company stated, "So when I started this company in 1996, I quit from [a large local prime]. I was one of their project engineers. When we did that project, I still knew the owner of the company and many of the upper management people. And so, they approached me because they knew our size would be such that we could get the small business enterprise designation. And they said, 'Hey, if you're willing to do this, we'll put you on our team, and you'll get 10% of this fee. And we'll figure out how we break the project down in order to make that all work.'" [#8]

The Subcontinent Asian American owner of a professional services company stated, "Mostly subcontractors are our existing network we've been working with since 2007. So, I know so many people, and we try to [work] with the people we know first." [#43]

4. Potential barriers to business success. Generally, public sector bidding is seen as labor intensive, especially with regard to reviewing lengthy solicitation documents, building teams in a timely fashion, and researching past awards to competitively estimate bids. Most agencies use unique bidding software, which takes time and effort to learn to navigate.

A representative of a Black American-owned, MBE-certified professional services company stated, "It's the primary reason I have chosen not to actively pursue a lot of [public] work. Is it great work to do? Certainly, it is. Are there opportunities to do it? Yes, it is. The [request for qualifications], the [request for proposals] processes are incredibly stringent. They are incredibly labor intensive in the preparation. The mechanics of the forms are not easily navigable. And because [organizations'] technology is in some ways, fairly antiquated … doesn't help me with my timing. … And then to upload those packages in systems that themselves are not universally linked." [#3]

The co-owner of a WBE-certified construction company stated, "[Government organizations] hardly give you any notice to turn around and submit the bid. They call you,and they want the bid in a few days or even next week. … There's all kind of factors and figuring out all the ins and outs, the materials that you'll need, and how much labor, and oh gosh, the timeframe, the schedules… ."[#27]

The Black American owner of an MBE- and EDGE-certified goods and services company stated, "A lot of things that we do is price sensitive. … And … it's just totally blind out there. … All of a sudden you get a rejection letter saying that your prices were too high. But where do you need to be? Who are you competing with and how do you need to compete … ." [#21]

The Black American male owner of a construction company stated, " So, for instance, the electronic bidding, the software, it's like you pay $3,000 a year. You purchase it. … And then you're kind of teaching yourself … and that's the problem right there. It's going to take me too much time to learn that technology on my own. I mean, yeah, they have people you can call and get help, but … it could be challenging learning electronically like that. Sometimes you need a person right there with you." [#26]

Many businesses reported that the cost of furnishing bid bonds is a prohibitive element of the bid process as is finding the appropriate balance between maintaining sufficient capital to grow and bond while also reducing risk. Programs that exist to assist businesses with bonding are not well known or advertised, and small and new firms report being subject to higher bonding rates than more established, larger businesses. A company's bonding limit can prevent them from being able to bid for more work, especially if separate bonds are required for bidding, licensing, and performing work.

The co-owner of a majority-owned construction company stated, "Through the years, the bigger barriers would've been bonding capacity … based on net worth, net volume. That's kind of a double-edged sword. The more money we leave in the business, the more at risk it is. So, you don't want too much money in, but if you don't leave much money in, then you can't grow, because it limits your bonding, [and] then no one's going to lend as much money. That's a challenge. … And it's [worse] for small businesses, I would say." [#2]

The male co-owner of a Hispanic and Native American woman-owned construction firm stated, "Most of the time you have to get a performance bond or a bid bond. Well, that's 10percent of the overall project that you're going to do. … If the project is $300,000, well that's $30,000 that you got to put up just to obtain that bid bond. That's very hard. … We actually won a project but weren't able to perform because of the bid bond. … They just said it was a non-responsive bid, so they went to the next person." [#17]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "We do have a bonding company, but you got to remember, I've been doing this stuff for over 30 years, so people in the business knew me, and getting bonding, for me, was no problem. But I can see where it's hard for any other minority. … Generally, the minority contractor will pay a higher bond rate than the average majority contractor because of unfamiliarity and because of racism, whatever you want to call it. Those have always been a sticking point for a lot of people." [#23]

A representative of a majority-owned professional services firm stated, "There's a bonding limit to everything you do. So, if our bonding limit's $1 million, and I've already got three or four projects that consume $800,000 of that and all of a sudden, a $500,000 opportunity comes along and I got to bond it, I can't do it. That's all there is to it. That's just based on the size that we are. And we pretty much can quote anything and know how to get it done. …The only thing is bonding will get us. That's the only thing." [#24]

With regard to payment terms, many businesses said that payment within 30 to 45 days is reasonable, but 60 to 120 day payment terms can destroy a small company.

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "We could weather a storm if we're going to get paid in 30, 45, 60 days. Sometimes in 90 days. … But the smaller guys can't. Matter of fact, me and [my partner] put together a payment plan … where the same bank that's financing the project would pay the subcontractor once the work is done, on a biweekly basis, which helped out the smaller contractor. … That was one of the things we came up with. ... It will help out minorities and small businesses if it can be a timely payment. … [Because] in some cases [payment] could be 2, 3, 6, 7 months." [#23]

The co-owner of a WBE-certified construction company stated, " Those payment terms have gotten [to] 100 to 120 days sometimes, or even they say, 'We'll pay you when we get paid.' … For a small business, even waiting the 30 days can sometimes be a struggle, because cash flow is everything. But when you talk 45, 60, 90, and now we're getting into 120-day things, it's just you can't pay out all that labor, and pay for the materials, and wait for that money." [#27]

The president of a Black American-owned construction firm stated, "Some of those larger projects could take you out of business. I mean, if it takes you three months to six months to get paid, I mean that could break you." [#39]

Financial literacy is necessary for a company's success and its often improved through close personal relationships with financial institutions. Obtaining loans is a barrier for many firms, especially those in high-risk industries. For many companies, access to capital is as much of a barrier as loans or financing, especially for companies who do not own their offices.

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "I come across a lot of brothers and sisters who a) can't get financing; b) they don't know how to go about getting financing; and c) the banks and the loan institutions [don't] make it easy anyway. ... But knowing what you're up against is very key, and financing is something that you can't play with, and you know that yourself by just dealing with banks and financial institutions, on a personal level." [#23]

A representative of a WBE-certified construction company stated, "The hardest challenge was getting a business loan. It's what they consider a high risk [industry], so that's the biggest thing is such high risk that a lot of people wouldn't look at you. Even being WBE, they wouldn't talk to us. Took out personal loans to make it work, until we could get enough established to go on." [#25]

A representative of a Black American-owned MBE- and WBE--certified construction company stated, " But without having capital and cashflow, we're not able to attract and retain talent that we need. … And so, it's a domino effect." [#29]

The Subcontinent Asian American owner of a professional services company stated, "Financing is [a barrier]. If you want to get a line of credit with 50 grand is very easy. Every bank probably will give it to you, but anything beyond that, it's a tedious process. It's very hard to get through, and they ask some really, really stupid questions and documents, if I'm honest. And then when it gets frustrating, and then you just say, 'You know what, it's not worth for me to spend all this time.'"[#43]

The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, " I would agree 100percent that access to capital is an issue. I just tried to buy another company in another region ... the president of the bank that I was talking to, he said, 'Everything looks good. Everything looks great. But how do I know I'm going to get my money back if that deal goes bad?'... I mean, our company started from scratch. So, we only have a 20-year relationship with a bank as opposed to a company that has 100-year relationship or a 50-year relationship, or they went to high school together, or they graduated college together. So, people that I went to college with and went to high school with and grew up with in my neighborhood are not presidents of banks." [#FG1]

The Black American owner of a DBE-certified professional services firm stated, "I literally I just got off a telephone call with a lender here in town that I've had a 25-year relationship with. And I asked for some funds on a multifamily renovation project that we currently own. …. We were told that they couldn't do the deal and that it would be better for me to apply for a personal loan against my personal residence. I mean, kind of a slap in the face when you hear that with a group that you've been doing business with for over 25 plus years. So, the challenges of capital I think clearly are our biggest challenge." [#FG1]

The woman owner of an MBE-, SBE-, and EDGE-certified construction company stated, "When you go for money, the problem is you can't get money because there's other people that have relationships with the bankers that the bankers are calling their clients, 'Hey, I have this money,' and then there's no money for the small people." [#PT1]

Beyond the effects of the pandemic on supply chain, small companies often struggle with inventory and supplies. Small businesses do not purchase goods or supplies in the same volume as larger companies, so they may be of less priority to suppliers or are offered less favorable prices. Businesses in equipment-heavy industries often struggle to have sufficient cash on hand to purchase equipment, and the cost of renting or financing equipment can increase the overall costs for such businesses. Furthermore, when elements of work are delayed that require supplies purchased in advance, subcontractor or suppliers have to float the costs of materials until they are able to complete their elements of work.

The male co-owner of a WBE-certified construction firm stated, "I mean, everything has gone up in price due to inflation and COVID. … The main constraints have been equipment supply. So, like I said, I mean, what industry is not facing that kind of shortage right now with stuff?" [#11]

The owner of a majority-owned construction company stated, "Just finding materials and being able to pay for them is what's killing me. Materials are really hard to get right now,

and inflation is the worst I've seen it in my career. … If you don't put something in your contract that states the bid's only good for this many days, and then we have to reevaluate the materials to see if they've inflated. That's what I've been doing, and it's helped a little, but it's still not covered the total cost." [#15]

The Black American owner of an MBE- and EDGE-certified goods and services company stated, "But part of the challenge that I see for my business is that a lot of [organizations] went to bigger companies because manufacturers were allocating products to certain companies, especially if your volume has not been great with them before … . So, access to the product, and also … at a reasonable rate [is an issue]." [#21]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "Getting suppliers or getting manufacturers and distributors to work with us [is a barrier]. A lot of distributors and manufacturers require that you do a certain amount of sales a year before they even will consider you. And … you can't guarantee [those sales will happen], because you don't know who will come to you for service. … and that is something that has plagued us from day one." [#23]

The owner of an SBE-certified construction company stated, "Generally, if you go into an equipment dealer, they will figure out some way to get you financed. You might not get the best finance rate. … They can get almost anybody financed. … If you rent equipment, it's okay on a million dollar project, where you can rent equipment. But if you're going to use the equipment long term, you pretty much have to buy it. … So, anybody with a credit card can rent. But of course, you know what the markup is on a credit card, as compared to... Somebody's been in business 20 years and got a perfect record, can get a two or three or four, five percent loan." [#28]

Finding personnel is challenging, especially for specialized industries. The competition for specialized skills leads to bidding wars for new employees, and the cost of training new hires can be daunting to small firms. Even companies that work only on prevailing wage jobs pay far more than average wages for non-federally funded projects and have difficulties finding employees. Some interviewees discussed the need for training, as there are few to no programs in schools that train for the skills their companies require.

A representative of a Black American-owned, MBE- and DBE-certified professional services company stated, "[We have] challenges getting workforce. We are a specialized industry so that makes it harder. … We have a harder time finding talent when it's challenging, there's more competition." [#1]

The co-owner of a majority-owned construction company stated, "The workforce shortage is the challenge for all of us. We're the high end of that since where all of our work is, well 90 percent of it, is [prevailing wage]. We're the top of the food chain as far as what we offer our folks monetarily. It's still a challenge, not enough people in the workforce now, but everyone's facing that stuff." [#2]

The male co-owner of a WBE-certified construction firm stated, "I would say [the primary barrier] is, and has been, and continues to be access to talent. You know, it seems like that's a problem with every single skilled trade group that I know. … So that's been the hardest thing for us … is everyone that we [hire], we're starting from scratch with." [#11]

A representative of a majority-owned professional services firm stated, "Finding experienced labor, extremely difficult. And very hard to do, very common to end up in bidding wars. I made four offers in the last two months to people. They accepted them, and then they reneged on me. ... So training is the way to go … but it is expensive on a 17-man firm. … We have to be very selective about how many new people we bring in, because we can't afford the drain on the inefficiency." [#24]

The largest barrier interviewees identified is the struggle to obtain the first project with an agency or qualify for an agency's prequalification process without past experience with the organization. However, multiple interviewees discussed the benefits of prequalification processes to ensure the winning contractor is capable of providing the work required.

A representative of a Black American-owned, MBE- and DBE-certified professional services company stated, "One of the barriers in our industry is a lot of firms have been around for a long time. So, for example, let's say you're talking about doing a library project, you always have to show past experience. So, a firm that's been around for a long time may be able to show 10 libraries. But say our firm has not been around for that long, maybe we can only show two or three libraries so that winds up being a negative on us." [#1]

A representative of a majority-owned professional services firm stated, "We don't qualify to do a power-related project that we've done a million times. … We have more experience than the people getting the work. I know that for a fact. We've proven it, but because we've never done work for [MSDGC], they disqualify us as unqualified, even though we do work for other sewer districts, but it's the way it is. I don't even bid projects there anymore. It's just not worth my time. And do you want to know the reason why... Their reason … from the purchasing person, 'Because you've never done work with MSD before'." [#24]

The owner of a WBE- and SBE-certified professional services firm stated, "I'll be in business five years in May, and literally last month was the first time I got approval to do work as a prime for greater Cincinnati waterworks. And the reason that happened is because the last time they opened their opportunity for anyone to become a prime was four years ago. … I had to submit showing that I've done similar type work as what waterworks would require or need. And then I had to go through their list of potential opportunities and select which of those things I specifically was capable of doing and then give resumes for all of my staff and histories of why they were able to do the work." [#FG1]

Interviewees identified multiple restrictive bid and contract specifications in areas such as insurance requirements and firm start/stop deadlines. Firm start/stop deadlines written into contracts are difficult for subcontractors whose work may be affected by the timeliness of the contractors performing work before them, leading to potential breeches of contract that are out of their control.

The owner of an SBE-certified construction company stated, "They got clauses in there. The project's got to be started in 15 days and 45 days. For example, I had a project for the city of Cincinnati that took seven months to get the electric transformers moved. … So, you're automatically in default before you can ever get started. … You're expected to perform in 15 days or 45 days or 30 days. ... But if absolutely anything goes wrong, it just turns into a nightmare and very easily can bankrupt a contractor or basically just run them off. … It's

ridiculous to have completion time of 45 days when permits are taken. … They've got the time so short it makes performing difficult." [#28]

A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "There are some [requests for proposals] that we see that come out from organizations that appear to be biased from the beginning. First of which is it can be written in a way that is about size, right? Says you must have this particular size, or you must have this particular insurance, or you must have these particular capabilities. And I have seen in many instances, none of that is applicable to the scope of work. It is designed to exclude opposed to include." [#40]

A representative of a majority-owned construction company stated, "Time frame they give you is not sufficient… they want it quickly done, by a date and we may be booked out." [#AV208]

Many interviewees discussed the potential harmful implications of prioritizing cost over quality in low bid contracting processes. For many companies, they would rather lose a job than underbid and underperform as reputation is key in most of their repeat work.

The owner of a majority-owned goods and services company stated, " We're all consumers, and we don't always go for the best price on something. We go for the best value. Sometimes the best value is a slightly higher price. … So that's kind of what I think buyers really should concentrate on is not the lowest price, but who's got the best value." [#19]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "I put my owner's hat on. Just like you have a house, you're going to have work done on your house, you want the best contractor to do the work for you. You want the best one, the ones who have the most experience in what you ask and have them do. … But in public works … it's, more or less, the lowest and most responsible bidder gets the job. … And a lot of us MBEs don't fall into that, because usually we're not the lowest and you have bigger companies that have been around for generations. You can't [outbid] them." [#23]

The co-owner of a WBE-certified construction company stated, "Price certainly seems to be the leading factor. I like to think that value is right behind that. … Once we get a job, our reputation is everything. Even if we are losing money, we finish the job. But it does seem to run so much on price." [#27]

5. Barriers related to race and gender. Multiple businesses reported their experiences with the "good ol' boy" network, noting its impact on their ability to secure work and feel included in their respective markets. It is seen most prominently in how prime contractor and subcontractor relationships are developed and how upcoming projects are communicated across different business groups. Although many interviewees commented that such relationships are natural outcomes of networking, it is a particular barrier for minority- and woman-owned businesses to develop such relationships with white male-owned prime contractors.

The owner of a majority-owned construction company stated, "I did [bid] some jobs there, but I didn't get anything. And I got the distinct impression that it was a good old boy network that, you know, I just … didn't know who I needed to know in order to do this. … You have to know who the person is, and then you have to develop a relationship with that

person. Otherwise, you're not getting any work. … If I find them … you can tell that they're not, they're not really paying attention, and they don't really care. They have their people. It's already set up and it's easier." [#12]

A representative of a WBE-certified construction firm stated, "I know that good old boys clubs [are] working, and it's not, unfortunately, it's not going to be something [of which my firm is a part], because I'm not in that circle. So, I don't know the projects I'm missing out on, you know what I mean? … Until they show their face, you don't know who they are. … I don't see that old boys club at the state and federal level. You only see it at the county and city level." [#14]

A representative of a majority-owned professional services firm stated, "Oh, [the good ol' boy network] really does exist. I mean, to the point I say, my network consists of people I know I can trust. … I mean a good old boy where, I guess, would work to keep somebody out, we don't do that … . But I give people chances all the time, and I have new contractors all the time." [#24]

Several minority business owners cited instances where prime contractors or subcontractors they work with, once realizing they were minorities, began to treat them differently. Some noted that there is substantially less discrimination affecting business opportunities for SBEs when compared to MBEs. It feels like there is more grace with regard to mistakes (even if they are not the mistakes of the contractor) for majority-owned firms than for minority- or woman-owned firms.

A representative of a Black American-owned, MBE- and DBE-certified professional services company stated, "The project that I'm thinking on that we were the primes on… we did basically a tour with other companies in the same space. Did you know they did not believe we did that project by ourselves? Literally the facility managers questioned whether we did the project. … I mean, even as [recent] as just a few weeks ago. We've had somebody tell us, 'Do you think you need to bring in another firm to help you?'" [#1]

A representative of a Black American-owned MBE-certified professional services company stated, "It's okay if you qualify, and you're an SBE. But the minute you identify as an MBE, there may be an attitudinal change as to the quality of work, the level of experience or the depth of experience, credentialing, structure, and ability to actually perform the work or service." [#3]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "They would look at you differently than … a majority contractor. You drop one thing, or you make a little mistake here, they make it sound like you done blew the whole project. They are not as forgiving as they would for a white contractor. I have seen it. I've been there, face to face. You have a legitimate problem that they don't want to understand but let the white guy [have] the same problem, it's no problem. … No respect. It's like in life ... you get treated differently than the mainstream." [#23]

The Black American owner of an MBE- and SBE-certified professional services firm stated, "Small and women owned businesses sometimes are perceived as literally less than, not capable, not qualified, not skilled enough, not experienced enough, and therefore the value of the product or the service is diminished. The other [barrier] is that the grace or the lack of grace for [mistakes]. In other words, there are majority companies who are incumbents

with their clients who may have made a mistake or a misstep, and because of the relationship are able to recover. They're able to recorrect, redirect. But oftentimes with small and women-owned businesses, minority businesses in particular, it's kind of a one and done type of relationship." [#FG1]

The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "We have to start proving ourselves before we get to the site. And then after we get to the site, if we make one little mistake, if we park in the wrong place, anything at all... I mean, we're starting off behind just because of what we look like." [#FG1]

6. Business assistance programs. Several interviewees mentioned that business assistance programs seem to be very focused on the construction industry but often leave out professional services and goods and other services entirely.

A representative of a Black American-owned, MBE- and DBE-certified professional services company stated, "They're so focused on the construction industry and the construction trades, like are there some minority private law firms out there to get work? I don't know. Do you hear [about] all of them? Accounting firms, do they [consider] minority accounting firms? You just don't hear of those." [#1]

A representative of a Black American-owned, MBE-certified professional services company stated, "Professional services firms don't get the respect, and we don't get the level of emphasis for procurement opportunities that construction and manufacturing gets, because those are higher dollar spends. … If I'm going to go to a networking session, or if I'm going to go into a relationship-building session, have people there who buy professional services and not folks who spend 90 percent of their time on construction deals. That doesn't do me any good, and it doesn't do them any good, because we can't have a conversation together." [#3]

The Black American woman owner of an SBE-certified professional services firm stated, "One thing I notice too about professional services, we're left out the conversations a lot. The focus is usually on construction and supplies and things like that. The professional part is left to the bigger firms. They get all of the work, and they're not required to partner." [#FG2]

A participant from a public meeting stated, "But it seems like the tone of the town [hall] conversation[s] is more about trying to find ways where [COVID] funds were not allocated properly as opposed to finding ways to assist a professional services business." [#PT1]

Interviewees perceive business assistance programs as only for people and businesses that do not have any business acumen or knowledge surrounding how to run a business, which makes businesses who could potentially benefit from assistance programs reluctant to engage.

The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We haven't participated in a whole bunch of direct programs. I think some of the ones that are out there today are really for people who maybe didn't have the business acumen, per se, to then start a business and figure all that you need to do for a business. A lot of the programs are really geared towards that." [#5]

The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "[Business assistance programs are] unhelpful because, to me, they're mostly for startups, and I'm not a startup." [#35]

Interviewees found federal programs to be very helpful, but city- and state-funded programs have been lacking with little effort put into helping MBEs, WBEs, and SBEs at the local level.

The male co-owner of a WBE-certified construction firm stated, "I wasn't aware [of city- and state-funded programs]. I'm sure there was some, but we weren't overly aware of local ones and the state ones. … I'm sure if we were more aware of local, county-level meetings and groups and stuff like that, [the other co-owner] would be probably much more active in those organizations." [#11]

A representative of an MBE-, SBE-, and DBE-certified construction firm stated, "I can't think of any tax-based organization that's better than the US government. The City is somewhat okay. The State,I don't know. But the County, they're nowhere on my map. ... The state, they more or less abolished the MBE and SBE Program far as I'm concerned, so that's all I'm saying. It's the federal government … I see a sincere effort by the military and the federal government to work with more MBEs. Can't say that for the City. I can't say that for the County." [#23]

7. Recommendations. Multiple interviewees requested regular forecasting meetings with both MSDGC and Hamilton County, to inform the public about how to learn about both public bid opportunities as well as small, informal quote opportunities.

A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "I wish the local government would operate more like the federal government where the federal government provides you with who's the contract officer, all their contact information, who has been the incumbent, what the award was and the terms of the contract. And they also forecast what's the opportunities in the next six months. And who's the contract officer for that, the description of it, and the opportunity that's forthcoming. … What will be very helpful is [if] the municipalities and counties would do the same. .... It will move toward being level. Because you are aware of what's coming just as others who have insider information." [#40]

The Hispanic American owner of a goods and services firm stated, "There are request for quotes somewhere. Knowing for me in the chamber, telling upcoming businesses where to go for that information, where to go look up those [requests for qualifications], where to see what the qualifications, the requirements are for the County. That's why I was focused early on the website, because it's got to be tool that we use to tell people how to get to do business with the County." [#FG2]

The woman owner of a professional services firm stated, "If they were connected [so] we don't have to fill out a lot [of paperwork] and then get all these random emails about [requests for proposals] that have nothing to do with my [line of work]. Just look at the NAICS code. That would be great." [#FG2]

The Hispanic American owner of a professional services firm stated, "If we can have like a forecast of what contracts are out there, who has them ... . I mean, and the sooner the

better, so you can start doing research and then your resources are not drained. You can have a bid, no bid decision early on, and then your resources are not drained going after things that you have no chance of winning." [#FG2]

Many interviewees requested, as a way to facilitate team building and networking, an accessible and well-organized list of potential plan holders, prime contractors, and subcontractors, organized by industry and certification status.

A representative of a majority-owned professional services firm stated, "Access to an updated list would be good. I don't know how many women, minority-owned businesses there are in Hamilton County that would do my type of work. I couldn't tell you." [#24]

A representative of a woman-owned construction company stated, "Why can't the federal government send out an email with a list of all the prime contractors looking for small businesses, woman-owned, veteran, whatever it is… . A list of all those companies with contact information to where we can reach out to them and say, 'Hey, listen. We're in this area, southwestern Ohio. We're a woman-owned business, 100 percent woman-owned business. This is what we do.' To where we can call them and have a conversation with them. I bet a lot of those prime companies would like for that to happen, because it'd make their job easier." [#13]

The owner of a majority-owned goods and services company stated, "If the County had a resource that could help put a prospecting list together … . Say, 'Okay, you're looking to reach sign companies. Well, here's a list of sign companies with some contacts.' Or at least help point them in the right direction where they can find that information. … I think that would be a huge help." [#16]

Businesses suggested that if organizations offer courses or programs, they should provide multiple time slots outside of work hours or online recordings with options for people to ask questions after the fact to allow all business owners to participate. They should also avoid using too much jargon and break down processes into discrete tasks.

The Black American woman owner of a professional services company stated, "A lot of business owners do a lot in a day in terms of reading contracts, reading and/or composing emails sometimes … . But when it comes to stuff like the government contracts, and the websites, and how to navigate the website, and just how things work, could we break it down simpler? … Having a video of someone actually talking about the steps, instead of me having to read it. …But that would be awesome, especially for people who are new to the situation. And I don't know if there are any classes that teach you about procurement contracts, I don't know if that's offered. If it is, then to have that information more out there about when the classes are available, that would be awesome. … Whoever designed the information that goes on there, they obviously work there and have been working there for a while. And so yeah, they're talking as if they're talking to a coworker … I may need the A, B, C, D, E, F, G version of what you've got going on. I'm not asking anybody to slow down, and I should come in with some idea of what the situation's about, but yeah, if we could just use a little less jargon and more plain English" [#4]

Pre-set rates are seen as a barrier as they are generally not in line with current market rates, reducing a business's competitiveness and profitability. The County should consider reviewing preset rates for professional services and associated audits.

> *A representative of a Black American-owned, MBE-certified professional services company stated, "With regard to local [organizations], what I've also discovered, which is another reason why I have opted not to bid, is that … for government and municipalities … they're dramatically different in their expectations. So, the scope of work is, 'We want you to do everything that you do for the corporate sector, but we want you to do it for half the price, or two thirds of the price.' And so, when you put in best and lowest [bids], those are almost oxymoronic. Best does not necessarily mean lowest, and lowest does not always equate to best." [#3]*

> *A representative of a majority-owned professional services company stated, "I was approached probably 15 years ago by an architect who said he wanted us to be part of his team, and we would be contracting directly with this housing authority. And I said okay, and he sent me some paperwork, and I sent [it] back, and I said, 'This has an engineering rate schedule.' And he goes, 'Yeah, that's their engineering rate schedule.' And I said, 'Well, that doesn't make sense. They're saying they're going to pay an engineering rate of $80 an hour.' And at that time, my billing rate was a $100 an hour. And he said, 'Well, yeah, that's just what they're willing to pay.' And I said, 'Well, then we're done here, because I'm not going to work for $80.' [#8]*

> *The owner of a WBE- and SBE-certified professional services firm stated, "I just work with MSD. I don't work directly with the County. I'll say, like in terms of doing the same work and making money, it used to be better. MSD has now require d... it's called a … federal audited rate, or something like that. For example, I used to build projects at a 2.97 multiplier and now I'm at a 2.4, because I'm small and I don't want to pay 20, 30 whatever, a thousand dollars to have this audit. So now your choice is you keep your multiplier, but you get this audit done. I don't even know if it's annual because it's far too much money for me to even consider doing. So, it's cheaper for me just to go at a 2.4 multiplier and just suck up the loss than to try to do that audit. And the reason that exists is because I'm being held to the same standard as a gigantic national firm because their contract rolls down to me." [#FG2]*

Businesses had several recommendations for how the County can make it easier for firms to "break in" to their work. Interviewees discussed how some projects are too large for small firms, and that breaking up the contracts into smaller pieces would benefit small, woman-, and minority-owned firms. In addition, some firms suggested the County find a balance between past experience that is identical to the type of work for a project and past experience that is equivalent, even if different. Lastly, companies suggested that the County continue to work to incentivize MBE participation.

> *I would say, as the County begins to think about how to explore this, think about it from the framework of, how do we increase the number of MBEs doing business with the County versus how do we eliminate people who shouldn't? It's a mindset shift. The structure of applications are either going to be structured to entice you to work with me, or the structure of the applications and the procurement is going to be structured to*

disincentivize or to discourage you from working with me. The choice is the County's. How do you want to structure the procurement process? It's the difference between being invited and welcomed." [#3]

The co-owner of a WBE-certified construction company stated, "I would say a lot of [public work opportunities] are too large. I've gotten together with a couple other smaller companies, and tried to team up, and bid on things. But I would definitely say some of the [requests for proposals] are way too large for smaller businesses." [#27]

A representative of a Black American-owned MBE- and WBE--certified construction company stated, "Everybody wants past performance, but how do you get the past performance if you don't allow me to perform on this?" [#29]

A representative of a Subcontinent Asian American-owned construction company stated, "MSD has been very tough to work with because they have a union requirement. Otherwise, projects are just so large that minority and smaller businesses don't get a chance to bid because of bonding restrictions and size limitations for prime contracting. I think the marketplace is fine, I think there is plenty of work out there. I think it's just making it more affordable for opportunity." [#AV50]

Chapter 5.
Data Collection

Chapter 5 provides an overview of the policies that Hamilton County (the County) uses to award contracts and procurements; the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the disparity study; and the process we used to collect relevant prime contract, subcontract, and vendor data for the study. Chapter 5 is organized into five parts:

A. Overview of contracting and procurement policies;

B. Contract and procurement data;

C. Vendor data;

D. Relevant types of work; and

E. Agency review process.

A. Overview of Contracting and Procurement Policies

The County has established a purchasing policy in accordance with state and federal laws. That policy, as laid out in the Hamilton County Purchasing Policy Manual, lays out procurement procedures, including quotes and bidding requirements for contracts and procurements of various sizes. County purchasing guidelines govern the purchasing functions of all its entities, including the Board of County Commissioners (BOCC), County departments, and elected offices and aim to maximize competition and transparency in County purchasing. The Purchasing Department oversees most County contracts and procurements and is responsible for ensuring compliance with procurement policies and procedures.

1. Purchasing policies. The County uses different purchasing methods depending on the estimated cost of the purchase, the required goods or services, the needs of the originating entity, the funding source, and any specific contract requirements. The County Administrator has administrative release authority and can approve certain contracts up to $100,000 on behalf of the BOCC. That authority applies to purchase orders or contracts up to $100,000 awarded via low bid procedures and purchase orders or contracts up to $50,000 typically awarded using other procedures. County entities may purchase goods and services worth less than $1,000 at their discretion but must follow County guidelines to make purchases worth $1,000 or more. Most County purchases worth $1,000 or more are procured using either a quote process or competitive procurement procedures.

a. Micro purchases. County entities may purchase goods and services worth less than $1,000 at their discretion but must follow the County's Small Business Enterprise (SBE) policy by utilizing small and diverse businesses listed in the Building Opportunities by Leveraging Diversity (BOLD) Contractors Directory whenever possible.

b. Quotes. Per the Purchasing Policy Manual, the County follows quote procedures to procure goods and services worth at least $1,000 but less than $50,000. County entities must obtain at least three quotes to ensure competitive pricing for purchases of that size. Entities can obtain quotes using the DemandStar/Onvia electronic quote solicitation tool, Bid Sync, or another method. The originating County entity must maintain a record of each quote received for auditing purposes.

In addition to those policy requirements, departments should utilize the BOLD Contractors Directory to identify small and diverse businesses for solicitation. In accordance with the County's SBE policy and Purchasing Policy Manual, County entities must follow procedures to encourage small and diverse business participation in purchases procured through quotes procedures:

- For small purchases with federal funds that require solicitation of quotes, departments shall ensure, whenever possible, that is receives a quote from at least one firm listed in the BOLD Contractors Directory that provides the product or service.
- For small purchases with local funds that do require solicitation of quotes, departments shall, whenever possible, ensure that it receives at least one of the three required quotes from a firm listed in the BOLD Contractors Directory that provides the product or service.

c. Competitive procurements. The County follows competitive procurement procedures to award contracts and procurements worth $50,000 or more. The County will issue an invitation to bid (ITB) or a request for proposals (RFP) depending on the required goods or services, and general requirements apply to both. The originating County entity is typically responsible for drafting bid documents for competitive bids and proposals but may consult with the Purchasing Department to ensure compliance with County purchasing procedures. The bid document must include defined specifications and quantifiable requirements for the goods or services being purchased and dates for advertising the bid, any pre-bid/pre-proposal conferences, questions and answers, and bid/proposal opening. The originating County entity must submit the bid document to the Purchasing Department for review and processing. All ITBs and RFPs must be posted on a public County bulletin board for at least two weeks preceding bid opening and published in a County newspaper of general circulation at least once a week for two consecutive weeks preceding bid opening. All competitive procurements solicited through the Purchasing Department are also published electronically using Bid Sync. ITBs and RFPs are also sent directly to SBEs via the Office of Economic Inclusion. County entities cannot split a project up into smaller components to avoid competitive procurement requirements. The County must follow additional guidelines depending on whether the goods and services are procured through an ITB or RFP.

i. Invitations to bid. For ITBs, once bids are opened and tabulated, they immediately become public record. When evaluating bids, the County may consider not only the lowest price offered and responsiveness to bid specifications but the actual capability of the respondent to perform the required work. An award is then made to the "lowest and best" bidder and typically results in a fixed-price contract. In general, the County cannot negotiate the terms, conditions, or specifications of an ITB after opening responses.

ii. Requests for proposals. The County uses RFPs to procure services such as technical solutions that are customizable and commodities with unpredictable prices. RFPs cannot be used for most construction related services. The County reviews and evaluates all proposals to determine which one is most advantageous to the County, taking into consideration the evaluation factors and criteria specified in the RFP. The County can negotiate price, schedule, terms, and specifications with individual respondents.

2. Exceptions to competitive purchasing requirements. Various types of purchases are exempt from competitive purchasing requirements.

a. Certain professional services. The County is not required to follow competitive purchasing procedures to procure the services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser.

b. Emergency purchases. Emergency purchases do not require competitive bids, but the BOCC must unanimously vote that a real and present emergency exists to execute an emergency purchase. Emergency purchases must also meet on of two criteria. Either the estimated cost must be less than $100,000, or there must be a physical disaster to structures, radio communications equipment, or computers.

c. Single source. Single source contracts are allowed when there is a single supplier of the required good or service. The originating County entity must fill out a Single Source Justification Form and submit it to the Purchasing Department for approval before executing a single source purchase.

d. Other exceptions. Additional types of goods and services are exempt from competitive purchasing requirements, including work performed by non-profits or governments, purchases related to certain social services, certain emergency medical services, services for delinquent youth, case management for prosecuting attorneys, and childcare for County employees.

3. Federally funded projects. Contracts that include federal funding are subject to federal procurement regulations in addition to County procurement requirements. Federally funded procurements must reflect County procurement requirements, so long as those requirements also conform to applicable federal regulations.

B. Contract and Procurement Data

BBC collected contract and procurement data from various Hamilton County (County) and City of Cincinnati, for Metropolitan Sewer District of Greater Cincinnati (MSDGC), data systems, which served as the basis for key disparity study analyses, including the utilization, availability, and disparity analyses. We collected the most comprehensive data available on construction, professional services, and goods and other services contracts and procurements the County and the City (for MSDGC) awarded between January 1, 2016 through June 30, 2021 (i.e., *the study period*). We sought data that included information about both prime contracts and subcontracts regardless of the race/ethnicity and gender of the owners of the businesses that performed the work or their statuses as certified minority- or woman-owned businesses.

1. Prime contract data. The County and the City (for MSDGC) provided BBC with electronic data on relevant prime contracts they awarded during the study period. Those data came primarily from the County's Performance Financial Management System and the City of Cincinnati's B2GNow and Vendor Compliance and Certification data systems, which BBC then augmented with data from individual County departments. As available, we collected the following information about each relevant prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount;
- Amount paid-to-date;
- Funding source (federal, state, or local funding); and
- Prime contractor name.

The County and the City (for MSDGC) advised BBC on how to interpret the data they provided, including how to identify unique *contract elements*—that is, prime contracts or subcontracts—and how to aggregate related payment amounts. When possible, we aggregated related payments or purchase order line items into larger contract or purchase order elements. In instances where we could not do so, we treated individual payments and line items as separate contract elements.

2. Subcontract data collection. The County and the City (for MSDGC) provided BBC with data they collect on subcontracts related to the prime contracts awarded during the study period. The County's Office of Economic Inclusion and Facilities Department provided comprehensive subcontract data for 42 prime contracts, which accounted for approximately $132 million of the contract and procurement dollars it awarded during the study period.

To gather additional subcontract data, BBC conducted surveys with prime contractors to collect information on the subcontracts associated with the County and MSDGC prime contracts on which they worked during the study period. We sent prime contractors surveys via e-mail and mail to request subcontract data associated with 344 prime contracts the County awarded and 339 prime contracts MSDGC awarded during the study period, accounting for approximately $318 million of County contracting and $1 billion of MSDGC contracting. We requested the following information from prime contractors about each relevant subcontract associated with their projects:

- Associated prime contract number;
- Subcontract commitment amount;
- Amount paid on the subcontract as of June 30, 2021;
- Description of work;
- Subcontractor name; and

- Subcontractor contact information.

After the first round of surveys, BBC sent reminder letters and e-mails to prime contractors that did not respond in the first round and worked with the County and MSDGC to continue to contact them. Through the survey effort, we collected subcontract data associated with more than $66 million worth of County contracts and procurements and more than $392 million worth of MSDGC contracts and procurements.

3. Prime contract and subcontract amounts. For each contract element included in our analyses, BBC examined the dollars the County and MSDGC awarded to each prime contractor and the dollars prime contractors committed to any subcontractors. If a contract did not include any subcontracts, we attributed the contract's or procurement's entire award amount to the prime contractor. If a contract or procurement included subcontracts, we calculated subcontract amounts as the amounts committed to each subcontractor. We then calculated the prime contract amount as the total award amount less the sum of dollars committed to all subcontractors.

4. Contracts and procurements included in the study. Figure 5-1 presents the number of contract elements and associated dollars BBC included in our analyses, and Figure 5-2 presents County contract and procurement dollars by relevant department. The number of contract elements and associated dollars presented for MSDGC in Figures 5-1 and 5-2 are inclusive of MSDGC's federally funded contracts through the Water Pollution Control Loan Fund (WPCLF). However, these contracts are not included in MSDGC's core analyses presented in this report because they are subject to the Environmental Protection Agency (EPA)'s Disadvantaged Business Enterprise (DBE) Program rather than MSDGC's SBE Program, and thus fall outside of MDSGC's sphere of influence as it relates to business inclusion. Results pertaining to these contracts can be found in Figure F-27 in Appendix F.

Figure 5-1.
County and MSDGC contract elements included in the study

Note:

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

Source:

BBC from County and MSDGC data.

Organization and contract type	Number	Dollars (in thousands)
Hamilton County		
Construction	3,146	$251,622
Professional services	1,988	$94,242
Good and other services	5,045	$146,931
Total	**10,179**	**$492,794**
MSDGC		
Construction	1,143	$599,958
Professional services	649	$343,346
Good and other services	726	$114,342
Total	**2,518**	**$1,057,646**

C. Collection of Vendor Data

BBC also compiled the following information on the businesses that participated in the County's and MSDGC's contracts and procurements during the study period:

- Business name;

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

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

- The County's and MSDGC's contract and vendor data;
- The County's and MSDGC's lists of certified vendors;
- The Ohio Department of Transportation's DBE Directory;
- The City of Cincinnati's Minority and Women Business Enterprise Program certification list;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Small Business Administration certification and ownership lists; and
- Surveys the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Online research of business websites and other sources.

Figure 5-2.
County contract and procurement dollars included in the study by department

Note:

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

Source:

BBC from County data.

Department	Dollars (in thousands)
County Engineer	$93,946
County Facilities	$84,568
Stadiums	$71,261
Job and Family Services	$63,372
Board of County Commissioners	$35,984
County Administrator	$22,133
Developmental Disabilities Service	$18,782
Metropolitan Sewer District	$15,917
Sheriff	$13,226
Non-Departmentals	$12,636
Auditor	$12,625
Planning and Development	$11,932
Board of Elections	$6,078
Court of Common Pleas	$4,770
Public Health District	$4,031
Environmental Services	$3,651
Mental Health & Recovery Services	$2,244
Communications Center	$2,229
Juvenile Court	$1,811
River City Correctional Facility	$1,673
Prosecutor	$1,394
Clerk of Courts	$1,213
Public Defender	$1,059
Probation	$915
Probate Court	$895
Transportation Improvement District	$645
Emergency Management	$542
Recorder	$541
Treasurer	$511
Municipal Court	$397
Court of Domestic Relations	$369
Coroner	$259
Soil & Water	$215
CLEAR	$199
Law Library	$198
Court Reporters	$178
Health and Hospitalization Tax Levy	$106
Zoological Gardens	$85
Court of Appeals	$78
Veterans Service Commission	$54
Community Development	$50
Regional Planning Commission	$20
Economic Development	$1
TOTAL	**$492,794**

For each prime contract and subcontract, BBC determined the *subindustry*, or work specialization, that best characterized the business that performed the work involved

(e.g., heavy construction).[1] We identified subindustries based on the County's and MSDGC's contract, procurement, and vendor data; surveys the study team conducted with prime contractors and subcontractors; business certification lists, D&B business listings; and other sources. Figure 5-3 presents contract and procurement dollars we included in the disparity study by subindustry, contract type, and organization.

BBC combined related subindustries that accounted for relatively small percentages of total contracting dollars into five "other" subindustries: "other construction services," "other construction materials," and "other professional services", "other goods" and "other services". For example, the dollars the County and MSDGC awarded to contractors for "masonry" represented less than 1 percent of total dollars BBC examined in the study. BBC combined "masonry" with other types of work that also accounted for relatively small percentages of total dollars and that were relatively dissimilar to other types of work into the "other construction services" subindustry.

There were also various subindustries BBC did not include in our analyses:

- Purchases and grants the County and MSDGC made with or awarded to government agencies, utility providers, hospitals, or other nonprofit organizations ($1.5 billion for the County and $124 million for MSDGC);
- Contracts and procurements that reflected *national markets*—that is, subindustries dominated by large national or international businesses—or subindustries for which the County and MSDGC awarded the majority of dollars to businesses located outside the relevant geographic market area ($119 million for the County and $83 million for MSDGC);[2]
- Purchases that often include property purchases, leases, or other pass-through dollars ($297 million for the County and $4 million for MSDGC);[3] or
- Types of work not typically included in disparity studies and account for relatively small proportions of the County's and MSDGC's contract and procurement dollars ($22 million for the County and $8 million for MSDGC).[4]

D. Agency Review Process

The County and MSDGC reviewed contract, procurement, and vendor data several times during the study process. BBC met with the County and MSDGC to review the data collection process, information the study team gathered, and summary results. We incorporated the County's and MSDGC's feedback into the final data we used as part of our analyses.

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[1] BBC developed subindustries based on groupings of 8-digit D&B industry classification codes.

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

[3] Examples of such work include real estate consultants and apartment building operators.

[4] Examples of industries not typically included in disparity studies include pharmaceuticals and casinos.

Figure 5-3.
County and MSDGC dollars by subindustry

Note:

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

Source:

BBC from County and MSDGC data.

Contract type and subindustry	Organization total (in thousands)	
Construction	**County**	**MSDGC**
Building construction	$42,507	$176,408
Electrical work	$42,014	$25,106
Highway, street, and bridge construction	$39,887	$77,337
Concrete, asphalt, sand, and gravel products	$30,852	$10,235
Plumbing and HVAC	$21,471	$58,070
Concrete work	$19,830	$17,026
Other construction materials	$14,601	$13,925
Other construction services	$14,152	$5,548
Painting, striping, marking, and weatherproofing	$8,945	$3,639
Roofing, siding, and flooring contractors	$5,882	$4,059
Excavation, drilling, wrecking, and demolition	$4,989	$34,269
Electrical equipment and supplies	$3,230	$5,545
Water, sewer, and utility lines	$2,889	$147,380
Remediation and cleaning	$374	$21,411
Total construction	**$251,622**	**$599,958**
Professional services	**County**	**MSDGC**
IT and data services	$20,817	$1,552
Engineering	$18,957	$232,888
Legal services	$13,712	$11,123
Finance and accounting	$10,916	$125
Appraisal services	$10,151	$336
Human resources and job training services	$8,521	$245
Other professional services	$3,481	$1,600
Business services and consulting	$2,859	$4,155
Advertising, marketing and public relations	$2,315	$3,389
Environmental services	$1,510	$75,527
Construction management	$1,003	$12,407
Total professional services	**$94,242**	**$343,346**
Goods and other services	**County**	**MSDGC**
Transit services	$51,552	-
Parking services	$20,218	$7
Computers and peripherals	$11,956	$9,291
Office equipment and supplies	$11,037	$3,638
Automobiles	$9,929	$176
Cleaning and janitorial services	$6,734	$717
Petroleum and petroleum products	$5,800	$611
Other services	$5,093	$5,389
Other goods	$4,582	$6,456
Printing, copying, and mailing	$4,189	$110
Waste and recycling services	$3,463	$26,582
Water and sewer treatment machinery	$2,636	$33,324
Industrial equipment and machinery	$2,399	$15,649
Landscape services	$2,295	$6,009
Uniforms and apparel	$1,801	$1,709
Cleaning and janitorial supplies	$1,488	$486
Security systems services	$880	$39
Facilities management	$879	$4,150
Total goods and other services	**$146,931**	**$114,342**
GRAND TOTAL	**$492,794**	**$1,057,646**

CHAPTER 6.
Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses *ready, willing, and able* to perform prime contracts and subcontracts that Hamilton County (the County)—including the Metropolitan Sewer District of Greater Cincinnati (MSDGC), which it owns and operates—awards in the areas of construction, professional services, and goods and other services.[1] Chapter 6 describes the availability analysis in five parts:

A. Purpose of the Availability Analysis;

B. Available Businesses;

C. Availability Database;

D. Availability Calculations; and

E. Availability Results.

Appendix E provides additional supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for County and MSDGC prime contracts and subcontracts to:

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

Estimating availability is useful to the County and MSDGC in setting overall goals for the participation of minority- and woman-owned businesses in the work they award as well as in setting *contract-specific goals*, if they decide the use of such measures is appropriate. Assessing disparities between participation and availability allowed BBC to determine whether certain business groups were *underutilized* during the study period relative to their availability for County and MSDGC work, which is crucial to determining whether the use of contract-specific goals or other *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. Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements the County and MSDGC awarded during the study

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

period, which serves as a proxy for the work they might award in the future. BBC began the availability analysis by identifying the specific subindustries in which the County and MSDGC spend the majority of their contracting dollars (for details, see Chapter 5) as well as the geographic area in which the majority of the businesses with which the County and MSDGC spend those contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*).[2]

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

1. Overview of availability surveys. BBC worked with Davis Research to conduct telephone and online surveys with business owners and managers to identify local businesses potentially available for County and MSDGC prime contracts and subcontracts. BBC began the process by compiling a *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and are located within the RGMA. BBC 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 that were most related to the contracts and procurements the County and MSDGC awarded during the study period. BBC obtained listings on 7,300 local businesses that perform work related to those work specializations. We did not have working phone numbers for 1,864 of those businesses, but the study team attempted availability surveys with the remaining 5,436 businesses.

2. Survey information. The study team conducted availability surveys with businesses listed in our phone book to collect various information about each business, including:

- Status as a private sector business (as opposed to 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 the business is able to perform;
- Whether the business is able to work or serve customers in Hamilton County; and

[2] BBC defined the RGMA for the County's contracting and procurement as Hamilton, Butler, Warren, and Clermont Counties in Ohio and Boone, Campbell, and Kenton Counties in Kentucky. We made that determination based on the fact that the County awards the vast majority of its contract and procurement dollars to businesses located within those geographical areas (approximately 90% of relevant contract and procurement dollars).

- Race/ethnicity and gender of ownership.

3. Potentially available businesses. BBC considered businesses to be potentially available for County and MSDGC prime contracts or subcontracts if they reported having a location in the RGMA and reported possessing *all* of the following characteristics:

- Being a private sector business;
- Having performed work relevant to County and MSDGC construction, professional services, or goods and other services contracting or procurement;
- Being able to perform work or serve customers in Hamilton County; and
- Being interested in working for government organizations.

BBC also considered the following information to determine if businesses were potentially available for specific prime contracts and subcontracts the County and MSDGC award:

- The roles in which they work (i.e., as a prime contractor, subcontractor, or both); and
- The largest contracts or procurements they are able to perform.

C. Availability Database

After conducting availability surveys, BBC developed a database of information about businesses potentially available for relevant County and MSDGC contracts and procurements. Figure 6-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The database included information on 681 businesses potentially available for specific construction, professional services, and goods and other services contracts and procurements the County and MSDGC award. As shown in Figure 6-1, of those businesses, 28.6 percent were minority- or woman-owned, which reflects a simple count of businesses with no analysis of their availability for specific County or MSDGC contracts or procurements. It represents only a first step toward analyzing the availability of minority- and woman-owned businesses for that work.

Figure 6-1.
Percent 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 Research & Consulting availability analysis.

Business group	Representation
All minority- and woman-owned	28.6 %
White woman-owned	15.3 %
Minority-owned	13.4 %
Asian American-owned	3.7 %
Black American-owned	8.2 %
Hispanic American-owned	1.0 %
Native American-owned	0.4 %

D. Availability Calculations

BBC used a *custom census* approach—which accounts for specific business characteristics such as work type, business capacity, contractor role, and interest in government work—to estimate the availability of minority- and woman-owned businesses for County and MSDGC work. We analyzed information from the availability database to develop dollar-weighted estimates of the

degree to which minority- and woman-owned businesses are ready, willing, and able to perform County and MSDGC work. Those estimates represent the percentage of contracting and procurement dollars one would expect the County and MSDGC to award to minority- and woman-owned businesses based on their availability for specific types and sizes of that work.

BBC used a contract-by-contract matching approach to estimate availability. Only a portion of the businesses in the availability database was considered potentially available for any given County or MSDGC prime contract or subcontract. BBC first identified the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*), including type of work, contract size, and contract role 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, professional services, or goods and other services work in that particular role for that type of work for government organizations;
   - Can perform work or serve customers in Hamilton County; and
   - Have the ability to perform work of that size or larger.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, and businesses owned by white men in the availability database that met the criteria specified in Step 1.
3. The study team translated the counts of businesses in step 2 into percentages.

BBC repeated those 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 availability of minority- and woman-owned businesses overall and separately for each relevant racial/ethnic and gender group. We also estimated availability separately for various subsets of contracts and procurements the County and MSDGC awarded during the study period. Figure 6-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract the County awarded during the study period.

BBC's availability calculations are based on prime contracts and subcontracts the County and MSDGC awarded between January 1, 2016 and June 30, 2021. A key assumption of the availability analysis is that the work the County and MSDGC awarded during the study period is representative of the contracts and procurements they will award in the future. If the types and sizes of the contracts and procurements the County and MSDGC award in the future differ substantially from the ones they awarded during the study period, then they should adjust availability estimates accordingly.

Figure 6-2.
Example of calculating availability for a County subcontract

On a contract the County awarded during the study period, the prime contractor awarded a subcontract worth $519,785 for engineering services. To determine the overall availability of minority- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

a. Indicated they performed engineering work;
b. Reported being able to perform work of equal size or larger;
c. Can perform work or serve customers in Hamilton County; and
d. Reported interest in working as a subcontractor on government contracts or procurements.

BBC found 30 businesses in the availability database that met those criteria. Of those businesses, 9 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 30.0 percent (i.e., 9/30 x 100 = 30).

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts the County and MSDGC awarded during the study period.

1. Overall. Figure 6-3 presents dollar-weighted estimates of the availability of minority- and woman-owned businesses for County and MSDGC contracts and procurements considered together. Overall, the availability of minority- and woman-owned businesses for that work is 26.0 percent, indicating that one might expect the County and MSDGC to award 26 percent of their contract and procurement dollars to minority- and woman-owned businesses based on their availability for that work. The business groups that exhibit the greatest availability for County and MSDGC work are white woman-owned businesses (8.8%), Black American-owned businesses (7.2%), and Asian American-owned businesses (7.0%).

Figure 6-3.
Availability estimates for County and MSDGC work considered together

Business group	Availability
All minority- and woman-owned	26.0 %
White woman-owned	8.8 %
Minority-owned	17.1 %
Asian American-owned	7.0 %
Black American-owned	7.2 %
Hispanic American-owned	1.8 %
Native American-owned	1.2 %

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 Figure F-2 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Figure 6-4 presents the availability of minority- and woman-owned businesses separately for County and MSDGC work. As shown in Figure 6-4, the availability of those businesses is greater for County work (28.4%) than for MSDGC work (24.5%). The same business groups exhibit the greatest availability for County and MSDGC work: white woman-owned businesses (County =

12.7%; MSDGC = 6.5%), Black American-owned businesses (County = 7.9%; MSDGC = 6.7%), and Asian American-owned businesses (County = 6.6%; MSDGC = 7.2%).

Figure 6-4.
Availability estimates for County and MSDGC work considered separately

Note:

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

For more detail, see Figures F-3 and F-15 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Organization	
	County	MSDGC
All minority- and woman-owned	28.4 %	24.5 %
White woman-owned	12.7 %	6.5 %
Minority-owned	15.7 %	18.0 %
Asian American-owned	6.6 %	7.2 %
Black American-owned	7.9 %	6.7 %
Hispanic American-owned	0.9 %	2.3 %
Native American-owned	0.4 %	1.7 %

2. Contract role. Many minority- and woman-owned businesses are small businesses and often work as subcontractors. Thus, it is useful to examine availability estimates separately for prime contracts and subcontracts. Figure 6-5 presents availability estimates for prime contracts and subcontracts separately for the County (top panel) and MSDGC (bottom panel). As shown in Figure 6-5, the availability of minority- and woman-owned businesses is lower for prime contracts than for subcontracts for both County work (prime contracts = 27.8%; subcontracts = 31.9%) and MSDGC work (prime contracts = 24.5%; subcontracts = 25.8%).

Figure 6-5.
Availability estimates for County and MSDGC 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-9. F-10, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Role	
	Prime contracts	Subcontracts
County		
All minority- and woman-owned	27.8 %	31.9 %
White woman-owned	11.1 %	22.1 %
Minority-owned	16.7 %	9.8 %
Asian American-owned	7.0 %	4.0 %
Black American-owned	8.5 %	4.4 %
Hispanic American-owned	0.9 %	0.8 %
Native American-owned	0.3 %	0.6 %
MSDGC		
All minority- and woman-owned	24.5 %	25.8 %
White woman-owned	6.2 %	13.1 %
Minority-owned	18.3 %	12.7 %
Asian American-owned	7.3 %	5.0 %
Black American-owned	6.8 %	5.6 %
Hispanic American-owned	2.4 %	1.3 %
Native American-owned	1.8 %	0.8 %

3. Industry. BBC examined availability analysis results separately for County and MSDGC construction, professional services, and goods and other services work to assess whether the availability of minority- and woman-owned businesses differed by industry. As shown in the top (County) and bottom (MSDGC) panels of Figure 6-6, minority- and woman-owned businesses exhibit the greatest availability for professional services work and less availability for construction and goods and other services work. That pattern exists for both the County (construction = 27.1%; prof. svcs. = 32.7%; goods and other svcs. = 27.8%) and MSDGC (construction = 20.8%; prof. svcs. = 29.7%; goods and other svcs. = 20.5%).

Figure 6-6. Availability estimates for County and MSDGC construction, professional services, and goods and other 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 F6, F-7, F-8, F-16, F-17, and F-18 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Industry		
	Construction	Professional services	Goods and other services
County			
All minority- and woman-owned	27.1 %	32.7 %	27.8 %
White woman-owned	14.5 %	5.6 %	14.0 %
Minority-owned	12.6 %	27.2 %	13.7 %
Asian American-owned	6.5 %	12.3 %	2.9 %
Black American-owned	4.4 %	13.0 %	10.6 %
Hispanic American-owned	1.1 %	1.8 %	0.0 %
Native American-owned	0.6 %	0.1 %	0.2 %
MSDGC			
All minority- and woman-owned	20.8 %	29.7 %	20.5 %
White woman-owned	9.9 %	1.5 %	10.8 %
Minority-owned	10.9 %	28.2 %	9.7 %
Asian American-owned	6.9 %	8.9 %	2.7 %
Black American-owned	2.1 %	11.7 %	6.9 %
Hispanic American-owned	0.7 %	4.8 %	0.0 %
Native American-owned	1.2 %	2.8 %	0.0 %

4. Contract size. BBC examined availability estimates separately for *large prime contracts*—prime contracts worth $100,000 or more—and *small prime contracts*—prime contracts worth less than $100,000—that the County and MSDGC awarded to examine the relationship between contract size and availability at the prime contract level. As shown in the top (County) and bottom (MSDGC) panels of Figure 6-7, minority- and woman-owned business availability is somewhat lower for large prime contracts than for small prime contracts for both the County (large = 27.2%; small = 29.9%) and MSDGC (large = 24.4%; small = 25.7%).

Figure 6-7. Availability estimates for County and MSDGC 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-11, F-12, F-21, and F-22 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Contract size	
	Large	Small
County		
All minority- and woman-owned	27.2 %	29.9 %
White woman-owned	9.1 %	17.8 %
Minority-owned	18.1 %	12.1 %
Asian American-owned	7.6 %	4.9 %
Black American-owned	9.1 %	6.5 %
Hispanic American-owned	1.1 %	0.3 %
Native American-owned	0.3 %	0.3 %
MSDGC		
All minority- and woman-owned	24.4 %	25.7 %
White woman-owned	6.0 %	13.6 %
Minority-owned	18.4 %	12.0 %
Asian American-owned	7.4 %	5.2 %
Black American-owned	6.8 %	5.7 %
Hispanic American-owned	2.4 %	0.6 %
Native American-owned	1.8 %	0.5 %

5. Time period. In the middle of 2020, the County began requiring prime contractors to submit Small Business Enterprise (SBE) Plans as part of their bids and proposals to award many of its contracts and procurements. As part of that program, the County sets a percentage goal on individual contracts and procurements, and as a matter of responsiveness, prime contractors must submit SBE Plans demonstrating how they met those goals either by making subcontracting commitments with certified SBEs or, in lieu of subcontracting commitments, by demonstrating genuine good faith efforts of trying to subcontract with SBEs. MSDGC required these plans to be submitted throughout the entire study period, and as such is not included in the time period analysis. BBC estimated the availability of minority- and woman-owned businesses separately for work the County awarded during the study period prior to requiring SBE Plans (January 1, 2016 through June 30, 2020) and after it started requiring those plans (July 1, 2020 through June 30, 2021). As shown in Figure 6-8, the availability of minority- and woman-owned businesses for work the County awarded before requiring SBE Plans (28.2%) was somewhat lower than for work the County awarded after it began requiring SBE Plans (29.4%).

Figure 6-8. Availability estimates for County work before and after it began requiring SBE Plans

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 Figure F-4 and F-5 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Organization and business group	Time period: Before SBE Plans	Time period: SBE Plans
All minority- and woman-owned	28.2 %	29.4 %
White woman-owned	12.3 %	14.8 %
Minority-owned	15.9 %	14.6 %
Asian American-owned	6.6 %	6.2 %
Black American-owned	8.1 %	6.9 %
Hispanic American-owned	0.9 %	0.7 %
Native American-owned	0.3 %	0.8 %

CHAPTER 7.
Utilization Analysis

Chapter 7 presents information about the participation of minority- and woman-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) awarded between January 1, 2016 and June 30, 2021 (i.e., the *study period*).[1] BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in County and MSDGC work in terms of *utilization*—the percentage of prime contract and subcontract dollars the organizations awarded to those businesses during the study period. We measured the participation of minority- and woman-owned businesses in County and MSDGC work regardless of whether they were certified as minority-owned business enterprises, woman-owned business enterprises, or small business enterprises (SBEs) by a certifying agency.

A. All Contracts and Procurements

BBC first examined the participation of minority- and woman-owned businesses in all relevant construction, professional services, and goods and other services prime contracts and subcontracts the County and MSDGC awarded during the study period, considered together. As shown in Figure 7-1, the County and MSDGC awarded 8.1 percent of their relevant contract and procurement dollars to minority- and woman-owned businesses. (Only 3.3 percent of the dollars the County and MSDGC awarded to minority- and woman-owned businesses were awarded to minority- and woman-owned businesses certified as SBEs.) The groups that exhibited the highest levels of participation were white woman-owned businesses (5.1%), Black American-owned businesses (1.5%), and Asian American-owned businesses (1.3%).

Figure 7-1.
Utilization results for County and MSDGC work considered together

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization
All minority- and woman-owned	8.1 %
White woman-owned	5.1 %
Minority-owned	3.0 %
Asian American-owned	1.3 %
Black American-owned	1.5 %
Hispanic American-owned	0.1 %
Native American-owned	0.0 %

Figure 7-2 presents the participation of minority- and woman-owned businesses in relevant contracts and procurements separately for the County and MSDGC. As shown in Figure 7-2, the participation of minority- and woman-owned businesses was 14.6 percent in work the County awarded during the study period and 4.1 percent in work MSDGC awarded during the study period. The same business groups exhibit the greatest participation in both County and MSDGC

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

work: white woman-owned businesses (County = 10.9%; MSDGC = 1.6%), Asian American-owned businesses (County = 2.6%; MSDGC = 0.5%), and Black American-owned businesses (County = 0.8%; MSDGC = 1.9%).

Figure 7-2.
Utilization analysis results for County and MSDGC work considered separately

Note:

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

For more detail, see Figures F-3 and F-15 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Organization	
	County	MSDGC
All minority- and woman-owned	14.6 %	4.1 %
White woman-owned	10.9 %	1.6 %
Minority-owned	3.7 %	2.6 %
Asian American-owned	2.6 %	0.5 %
Black American-owned	0.8 %	1.9 %
Hispanic American-owned	0.3 %	0.1 %
Native American-owned	0.0 %	0.0 %

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 prime contracts and subcontracts the County and MSDGC awarded during the study period. Figure 7-3 presents those results separately for the County (top panel) and MSDGC (bottom panel). As shown in Figure 7-3, the participation of minority- and woman-owned businesses was greater in County prime contracts (14.8%) than in the organization's subcontracts (13.5%). In contrast, the participation of minority- and woman-owned businesses was substantially less in MSDGC prime contracts (3.4%) than in its subcontracts (20.4%).

Figure 7-3.
Utilization analysis results for County and MSDGC 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-9. F-10, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Contract role	
	Prime contracts	Subcontracts
County		
All minority- and woman-owned	14.8 %	13.5 %
White woman-owned	11.1 %	9.7 %
Minority-owned	3.7 %	3.8 %
Asian American-owned	2.8 %	1.0 %
Black American-owned	0.6 %	2.3 %
Hispanic American-owned	0.3 %	0.3 %
Native American-owned	0.0 %	0.2 %
MSDGC		
All minority- and woman-owned	3.4 %	20.4 %
White woman-owned	1.3 %	7.9 %
Minority-owned	2.1 %	12.5 %
Asian American-owned	0.3 %	6.1 %
Black American-owned	1.7 %	6.1 %
Hispanic American-owned	0.1 %	0.0 %
Native American-owned	0.0 %	0.3 %

C. Industry

BBC also examined utilization analysis results separately for the construction, professional services, and goods and other services contracts and procurements the County and MSDGC awarded during the study period to determine whether the participation of minority- and woman-owned businesses differed by industry. As shown in the top (County) and bottom (MSDGC) panels of Figure 7-4, minority- and woman-owned business participation differed by organization and across industries:

- For the County, minority- and woman-owned business participation was greatest for goods and other services work (27.4%) followed by construction work (9.6%) and professional services work (8.1%).
- For MSDGC, minority- and woman-owned business participation was greatest for goods and other services work (6.7%) followed by professional services work (5.3%) and construction work (2.3%).

Figure 7-4. Utilization analysis results for County and MSDGC construction, professional services, and goods and other 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 F6, F-7, F-8, F-16, F-17, and F-18 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

	Industry		
Business group	Construction	Professional services	Goods and other services
County			
All minority- and woman-owned	9.6 %	8.1 %	27.4 %
White woman-owned	4.3 %	5.1 %	26.1 %
Minority-owned	5.4 %	3.0 %	1.3 %
Asian American-owned	4.2 %	1.6 %	0.4 %
Black American-owned	0.7 %	1.1 %	0.9 %
Hispanic American-owned	0.5 %	0.1 %	0.0 %
Native American-owned	0.0 %	0.2 %	0.0 %
MSDGC			
All minority- and woman-owned	2.3 %	5.3 %	6.7 %
White woman-owned	1.2 %	2.1 %	1.3 %
Minority-owned	1.1 %	3.2 %	5.5 %
Asian American-owned	0.3 %	1.0 %	0.0 %
Black American-owned	0.6 %	2.2 %	5.5 %
Hispanic American-owned	0.1 %	0.0 %	0.0 %
Native American-owned	0.0 %	0.0 %	0.0 %

D. Contract Size

BBC examined utilization analysis results separately for *large prime contracts*—construction, professional services, and goods and other services prime contracts worth $100,000 or more—and *small prime contracts*—construction, professional services, and goods and other services prime contracts worth less than $100,000—that the County and MSDGC awarded during the study period to examine whether contract size was related to the participation of minority- and woman-owned businesses in that work, at least at the prime contract level. As shown in the top panel of Figure 7-5, minority- and woman-owned business participation was greater in large prime contracts the County awarded (16.2%) than in small prime contracts the organization awarded (10.4%). In contrast, as shown in the bottom panel of Figure 7-5, minority- and

woman-owned business participation was lower in large prime contracts MSDGC awarded (3.2%) than in small prime contracts it awarded (10.9%).

Figure 7-5.
Utilization analysis results for County and MSDGC 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-11, F-12, F-21, and F-22 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Contract size	
	Large	Small
County		
All minority- and woman-owned	16.2 %	10.4 %
White woman-owned	12.5 %	6.7 %
Minority-owned	3.7 %	3.8 %
Asian American-owned	3.0 %	2.3 %
Black American-owned	0.3 %	1.4 %
Hispanic American-owned	0.4 %	0.0 %
Native American-owned	0.0 %	0.0 %
MSDGC		
All minority- and woman-owned	3.2 %	10.9 %
White woman-owned	1.1 %	6.6 %
Minority-owned	2.0 %	4.4 %
Asian American-owned	0.3 %	1.1 %
Black American-owned	1.7 %	3.1 %
Hispanic American-owned	0.1 %	0.0 %
Native American-owned	0.0 %	0.2 %

E. Time Period

In the middle of 2020, the County began requiring prime contractors to submit Small Business Enterprise (SBE) Plans as part of their bids and proposals to award many of its contracts and procurements. As part of the program, the County sets a percentage goal on individual contracts and procurements, and as a matter of responsiveness, prime contractors must submit SBE Plans as part of their bids or proposals demonstrating how they met those goals either by making subcontracting commitments with certified SBEs or, in lieu of subcontracting commitments, by demonstrating genuine good faith efforts of trying to subcontract with SBEs. MSDGC required these plans to be submitted throughout the entire study period, and as such is not included in the time period analysis. BBC calculated the participation of minority- and woman-owned businesses separately for work the County awarded during the study period prior to requiring SBE Plans (January 1, 2016 through June 30, 2020) and after it started requiring those plans (July 1, 2020 through June 30, 2021). As shown in Figure 6-8, minority- and woman-owned business participation in work the County awarded before requiring SBE Plans (15.2%) was greater than in work the County awarded after it began requiring SBE Plans (11.%).

Figure 7-6.
Utilization analysis results for County work before and after it began requiring SBE Plans

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 Figure F-4 and F-5 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Time period: Before SBE Plans	Time period: SBE Plans
All minority- and woman-owned	15.2 %	11.5 %
White woman-owned	11.5 %	7.6 %
Minority-owned	3.7 %	3.9 %
Asian American-owned	2.5 %	2.8 %
Black American-owned	0.8 %	0.9 %
Hispanic American-owned	0.3 %	0.2 %
Native American-owned	0.0 %	0.0 %

F. Concentration of Dollars

BBC analyzed whether the relevant contract and procurement dollars the County and MSDGC awarded to minority- and woman-owned businesses during the study period were spread across a relatively large number of businesses or were concentrated with relatively few businesses. The study team assessed that question by calculating:

- The number of different businesses within each racial/ethnic and gender group to which the County and MSDGC awarded contract and procurement dollars during the study period; and
- The number of different businesses within each racial/ethnic and gender group that accounted for 75 percent of the group's total contract and procurement dollars during the study period.

Figure 7-7 presents those results for each relevant racial/ethnic and gender group. As shown in the top panel of Figure 7-7, although the County awarded contract and procurement dollars to 93 different non-Hispanic white woman-owned businesses during the study period, three of them (or 3.2%) accounted for 75 percent of those dollars. One business alone accounted for 66 percent of all the contract and procurement dollars the County awarded to non-Hispanic white woman-owned businesses in total. Similarly, although MSDGC awarded contract and procurement dollars to 49 different non-Hispanic white woman-owned businesses during the study period, eight of them (or 16.3%) accounted for 75 percent of those dollars. One business accounted for 21 percent of all the contract and procurement dollars MSDGC awarded to non-Hispanic white woman-owned businesses in total.

Figure 7-7.
Concentration of contract and procurement dollars the County and MSDGC awarded to minority- and woman-owned businesses

Source:

BBC Research & Consulting utilization analysis.

Organization and business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
County			
All minority- and woman-owned	141	9	6.4 %
White woman-owned	93	3	3.2 %
Minority-owned	48	7	14.6 %
Asian American-owned	13	2	15.4 %
Black American-owned	27	7	25.9 %
Hispanic American-owned	4	1	25.0 %
Native American-owned	2	1	50.0 %
MSDGC			
All minority- and woman-owned	107	23	21.5 %
White woman-owned	49	8	16.3 %
Minority-owned	58	15	25.9 %
Asian American-owned	12	5	41.7 %
Black American-owned	36	7	19.4 %
Hispanic American-owned	4	2	50.0 %
Native American-owned	1	1	100.0 %

CHAPTER 8.
Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the percentage of contract and procurement dollars Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) award to minority- and woman-owned businesses (i.e., *utilization* or *participation*) with the percentage of contract and procurement dollars one might expect the County and MSDGC to award to those businesses based on their *availability* for that work.[1] The analysis focused on construction, professional services, and goods and other services contracts and procurements the County and MSDGC awarded between January 1, 2016 and June 30, 2021 (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 utilization and availability as percentages of total dollars associated with a particular set of contracts or procurements and then calculated a *disparity index* to help compare actual participation and estimated availability for relevant business groups and different sets of contracts and procurements. We used the following formula to do so:

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

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 ratio 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 ratio 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]

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[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by minority women are included along with those of their corresponding racial/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 various sets of contracts and procurements the County and MSDGC awarded during the study period.

1. All contracts and procurements. Figure 8-1 presents disparity indices for all relevant prime contracts and subcontracts the County and MSDGC awarded during the study period considered together. There is a line at the disparity index level of 100, which indicates parity, and a line at the disparity index level of 80, which indicates a substantial disparity. Disparity indices of less than 100 indicate disparities, and disparity indices of less than 80 indicate substantial disparities. As shown in Figure 8-1, minority- and woman-owned businesses exhibited a disparity index of 31 for all relevant contracts and procurements the County and MSDGC awarded during the study period, indicating a substantial disparity. Moreover, all individual business groups also exhibited substantial disparities for County and MSDGC work considered together.

Figure 8-1.
Disparity analysis results for County and MSDGC work considered together

Note:

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

Source:

BBC Research & Consulting disparity analysis.

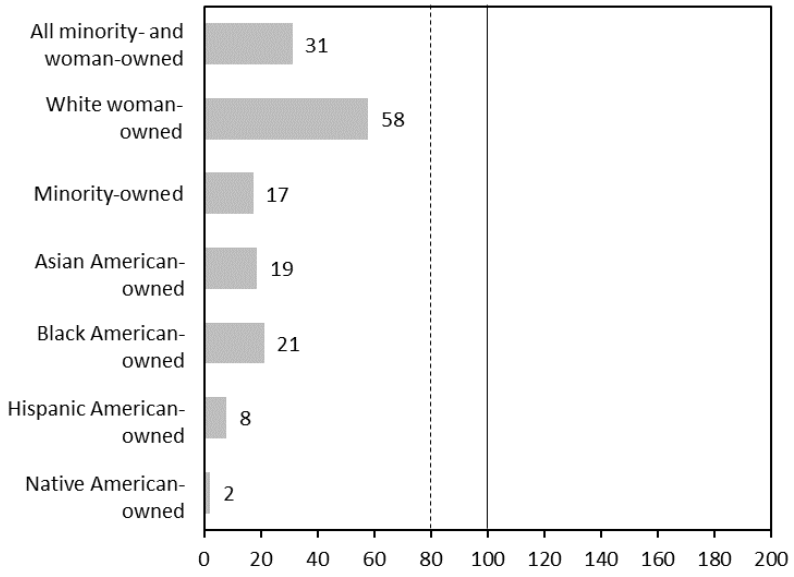


Figure 8-2 presents disparity indices separately for the relevant contracts and procurements the County and MSDGC awarded during the study period. As shown in Figure 8-2, minority- and woman-owned businesses exhibited a disparity index of 52 for County work and a disparity index of 17 for MSDGC work, both of which are substantial disparities. Nearly all individual business groups exhibited substantial disparities for both County and MSDGC work. The only exception is that white woman-owned businesses showed a disparity for County work, but that disparity did not reach the threshold for being considered substantial (disparity index of 86).

Figure 8-2. Disparity analysis results for County and MSDGC work considered separately

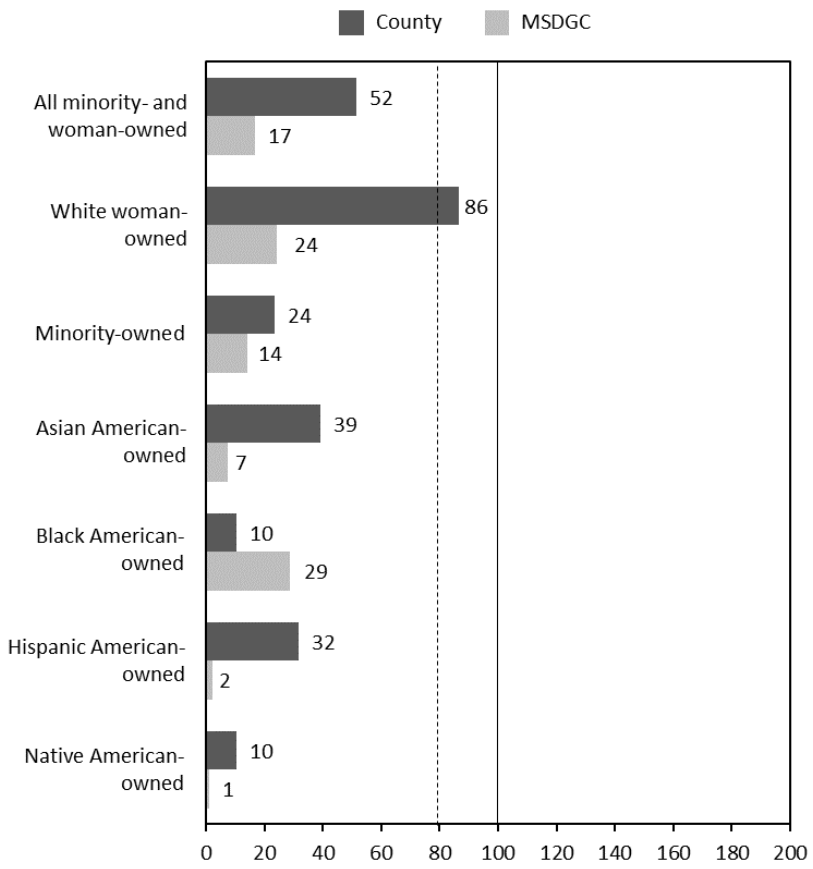
Note:

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

For more detail, see Figures F-3 and F-15 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



2. Contract role. Many minority- and woman-owned businesses are small businesses and often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts the County and MSDGC awarded during the study period. As shown in Figure 8-3, minority- and woman-owned businesses exhibited substantial disparities for prime contracts and subcontracts for both the County (disparity index of 53 for prime contracts; disparity index of 42 for subcontracts) and MSDGC (disparity index of 14 for prime contracts; disparity index of 79 for subcontracts). However, disparity analysis results differed for individual business groups by organization and contract role:

- All business groups exhibited substantial disparities for County prime contracts with the exception of white woman-owned businesses (disparity index of 100).
- All business groups exhibited substantial disparities for County subcontracts.
- All business groups exhibited substantial disparities for MSDGC prime contracts.
- White woman-owned businesses (disparity index of 60), Hispanic American-owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 39) exhibited substantial disparities for MSDGC subcontracts.

Figure 8-3.
Disparity analysis results for County and MSDGC prime contracts and subcontracts

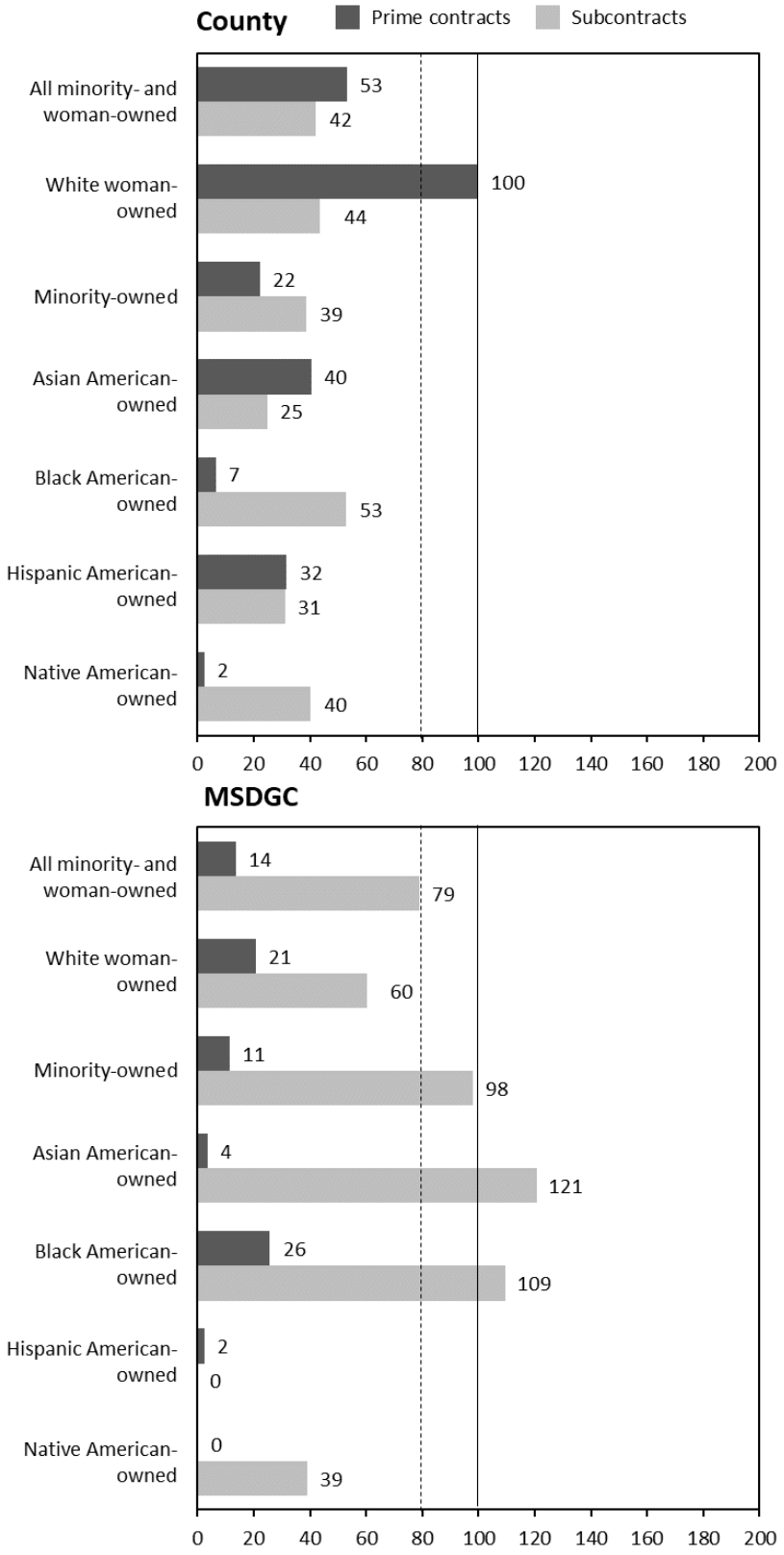
Note:

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

For more detail, see Figures F-9. F-10, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



3. Industry. BBC also examined disparity analysis results separately for the County's and MSDGC's construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by industry. As shown in the top panel of Figure 8-4, minority- and woman-owned businesses exhibited substantial disparities for County construction (disparity index of 36) and professional services work (disparity index of 25) but not for goods and other services work (disparity index of 99). As shown in the bottom panel of the figure, minority- and woman-owned businesses exhibited substantial disparities for MSDGC construction (disparity index of 11), professional services (disparity index of 18), and goods and other services work (disparity index of 33). Disparity analysis results differed for individual business groups by organization and contract role:

- All business groups exhibited substantial disparities for County construction work.
- Asian American-owned businesses (disparity index of 13), Black American-owned businesses (disparity index of 8), and Hispanic American-owned businesses (disparity index of 4) exhibited substantial disparities for County professional services work.
- All business groups exhibited substantial disparities for County goods and other services work with the exception of white woman-owned businesses (disparity index of 186).
- All business groups exhibited substantial disparities for MSDGC construction work.
- All business groups exhibited substantial disparities for MSDGC professional services work with the exception of white woman-owned businesses (disparity index of 136).
- All business groups exhibited substantial disparities for MSDGC goods and other services work.

Figure 8-4.
Disparity analysis results for County and MSDGC construction, professional services, and goods and other services work

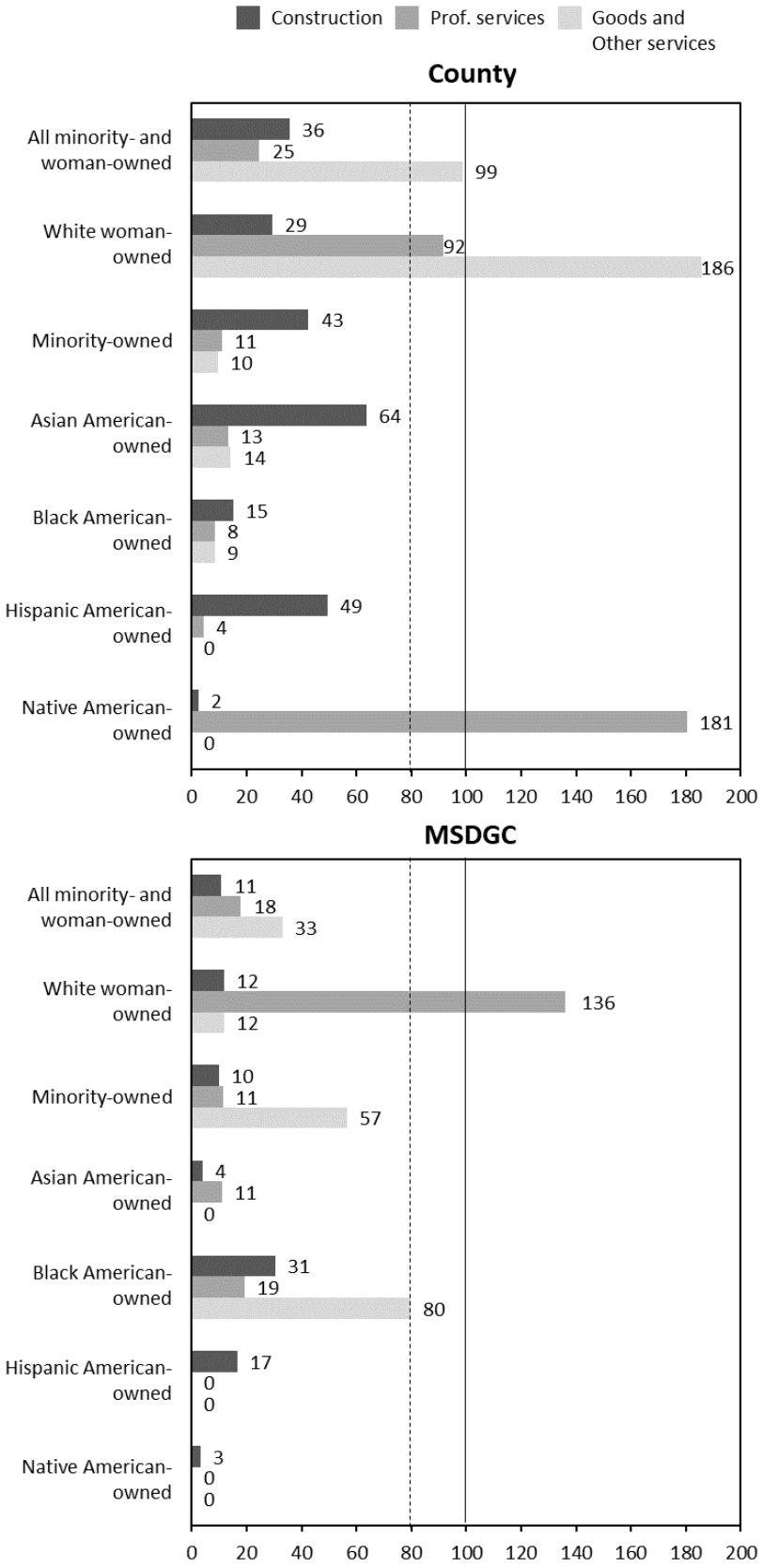
Note:

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 F6, F-7, F-8, F-16, F-17, and F-18 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



4. Contract size. BBC examined disparity analysis results separately for *large prime contracts*—construction, professional services, and goods and other services prime contracts worth $100,000 or more—and *small prime contracts*—construction, professional services, and goods and other services prime contracts worth less than $100,000—that the County and MSDGC awarded during the study period to examine whether contract size was related to disparities between participation and availability, at least at the prime contract level. As shown in Figure 8-5, minority- and woman-owned businesses exhibited substantial disparities for both large and small prime contracts for both the County (disparity index of 59 for large; disparity index of 59 for small) and MSDGC (disparity index of 13 for large; disparity index of 43 for small). Nearly all individual business groups exhibited substantial disparities for both large and small prime contracts and for both the County and MSDGC. The only exception is that white woman-owned businesses did not show a disparity for large prime contracts the County awarded (disparity index of 137).

Figure 8-5.
Disparity analysis for County and MSDGC large and small prime contracts

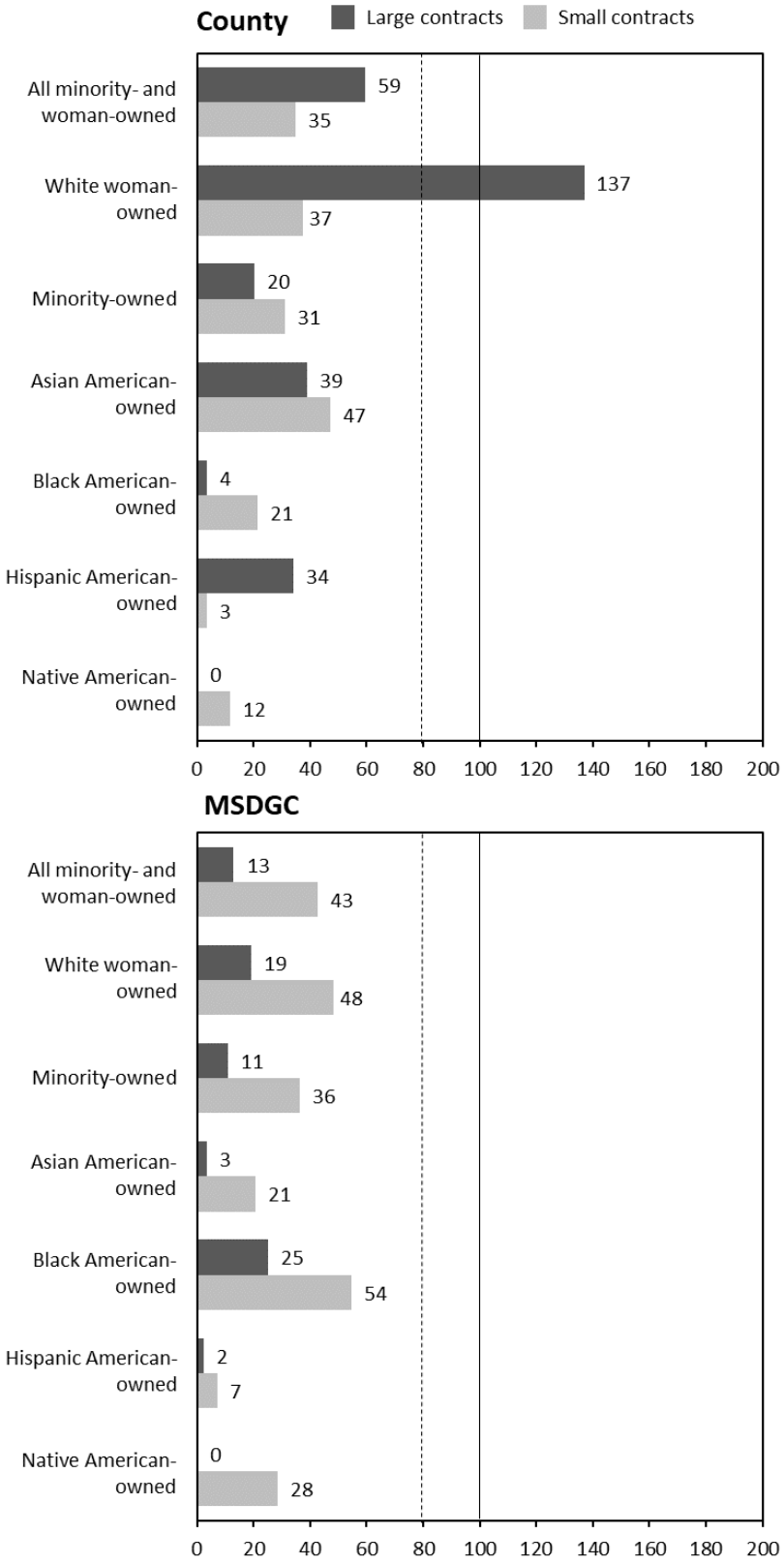
Note:

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

For more detail, see Figures F-11, F-12, F-21, and F-22 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



5. Time period. In the middle of 2020, the County began requiring prime contractors to submit Small Business Enterprise (SBE) Plans as part of their bids and proposals to award many of its contracts and procurements. As part of the program, the County sets a percentage goal on individual contracts and procurements, and as a matter of responsiveness, prime contractors must submit SBE Plans as part of their bids or proposals demonstrating how they met those goals either by making subcontracting commitments with certified SBEs or, in lieu of subcontracting commitments, by demonstrating genuine good faith efforts of trying to subcontract with SBEs. MSDGC required these plans to be submitted throughout the entire study period, and as such is not included in the time period analysis. BBC examined disparity analysis results separately for work the County awarded during the study period prior to requiring SBE Plans (January 1, 2016 through June 30, 2020) and after it started requiring those plans (July 1, 2020 through June 30, 2021). As shown in Figure 8-6, minority- and woman-owned businesses exhibited substantial disparities for work the County awarded before it began requiring SBE Plans (disparity index of 54) as well as after it began requiring them (disparity index of 39). Nearly all individual business groups exhibited substantial disparities for work the County awarded before and after it began requiring SBE Plans. The only exception is that white woman-owned businesses did not show a substantial disparity for County work before it began requiring SBE Plans (disparity index of 94).

Figure 8-6. Disparity analysis results for County work before and after it began requiring SBE Plans

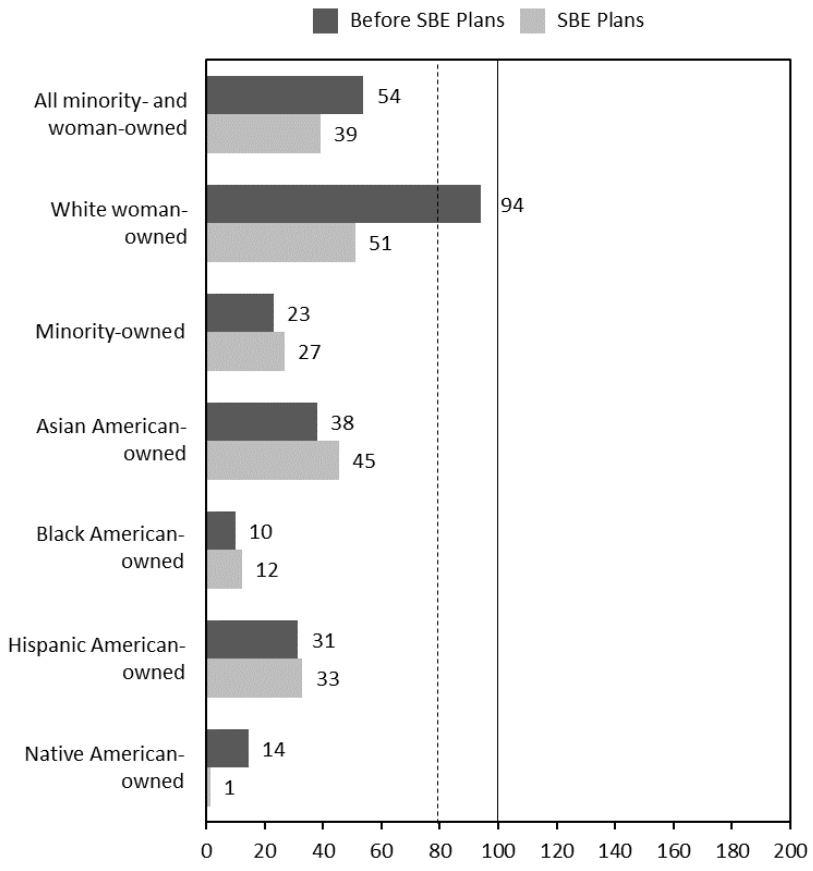
Note:

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

For more detail and results by group, see Figure F-4 and F-5 in Appendix F.

Source:

BBC Research & Consulting 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 as statistically reliable or real. BBC used 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 it 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 were awarded randomly based only on the availability of relevant businesses working in the local 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. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of simulations), then BBC considered the disparity index to be statistically significant at the 90 percent confidence level.

2. Results. BBC ran Monte Carlo simulations on all County contracts and procurements considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in the top panel of Figure 8-7, results from the Monte Carlo analysis indicated that the disparity minority- and woman-owned businesses considered together exhibited for County work was statistically significant at the 95 percent confidence level. In addition, the disparities exhibited by Asian American-, Black American-, and Native American-owned businesses were also statistically significant at the 95 percent confidence level.

BBC also ran Monte Carlo simulations on all MSDGC contracts and procurements considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in the bottom panel of Figure 8-7, Monte Carlo results indicated that the disparity minority- and woman-owned businesses considered together

exhibited for MSDGC work was statistically significant at the 95 percent confidence level. In addition, the disparities exhibited by all individual minority-owned business groups as well as white woman-owned businesses were statistically significant at the 95 percent confidence level.

Figure 8-7.
Monte Carlo simulation results

Business Group	Disparity index	Number of simulations out of 1 million that was equal or below observed participation	Probability of observed participation occurring due to "chance"
All County contracts			
Minority-owned and woman-owned	52	0	<0.1 %
White woman-owned	86	155,980	15.6 %
Minority-owned	24	0	<0.1 %
Asian American-owned	39	601	<0.1 %
Black American-owned	10	0	<0.1 %
Hispanic American-owned	32	194,518	19.5 %
Native American-owned	10	9,647	1.0 %
All MSDGC contracts			
Minority-owned and woman-owned	17	0	<0.1 %
White woman-owned	24	0	<0.1 %
Minority-owned	14	0	<0.1 %
Asian American-owned	7	0	<0.1 %
Black American-owned	29	143	<0.1 %
Hispanic American-owned	2	490	<0.1 %
Native American-owned	1	1,445	0.1 %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 9.
Program Measures

Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) operate Small Business Enterprise (SBE) Programs to encourage the participation of small businesses, including many minority- and woman-owned businesses, in their contracting and procurement.[1] In addition, the County and the City of Cincinnati (the City) have implemented a similar, but separate, SBE Program for the Banks Project, a multiphase, multiuse development project in downtown Cincinnati. The County SBE Program, the MSDGC SBE Program, and the Banks Project SBE Program all comprise *race- and gender-neutral measures* exclusively. Race- and gender-neutral measures are designed to encourage the participation of all businesses—or, all small businesses—in an organization's work, irrespective of the race/ethnicity or gender of business owners.

In contrast to race- and gender-neutral measures, *race- and gender-conscious* measures are designed specifically to encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned business on individual contracts or procurements). Neither the County nor MSDGC currently use any race- or gender-conscious measures as part of their contracting or procurement policies, and the County and City do not use any race- or gender-conscious measures as part of the Banks Project. Importantly, the County has a policy in place stating it will make hiring and purchasing decisions without consideration to race, sex, sexual orientation, gender, age, religion, color, national origin, ancestry, disability, or other non-job related criteria, potentially limiting its use of race- and gender-conscious measures.

BBC Research & Consulting (BBC) reviewed measures the County and MSDGC use to encourage the participation of small businesses, including many minority- and woman-owned businesses, in their contracting and procurement as part of their SBE Programs and as part of the Banks Project SBE Program. That information is useful to both organizations in assessing the efficacy of race- and gender-neutral measures in encouraging the participation of minority- and woman-owned businesses in their work as well as in determining whether they have maximized their use of race- and gender-neutral measures as part of their contracting and procurement policies, which is a prerequisite to potentially using race- and gender-conscious measures in the future.

A. County SBE Program

In May 2017, the Hamilton County Board of Commissioners passed a resolution that established the Economic Inclusion and Equity Department to promote inclusion in County procurement and employment practices. Within that department, the Office of Economic Inclusion works to ensure that the County lawfully encourages its departments to provide more contracting opportunities

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for minority woman-owned businesses are included along with their corresponding racial/ethnic groups.

for small businesses, including many minority- and woman-owned businesses. The County's SBE Program, which the Office of Economic Inclusion operates, is designed to help ensure inclusion of different types of individuals and businesses in County operations as well as County contracting and procurement. As part of the program, the County has established annual aspirational goals for the participation of certified SBEs in its work: 30 percent for construction work and 15 percent for professional services and goods and other services work. The County uses various race- and gender-neutral measures to try to meet those goals each year.

1. SBE contract goals. The County sets goals for the participation of SBEs on individual contracts and procurements. Prime contractors bidding on that work are required to meet the goals by either:

- Making subcontracting commitments to certified SBEs and documenting those commitments in their SBE Plans, which they must submit as part of their bids, quotes, and proposals; or
- Submitting documentation they made *good faith efforts* (GFEs) to meet the goals through subcontracting commitments but failed to do so.

Bidders who do not meet the goal but seek an exemption, in whole or in part, and have exercised GFEs to meet the goal must submit the following information:

- Bidders who partially meet the goal by subcontracting with SBE subcontractors/suppliers must identify the SBE subcontractors/suppliers that will be utilized in the execution of the contract. Bidders must submit a Letter of Intent for each SBE subcontractor/supplier.
- Bidders who seek a partial or total exemption and have exercised GFEs to meet the goal must complete and submit the Statement of Good Faith Efforts with their bid.

Prime contractors are also required to submit monthly SBE payment reports throughout the duration of County projects, which help the organization ensure that they are in compliance with their SBE Plans.

2. Business outreach and communication. The County facilitates and participates in various outreach and communication efforts to encourage the growth of small businesses as well as minority- and woman-owned businesses and increase their participation in its contracts and procurements. Those efforts include:

- Hosting presentations by large prime contractors on their expectations of subcontractors, how their business processes work, and how to effectively respond to their solicitations for subcontract opportunities;
- Hosting "match-maker" events during which prime contractors can meet and get to know potential subcontractors in the region; and
- Maintaining its "Building Opportunities by Leveraging Diversity Contractors Directory", which is an organization-wide vendor list made up of businesses interested in working with the County.

3. Technical assistance. The County hosts various educational workshops for businesses on how to do business with the organization and provides interested businesses with referrals to other local technical assistance programs related to bonding, financing, business planning, business technology, business partnerships, and other topics.

4. Inclusion monitoring. The County monitors and reports on the participation of small businesses as well as minority- and woman-owned businesses in its contracts and procurements. In addition, the County offers training and support programs for department staff focused on increasing inclusion in the contracts and procurements their departments award.

B. MSDGC SBE Program

MSDGC also operates an SBE Program to increase the participation of small businesses—including many minority- and woman-owned businesses—in its construction, professional services, and goods and other services contracts and procurements. MSDGC has established annual aspirational goals for the participation of certified SBEs in its work: 30 percent for construction work, 10 percent for professional services work, and 15 percent for goods and other services work. Like the County, MSDGC exclusively uses race- and gender-neutral efforts to try to meet those goals each year.

1. SBE contract goals. MSDGC may set goals for the participation of SBEs on certain individual contracts and procurements worth more than $50,000. Prime contractors bidding on that work are required to meet the goals by either:

- Making subcontracting commitments to certified SBEs and documenting those commitments in their SBE Plans, which they must submit as part of their bids, quotes, and proposals; or
- Submitting documentation they made GFEs to meet the goals through subcontracting commitments but failed to do so.

Prime contractors are also required to submit monthly SBE utilization reports throughout the duration of MSDGC projects, which help the organization ensure that they are in compliance with their SBE Plans.

2. Small Contract Rotation Pool. For contracts and procurements worth between $5,000 and $50,000, MSDGC may establish a Small Contract Rotation Pool for competition among certified SBEs, at the discretion of the Chief Procurement Officer. As part of the program, SBEs in the pool receive notices from MSDGC about contract and procurement opportunities within the specified size range that correspond with businesses' primary lines of work. MSDGC initially limits competition for that work to SBEs that are in the pool. The organization opens up competition for the work to non-SBEs only if no known SBEs are able to perform the required work or supply the required goods; no eligible SBEs provide bids or quotes; MSDGC determines it is not practical to award the work to SBEs based on price; or MSDGC rejects all quotes it received from SBEs for other reasons.

3. Prompt payment policies. MSDGC is required to make project payments to prime contractors within 30 days of approving invoices and requires prime contractors to pay their

subcontractors within 10 days of receiving payment from MSDGC. Prime contractors are required to pay an interest penalty to subcontractors on any payments they make to them after those 10 days have elapsed. MSDGC also requires all prime contractors to certify in writing that all their subcontractors and suppliers have been paid for work and materials from previous payments before the organization will make any additional payments.

4. Technical assistance and outreach efforts. MSDGC implements a comprehensive outreach program to increase SBE participation in its contracting and procurement, including outreach regarding contract opportunities at community events and through business assistance organizations. In addition, MSDGC provides individual counseling to businesses and conducts seminars on doing business with the organization, including advice on business marketing, soliciting business and organizations for work opportunities, and preparing bids. MSDGC also hosts networking events to allow local businesses to meet each other and technical assistance workshops related to estimating and bonding.

5. Joint venture policies. For construction contracts worth more than $5 million and professional services and goods and other services work worth more than $100,000, MSDGC may choose to require the formation of joint ventures between large businesses and SBEs or GFEs documentation detailing large businesses' efforts to form such relationships. Joint ventures must be approved by MSDGC prior to bid submission. For construction contracts, SBE ownership in the joint venture must be 30 percent or greater and for professional services and goods and other services work, SBE ownership must be greater than 20 percent. In addition, SBEs must perform clearly defined portions of the work equal to or greater than their ownership percentages in the joint ventures.

C. Banks Project SBE Program

The Banks is a large, multiphase, multiuse development project on the banks of the Ohio River, which runs through downtown Cincinnati. The project is a public/private partnership involving both the County and the City. To help ensure the inclusion of different types of businesses in the Banks Project, the County and City developed the Banks Project SBE Program. As part of the program, the County and City have established annual aspirational goals for the participation of certified SBEs in its work: 30 percent for construction work, 10 percent for professional services work, and 15 percent for goods and other services work. The County and City exclusively use race- and gender-neutral efforts to try to meet those goals.

1. SBE contract goals. The County and City sets goals for the participation of SBEs on individual Banks Project contracts and procurements worth more than $5,000. Prime contractors bidding on that work are required to meet the goals by either:

- Making subcontracting commitments to certified SBEs and documenting those commitments in their SBE Plans, which they must submit as part of their bids, quotes, and proposals; or
- Submitting documentation they made GFEs to meet the goals through subcontracting commitments but failed to do so.

Prime contractors are also required to submit monthly SBE utilization reports throughout the duration of their contracts, which help the County and City ensure that they are in compliance with their SBE Plans.

2. Outreach and communication. In advance of awarding Banks Project contracts and procurements, the County and City host pre-bid meetings to inform potential bidders of SBE contract goal requirements and to share information about SBEs potentially available to participate in the work involved. In addition, the County and City notify SBEs of contract and procurement opportunities related to the Banks Project through government bulletins, major local newspapers, and trade association materials. The County and City make copies of bid notices available to local trade associations, chambers of commerce, technical assistance agencies, and contractor associations. They also make copies of specifications and requests for proposals available to prospective bidders for review. The County and City also conduct outreach events directed to SBEs regarding contracting procedures and specific contracting and procurement opportunities related to the Banks Project.

3. Technical assistance. The County and City provide SBEs with information and lists of resources related to obtaining insurance, bonding, and financing as well as a list of small business resources available to help with business management, recordkeeping, accounting, and other business functions.

CHAPTER 10.
Program Recommendations

The disparity study provides substantial information Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) should examine as they consider potential refinements to their Small Business Enterprise (SBE) Programs and their efforts to further encourage the participation of small businesses, including many minority- and woman-owned businesses, in their contracts and procurements. BBC Research & Consulting (BBC) presents several key recommendations the County and MSDGC should consider based on disparity study results, organized into the following categories:

A. Overall Aspirational Goal;

B. Contract-specific Goals; and

C. Race- and Gender-neutral Measures.

A. Overall Aspirational Goal

Many organizations establish overall percentage goals for the participation of minority- and woman-owned businesses in their contracts and procurements. Such goals help guide efforts to encourage the participation of minority- and woman-owned businesses and create a shared understanding of an organization's diversity objectives among internal and external stakeholders. Typically, organizations use various *race- and gender-neutral*, and, if appropriate, *race- and gender-conscious* measures to meet those goals each year. If they fail to do so in a particular year, they assess why they failed and develop plans to meet their goals the following year.

BBC recommends the County and MSDGC consider following a common two-step process to develop overall aspirational goals for the participation of minority- and woman-owned businesses in their contracts and procurements, which would consist of *establishing a base figure* and *considering an adjustment* to their base figures based on information about local marketplace conditions and other factors that might impact the ability of minority- and woman-owned businesses to compete successfully their work. BBC presents an example of a two-step goal-setting process based on best practices and disparity study results.

1. Establishing a base figure. Organizations often develop base figures for their overall aspirational goals based on demonstrable evidence of the availability of minority- and woman-owned businesses for their contracts and procurements, ideally from an availability analysis like the one BBC conducted as part of the disparity study. The availability analysis indicated that minority- and woman-owned businesses are potentially available to participate in 28.4 percent of the County's contracting and procurement dollars and 24.5 percent of MSDGC's contracting

and procurement dollars, which the County and MSDGC could consider as the base figures for their respective overall aspirational goal.[1]

2. Considering an adjustment. In setting overall aspirational goals, organizations often examine various information to determine whether adjustments to their base figures are necessary to account for any barriers in their local marketplaces that might affect the ability of minority- and woman-owned businesses to participate in their contracts and procurements. For example, the Federal Disadvantaged Business Enterprise (DBE) Program, which organizations sometimes use as a model for goal-setting, outlines several factors organizations might consider when assessing whether to adjust their base figures:

- Past participation of minority- and woman-owned businesses in organization work;
- Information related to employment, business ownership, education, training, and unions;
- Information related to financing, bonding, and insurance; and
- Other relevant information.

a. Past participation of minority- and woman-owned businesses in organization work. The County and MSDGC could consider making adjustments to their base figures based on the degree to which minority- and woman-owned businesses have participated in their contracts and procurements in recent years. Results from the utilization analysis indicate that the County awarded 14.6 percent of its work to minority- and woman-owned businesses during the study period, and MSDGC awarded 4.1 percent of its work to those businesses. Thus, information about the past participation of minority- and woman-owned businesses in County and MSDGC work indicates that a downward adjustment to both organizations' base figures might be warranted.

b. Information related to employment, business ownership, education, training, and unions. Chapter 3 summarizes information about conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses. Additional quantitative and anecdotal information about local marketplace conditions is presented in Appendix C, and relevant anecdotal evidence is presented in Chapter 4 and Appendix D. Those analyses indicate that certain minority groups and women face barriers related to human capital, financial capital, and business ownership in the local marketplace. For example, marketplace analyses indicated that Black Americans, Hispanic Americans, and Native Americans are far less likely than non-Hispanic whites to earn college degrees in the Hamilton County area, and the same groups, as well as women, earn substantially less in wages than non-Hispanic white men in the region. Such barriers may decrease the availability of minority- and woman-owned businesses for County and MSDGC contracts and procurements, which supports an upward adjustment to each organization's base figure.

c. Information related to financing, bonding, and insurance. BBC's analyses of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in the Hamilton County area do

[1] See Figures F-3 and F-15 in Appendix F for more details about those availability estimates.

not have the same access to those business inputs as white men and businesses owned by white men. For example, all minority groups were less likely to own homes than whites in the region, and Black Americans, Hispanic Americans, and Native Hawaiian/Other Pacific Islanders were more likely to receive subprime conventional home purchase loans. For many business owners, homeownership and home equity have been shown to be key sources of business capital. In addition, anecdotal evidence the study team collected through public meetings, surveys, and in-depth interviews with local businesses indicated that minority- and woman-owned businesses often have difficulties obtaining business loans, bonds, and insurance. Any barriers to obtaining financing, bonding, or insurance might limit opportunities for minorities and women to successfully form and operate businesses in the local marketplace, thus making it more difficult for them to compete and perform County and MSDGC work. Taken together, that information also supports an upward adjustment to each organization's base figure.

d. Other relevant information. Organizations also often examine "other relevant information" when determining whether to adjust their overall aspirational goals. For example, there is quantitative evidence that businesses owned by minorities and women earn less in revenue than businesses owned by white men and face greater barriers in the local marketplace, even after accounting for factors that are ostensibly race- and gender-neutral. Chapter 3 summarizes that evidence and Appendix C presents additional, corresponding results. There is also anecdotal evidence of barriers to the success of minority- and woman-owned businesses presented in Chapter 4 and Appendix D. For example, as part of the anecdotal evidence process, many businesses reported experiencing stereotyping, double standards, and business networks closed off to minority- and woman-owned businesses. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local marketplace, again supporting an upward adjustment to the County's and MSDGC's base figures.

3. Goal updates. If the County or MSDGC decide to establish overall aspirational goals for the participation of minority- and woman-owned businesses in their work, they should also determine how frequently they will update their goals. In addition, BBC recommends they consider any changes they plan to make to their business development programs, procurement processes, staff resources, or other processes and programs that might affect their ability to achieve their goals each year. Finally, the County and MSDGC should review their goal-setting processes regularly to ensure they provide adequate flexibility to respond to any changes in local marketplace conditions, anticipated contract and procurement opportunities, and other information.

B. Contract-specific Goals

Both the County's and MSDGC's SBE Programs are made up exclusively of race- and gender-neutral measures, which are designed to encourage the participation of all small businesses in their contracts and procurements, regardless of the race/ethnicity or gender of business owners. Disparity analysis results indicated that most racial/ethnic and gender groups show substantial disparities on key sets of contracts and procurements the County and MSDGC awarded during the study period. Because the County and MSDGC have been using myriad race- and gender-neutral measures to encourage the participation of small businesses in their work, and because those measures have not sufficiently addressed disparities for all groups of minority- and

woman-owned businesses, BBC recommends both organizations consider using race- and gender-conscious minority- and woman-owned business goals to award individual contracts and procurements in the future (i.e., *contract-specific goals*).

To do so, the County and MSDGC would set participation goals on individual contracts and procurements based on the availability of minority- and woman-owned businesses for the types of work involved with the project, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with eligible, certified minority- and woman-owned businesses as part of their bids or by demonstrating they made sufficient good faith efforts (GFEs) to subcontract with minority- and woman-owned businesses but failed to do so. (The County and MSDGC could also allow prime contractors certified as minority- and woman-owned businesses themselves to count their own work toward meeting contract-specific goals.) If the County or MSDGC decide to develop a contract goals program, they should review disparity analysis results carefully to determine which types of contracts to include in the program. For example, the County and MSDGC could consider setting participation goals only on particular types of contracts such as construction and professional services contracts, which together account for nearly 65 percent of County spend and 89 percent of MSDGC spend. Many organizations design race- and gender-conscious programs based on the industries of the projects they award, including the City of Charlotte, the City of Boston, and the City of Virginia Beach.

Because the use of contract-specific goals is a race- and gender-conscious measure, the County and MSDGC will have to ensure the use of those goals meets the *strict scrutiny standard* of constitutional review, including showing a *compelling governmental interest* for their use and ensuring their use is *narrowly tailored* (for detailed legal information, see Chapter 2 and Appendix B). Among other factors, one important aspect of narrow tailoring is that eligibility for participation in race- and gender-conscious measures should be limited to those business groups for which there is evidence of barriers existing in an organization's contracting or procurement processes. For example, as part of a contract-specific goals program, only the participation of business groups for which there is compelling evidence of barriers would count toward meeting goals on individual contracts or procurements.

One of the primary reasons for conducting a disparity study is to assess whether any relevant minority- and woman-owned business groups exhibit *substantial disparities* (i.e., disparity indices of less 80) between participation and availability for organization work, which many courts have considered as *inferences of discrimination* against particular business groups.[2] As part of the disparity analysis, BBC observed that all relevant business groups—white woman-owned businesses, Asian American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, and Native American-owned businesses—exhibited substantial disparities on various sets of County and MSDGC contracts and procurements. If the County and MSDGC decide to use contract-specific goals in the future, both organizations should review disparity analysis results carefully to ensure they design their goals programs effectively

[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).

and in a legally defensible manner (for detailed disparity analysis results, see Chapter 8 and Appendix F).

In addition, prior to using contract-specific goals, the County and MSDGC should consider whether they have maximized their use of existing race- and gender-neutral measures and whether it is necessary to strengthen those measures or implement additional race- and gender-neutral measures to further encourage the participation of minority- and woman-owned businesses in their work. Finally, the County and MSDGC should consider the staff and resources required to implement their goals programs effectively.

C. Race- and Gender-neutral Measures

Disparity study results indicate that there are several race- and gender-neutral measures the County and MSDGC should consider to further encourage the participation of small businesses, including many minority- and woman-owned businesses, in their contracts and procurements. BBC recommends the County and MSDGC consider new measures and refinements related to:

- Procurement policies;
- Contract administration; and
- Supportive services and capacity building.

1. Procurement policies. Based on our review of County policies and feedback we received from stakeholders, BBC identified several ways the County could consider refining or augmenting its procurement policies to help increase the participation of small businesses, including many minority- and woman-owned businesses, in County and MSDGC work.[3]

a. Unbundling contracts and procurements. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts and procurements the County and MSDGC awarded during the study period. In addition, as part of in-depth interviews, several business owners reported that the size of government work is sometimes a barrier to their success. To further encourage the participation of minority- and woman-owned businesses in County and MSDGC work, the County should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into multiple smaller pieces. Such initiatives might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses.

b. Alternative teaming arrangements. As part of the anecdotal evidence process, many interviewees reported interest in working as prime contractors but are often only able to work as subcontractors due to capacity issues and lack of opportunities. Minority- and woman-owned businesses discussed various barriers to obtaining prime contract work, including their inability to gain the experience or capital to bid on future work as prime contractors and their reduced

[3] Under a County-City agreement effective May 1, 1968 (1968 Agreement) for MSDGC operations, the City of Cincinnati is authorized to manage and operate MSDGC subject to the County Commissioner's authority under Ohio law. The City's authority under the 1968 Agreement specifically includes performing all MSDGC procurement. MSDGC procurement parameters were further defined based upon a June 2014 ruling from the US District Court that held that Ohio procurement laws applicable to the Boards of County Commissioners for county sewer districts apply to MSDGC procurement.

bonding capacity relative to businesses owned by white men. The County could better encourage prime contract participation by minority- and woman-owned businesses by identifying alternative acquisition strategies and structuring procurements to facilitate competition from consortia or alternative teaming arrangements—such as joint ventures or co-prime relationships—on certain projects. (MSDGC already has joint venture policies in place.) Encouraging alternative teaming arrangements would allow small businesses, including many minority- and woman-owned businesses, to build their capacities for relatively large projects and gain experience working as prime contractors while mitigating some of the difficulties and costs of doing so.

c. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses—including many minority- and woman-owned businesses—to become involved in contracting. The County should consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each eligible contract or procurement, the County and MSDGC would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the project would be required to subcontract a corresponding percentage of the work for their bids to be responsive. If the County were to implement such a program, it should include flexibility provisions such as a GFEs process that would require prime contractors to document their efforts to identify and include potential subcontractors in their proposals for County and MSDGC contracts and procurements.

d. Price and evaluation preferences. As part of in-depth interviews, multiple interviewees supported price or evaluation preferences for small businesses. One example of a preference program is the District of Columbia Government's (DC Government's) Certified Business Enterprise (CBE) Program, in which CBEs (that is, local businesses) are given price discounts or awarded additional points as part of bid and proposal evaluations. Options could include basing preferences on SBE certification status of bidders themselves or on the degree to which bidders have consistently met established contract-specific goals on County of MSDGC contracting opportunities in the past.

e. New businesses. Disparity study results indicate that a substantial portion of the contract and procurement dollars the County and MSDGC awarded to minority- and woman-owned businesses during the study period went to a relatively small number of businesses (for detailed participation results, see Chapter 7). To expand the number of minority- and woman-owned businesses that participate in County and MSDGC work, the County should consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked in the past. For example, as part of the bid process, the County and MSDGC might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past. The County and MSDGC could award evaluation points or price preferences based on the degree to which prime contractors partner with new subcontractors with which they have not previously worked. In addition, the County should consider efforts to expand its base of minority- and woman-owned businesses through additional outreach, including by using vendor information BBC collected as part of the utilization and availability analyses.

f. Competitive bidding for certain professional services. The County's procurement manual specifies that competitive bidding is not required when contracting for certain types of professional services, including accountants, architects, attorneys, physicians, professional engineers, construction project managers, consultants, surveyors, or appraisers.[4] To ensure broader competition among local businesses, the County should consider enforcing competitive bidding procedures for those types of contracts, which represent contracting opportunities that the County and MSDGC could award to small businesses, including many minority- and woman-owned businesses.

g. Minimum solicitations of quotes. The County's Purchasing Policy Manual requires County agencies to solicit a minimum of three vendors for quotes on procurements worth at least $1,000 and up to $50,000. The County should consider increasing the minimum number of quotes it requires for such purchases. For example, the County could require that County staff solicit a minimum of five quotes for purchases worth at least $10,000 and up to $25,000 and a minimum of seven quotes for purchases worth at least $25,000 and up to $50,000 to further encourage participation from a larger number of businesses. The County should also consider requiring that some number of those quotes be from SBEs or minority- and woman-owned businesses.

2. Contract administration. Based on recommendations from stakeholders and a review of County policies, BBC recommends the County and MSDGC consider additional measures designed to support small businesses, including many minority- and woman-owned businesses, as part of administering contracts and procurements.

a. Subcontractor data collection*.* Although the County and MSDGC maintain comprehensive and complete information about all prime contracts and procurements they award, they do not do so for subcontracts. The County and MSDGC should consider collecting comprehensive data on *all* subcontracts, regardless of the type of businesses that perform those subcontracts. Doing so might require upgrading to a different data management system that allows them to more effectively collect and maintain prime contract and subcontract data. Collecting the following data on all subcontracts might be appropriate:

- Associated prime contract numbers (e.g., purchase order or contract number);
- Subcontractor names, addresses, phone numbers, and email addresses;
- Types of associated work;
- Award amounts; and
- Paid-to-date amounts.

The County and MSDGC should consider collecting those data at the time of award and requiring prime contractors to submit data on the payments they make to all subcontractors as part of

[4] O.R.C 307.86

monthly invoicing. The County and MSDGC would have to train relevant staff to collect and enter subcontract data accurately and consistently.

b. Business certification and directory. Neither the County nor MSDGC are certifying agencies, instead relying on other local organizations—including the State of Ohio and the City of Cincinnati—to certify SBEs, minority-owned business enterprises (MBEs), and woman-owned business enterprises (WBEs). The County and MSDGC should consider certifying businesses themselves, particularly if they begin using race- and gender-conscious measures. If the costs of implementing a certification process is too high, then the County should consider developing and regularly updating its own database of certified SBEs, MBEs, and WBEs based on the certifications it already recognizes. Doing so would help prime contractors competing for County work identify SBEs, MBEs, and WBEs with which to work; help the County and verify the certification statuses of small businesses, minority-owned businesses, and woman-owned businesses prime contractors use to meet any contract-specific goals; and help the County monitor the participation of SBEs, MBEs, and WBEs in their work.

The County should also consider developing an online directory based on its certification database that County departments as well as prime contractors could use to identify SBEs, MBEs, and WBEs potentially available for organization opportunities. At a minimum, the directory should include the following information about each relevant business:

- **Vendor name:** Primary name that the vendor does business as;
- **Address(es):** Physical address(es) where the business is located, including street address, city, state, and ZIP codes;
- **Phone number(s):** Primary phone number(s) of the business;
- **E-mail address(es):** Primary email address(es) of the business;
- **Lines of work:** The primary lines of work that the vendor performs;
- **Ownership status:** Whether the business is minority- or woman-owned and, if minority-owned, the owners' race/ethnicity; and
- **Certifications**: Whether the business is certified as an SBE, MBE, or WBE.

MSDGC utilizes the City of Cincinnati Vendor Compliance and Certification System (VCCS) to register SBEs with the MSDGC SBE Program. This directory is used by MSDGC divisions and prime contractors to identify SBEs potentially available for opportunities, and includes all of the above information; however, due to the race- and gender-neutral aspect of the program, information on ownership status is voluntary.

c. Subcontractor commitments. Anecdotal evidence suggests prime contractors often do not use subcontractors to the full extent of their subcontracts or eliminate their subcontracts altogether on projects. The County should consider implementing an approval process for any changes to subcontracts or subcontractors on projects, as well as an electronic system to track subcontract participation on an invoice-by-invoice basis to ensure prime contractors use subcontractors to the full extent of their subcontracts. In addition, the County should consider establishing direct points-of-contact between subcontractors and the County to address any issues they are

experiencing with prime contractors or projects on which they are working. Interview and public meeting participants made several additional suggestions to maximize work on subcontracts, including inviting subcontractors to contract negotiation meetings to discuss their expected portions of projects; notifying subcontractors when projects have been awarded; and considering prime contractors' past use of subcontractors relative to subcontract commitments as a factor during bid evaluations.

d. Prompt payment. As part of in-depth interviews and surveys, several businesses reported difficulties receiving payment in a timely manner on government work, particularly when they work as subcontractors and suppliers. The County should consider establishing prompt payment processes to ensure timely payment to prime contractors and from prime contractors to subcontractors and suppliers, ideally within a specified maximum number of days after approving invoices. The County should consider making efforts to enforce those requirements by creating electronic systems to track and confirm subcontractor payments. MSDGC has policies in place surrounding prompt payment, as outlined in Chapter 9.

3. Supportive services and capacity building. Disparity study results indicate that existing minority- and woman-owned businesses in the Hamilton County area have relatively low capacities for County and MSDGC work. In addition to contract and procurement measures, BBC recommends the County and MSDGC should consider strengthening their SBE Programs to help build capacity among minority- and woman-owned businesses and further encourage their participation in County and MSDGC work.

a. Growth monitoring. The County and MSDGC have services in place specifically designed to build business capacity, such as educational workshops and training related to bonding, financing, business planning, business technology, business partnerships, and other topics. To assess the effectiveness of those measures in building business capacity—particularly of small businesses as well as minority- and woman-owned businesses—the County and MSDGC might consider collecting data on the impact their SBE Programs and business development efforts have on the growth of businesses over time. Doing so would require the County and MSDGC to collect baseline information on certified businesses—such as revenue, number of locations, number of employees, and business ownership information—and then continue to collect that information from each business on an annual basis. Such metrics would allow the County and MSDGC to assess whether their programs are helping businesses grow and help them refine measures they use to encourage the participation of small businesses, including many minority- and woman-owned businesses, in their work.

b. Networking and outreach. The County and MSDGC host and participate in several outreach and networking events that provide information about doing business with them and available contracting opportunities. The County and MSDGC should consider continuing their current networking and outreach efforts and consider broadening those efforts to include more partnerships with local trade and government organizations and participate in events even more frequently. The County and MSDGC might consider tailoring some events to specific industries or business groups to further maximize their value and provide opportunities to foster deeper connections among participants. In addition, the County and MSDGC should consider ways they can better leverage technology to network with and provide information to businesses

throughout the County. The County and MSDGC should consider making use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

c. Bonding assistance. County purchasing policies require bonding for construction projects worth more than $50,000. Projects of that size are relatively accessible to small businesses, including many minority- and woman-owned businesses, but bonding requirements can present a substantial barrier for such businesses. The County should consider conducting a risk assessment of raising the dollar threshold for its bonding requirement to determine whether raising that threshold might result in an acceptable tradeoff between increased small business competition for such work and organizational risk. The County should also consider offering bonding assistance to small businesses pursuing County and MSDGC work. Various state programs, such as the State of Ohio's Encouraging Diversity, Growth, and Equity Program and MBE Program, include bonding assistance to make bonding more accessible to small businesses. The County should consider establishing similar programs for small businesses bidding on County and MSDGC work.

d. Financing assistance. As part of in-depth interviews, many businesses noted difficulties obtaining financing to start, grow, and expand their businesses. Many businesses also commented that having access to capital is crucial to business success but very challenging for small businesses. The County should consider providing guarantees for loans, encouraging contract-backed loans with lenders, or facilitating lender fairs. It could develop such programs with the support of local, regional, or statewide financial institutions or with business assistance organizations. For example, the City of Los Angeles, the United States Department of Administration, and the Maryland Department of Transportation operate loan guarantee programs and the Mississippi Development Authority, the Arkansas Economic Development Commission, and the City of Philadelphia operate contract-backed loan programs. In addition, the Maryland Department of Transportation provides term loans, lines of credit, and equity investments to small businesses, which could serve as another model for the County's consideration.

e. Training and technical assistance. Anecdotal evidence indicated that businesses find training and technical assistance programs—when implemented well—to be valuable in helping them build their capacities for larger projects and learn the necessary skills required to compete in their industries. The County and MSDGC currently conduct various trainings and other technical assistance programs (for more information, see Chapter 9). The County and MSDGC should continue conducting those programs and should consider additional programs focused on bonding, bookkeeping, business plan development and refinement, financial literacy, and other topics. It could host those programs on its own or in conjunction with local partners. The County and MSDGC should also consider implementing a program to help individual businesses develop and grow. As part of such a program, the County and MSDGC could have an application and interview process to select businesses with which to work closely to provide tailored support and resources necessary for their growth.

f. Mentor/protégé program. Many businesses that participated in the anecdotal evidence process spoke highly of mentor/protégé programs and relationships, noting the benefits of

working with and learning from larger, more successful companies in similar industries. The County and MSDGC should consider developing a mentor/protégé program on its own or in collaboration with local business assistance organizations.

g. Staffing. The County employs dedicated staff members within the Economic Inclusion and Equity Department (EIED) to implement the SBE Program and monitor the participation of SBEs in its work, among other responsibilities. However, conversations with County staff and anecdotal evidence from business owners indicate that EIED does not have a large enough staff to fully implement various aspects of the SBE Program, including monitoring activities and supportive services programs. The County should consider expanding the EIED staff to carry out essential program functions as well as implement additional program measures. When considering how many additional staff members it might need, the County should consider various functions, including:

- Assisting businesses with relevant certification requirements;
- Administrating the SBE Program (e.g., setting overall aspirational goals and monitoring business participation in County work);
- Implementing various program measures, including networking and outreach, technical assistance programs, and contract-specific goals, as applicable;
- Conducting contract compliance activities with respect to contract-specific SBE, MBE, and MBE goals, as applicable; and
- Training County staff on program policies and measures.

h. Disparity studies. The County and MSDGC should consider conducting disparity studies on a regular basis. Many organizations conduct studies every three to five years to understand changes in their marketplaces, refine program measures, and ensure up-to-date information on the participation and availability of minority- and woman-owned businesses for their work. Codifying disparity studies at regular intervals will help ensure that the County and MSDGC have up-to-date information about outcomes for minority- and woman-owned businesses in their work, regardless of the political climate or the individuals who are in leadership positions.

APPENDIX A.
Definitions of Terms

Appendix A defines terms useful to understanding the 2022 Hamilton County Disparity Study report.

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, focus group participants, and other stakeholders in the local marketplace.

Banks Project Small Business Enterprise (SBE) Program

Hamilton County and the City of Cincinnati developed the Banks Project SBE Program to help ensure the inclusion of different types of business in the Banks Project, a multiphase, multiuse development project in downtown Cincinnati. The Banks Project SBE Program only includes race- and gender-neutral efforts.

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 business as well as all its other locations, if applicable.

Business Listing

A business listing is a record in a database of business information. A single business can have multiple listings (e.g., when a single business has multiple locations listed separately).

Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate a compelling governmental interest in remedying past, identified discrimination in order to implement race- or gender-conscious measures. That is, an organization 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—that supports the use of such measures. The organization must assess such discrimination within its own relevant geographic market area.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Control

Control means exercising management and executive authority of a business.

County Small Business Enterprise (SBE) Program

The County SBE Program is designed to help ensure inclusion of different types of individuals and businesses in Hamilton County operations as well as contracting and procurement activities through various race- and gender-neutral efforts. With regard to operations, Hamilton County departments must develop inclusion plans for their staffing and employment. With regard to contracting and procurement, Hamilton County departments must provide support to small businesses to increase their ability to compete for County work.

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 a specific group of businesses to receive on contracts or procurements the agency awards. 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 Code of Federal Regulations (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 and personal net worth. Some 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 economic requirements set forth in 49 CFR Part 26.

Disparity

A disparity is a difference between an actual outcome and some benchmark such that the actual outcome is less than the benchmark. In this report, the term *disparity* refers specifically to a difference between the participation of a specific group of businesses in agency contracting and procurement and the estimated availability of the group for that work.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation of a specific group of businesses in an organization's contracts and procurements and the estimated availability of the group for that work.

Disparity Index

A disparity index is computed by dividing the actual participation of a specific group of businesses in an organization's 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.

Dun & Bradstreet (D&B)

D&B is the leading global provider of lists of business establishments and other business information for specific industries within specific geographical areas (for details, see www.dnb.com).

Firm

See *business*.

Hamilton County (The County)

The County is located in southwestern Ohio and is the third-most populous county in the state with more than 800,000 residents. Its largest city is Cincinnati, which also serves as the county seat. Each year, the County spends hundreds of millions of dollars in contracts and procurements to procure various construction services, professional services, and goods and other services to serve the needs of local residents, visitors, and businesses.

Hamilton County Board of County Commissioners (BOCC)

The BOCC has full or shared authority over County departments, boards, offices, and other entities, including how they contract and procure for various goods and services.

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 a particular business group suffers from barriers or discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations often use

relatively strong measures to address barriers affecting particular groups, sometimes including race- and gender-conscious measures.

Local Marketplace

See *relevant geographic market area.*

Majority-owned Business

A majority-owned business is a for-profit business that is at least 51 percent owned and controlled by non-Hispanic white men.

Marketplace Conditions

Marketplace conditions are factors that potentially affect outcomes for workers and businesses. The study team assessed conditions in the local marketplace in four primary areas: human capital, financial capital, business ownership, and business success.

Metropolitan Sewer District of Greater Cincinnati (MSDGC)

MSDGC is responsible for collecting and treating wastewater in Cincinnati and Hamilton County, Ohio. It maintains approximately 3,000 miles of sanitary and combined sewers and operates nine wastewater treatment plants, more than 100 pump stations, and several high-rate treatment facilities. The County owns and operates MSDGC, and the BOCC has full authority for its operations.

Minority

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

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify with one of the following racial/ethnic groups: Asian American, Black American, Hispanic American, Native American, or other non-white racial or ethnic group. The study team considered businesses owned by minority men and minority women as minority-owned businesses.

Minority-owned Business Enterprise (MBE)

An MBE is a minority-owned business that is certified specifically as such by a credible and recognized certifying agency, including the City of Cincinnati, the State of Ohio, and the Ohio Department of Transportation.

MSDGC SBE Program

MSDGC operates an SBE Program to increase the participation of small businesses in its construction, professional services, and goods and others services contracts and procurements. The program comprises various race- and gender-neutral efforts.

Narrow Tailoring

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

a) The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;

b) The degree to which the use of such measures is limited to those groups that suffer discrimination in the local marketplace;

c) The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;

d) The relationship of any numerical goals to the relevant business marketplace; and

e) The impact of such measures on the rights of third parties.

Participation

See *utilization*.

Prime Consultant

A prime consultant is a business that performs professional services prime contracts directly for end users, such as the County.

Prime Contract

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

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for end users, such as the County.

Procurement

See *contract*.

Project

A project refers to a construction, professional services, or goods and other services endeavor the County 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 specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for

such measures but other businesses would not. Similarly, businesses owned by women might be eligible for such measures but businesses owned by men would not. An example of race- and gender-conscious measures is an organization's use of minority- or woman-owned business participation goals on individual contracts or procurements.

Race- and Gender-neutral Measures

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

Rational Basis

Government organizations that implement contracting and procurement programs that rely only on race- and gender-neutral measures to encourage the participation of businesses, regardless of the race/ethnicity or gender of business owners, must show a rational basis for their programs. Showing a rational basis requires organizations 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. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which organizations award most of their contracting dollars are located. The RGMA is also referred to as the local marketplace. Case law related to contracting programs and disparity studies requires analyses to focus on the RGMA. The RGMA for the County's contracting and procurement activities comprises Butler, Clermont, Hamilton, and Warren Counties in Ohio as well as Boone, Campbell, and Kenton Counties in Kentucky.

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 organization's use of race- and gender-conscious measures must meet to be considered constitutional. Strict scrutiny is the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, an organization 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 remedy identified discrimination.

An organization's use of race- and gender-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. The County or MSDGC had to have awarded a contract or procurement during the study period for it to be included in the study team's analyses. The study period for the disparity study was January 1, 2016 through June 30, 2021.

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*).

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating that actual participation of a specific business group is 80 percent or less of the group's estimated availability. Substantial disparities are considered *inferences of discrimination* in the marketplace against particular business groups. Government organizations often use substantial disparities as justification for the use of relatively strong measures to address barriers affecting those groups, sometimes including race- and gender-conscious measures.

Utilization

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

Vendor

A vendor is a business that sells goods either to a prime contractor or prime consultant or to an end user, such as the County.

Woman-owned Business

A woman-owned business is a business with at least 51 percent ownership and control by individuals who identify as non-Hispanic white women. (The study team considered businesses owned by minority women as minority-owned businesses.)

Woman-owned Business Enterprise (WBE)

A WBE is a business owned by individuals who identify as women certified specifically as a WBE by a credible and recognized certifying agency, including the City of Cincinnati, the State of Ohio, and the Ohio Department of Transportation.

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APPENDIX B.
Legal Framework and Analysis

Executive Summary

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise ("MBE/WBE/DBE") programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Hamilton County, Ohio Disparity Study.

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[1] *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*,[2] ("*Adarand I*"), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court's decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study and the strict scrutiny analysis. Hamilton County, Ohio is within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. This analysis reviews the Sixth Circuit Court of Appeals decisions and district court decisions in the Sixth Circuit regarding MBE/WBE/DBE programs.

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

In addition, the appendix reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise ("Federal DBE") Program[3] and the implementation of the Federal DBE Program by local and state governments.

The appendix analyzes these recent federal cases in Section F below that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, and the validity of local and state DBE programs that are

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

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

[3] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").

informative to the study, including: *Dunnet Bay Construction Co. v. Illinois DOT,*[4] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.,*[5] *Western States Paving Co. v. Washington State DOT,*[6] *Mountain West Holding Co. v. Montana, Montana DOT, et al.,*[7] *M.K. Weeden Construction v. Montana, Montana DOT, et al.,*[8] *Northern Contracting, Inc. v. Illinois DOT,*[9] *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads,*[10] *Adarand Construction, Inc. v. Slater*[11] *("Adarand VII")*, *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[12] *Geyer Signal, Inc. v. Minnesota DOT,*[13] *Geod Corporation v. New Jersey Transit Corporation,*[14] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[15]

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

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to local government's implementation of the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,[16] 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

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[4] *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.,* 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), *cert. denied*, 137 S. Ct. 31, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT*, et al. 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay,* 2015 WL 4934560 (7th Cir., 2015).

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

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

[7] *Mountain West Holding Co., Inc. v. Montana,* 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. 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. 2014).

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

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

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

[11] *Adarand Construction, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

[12] *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,* 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). *Midwest Fence* filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, *see* 2017 WL 511931 (Feb. 2, 2017), which was *denied,* 2017 WL 497345 (June 26, 2017).

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

[14] *Geod Corporation v. New Jersey Transit Corporation*, 766 F.Supp. 2d 642 (D. N. J. 2010).

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

[16] 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions).

business enterprises, including from disparity studies and other evidence[17]. Congress recently passed legislation in 2021, which was signed by the President, (H.R. 3684 - 117th Congress, Section 11101, Infrastructure Investment and Jobs Act of 2021)[18] that again reauthorized the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

It is noteworthy and instructive to the study that the U.S. Department of Justice in January 2022 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.

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

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

B. U.S. Supreme Court Cases

21. *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989). In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" governmental programs.[19] 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."[20] 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.[21] 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.[22]

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

[19] 488 U.S. 469 (1989).

[20] 488 U.S. at 500, 510.

[21] 488 U.S. at 480, 505.

[22] 488 U.S. at 507-510.

Title VII.,[23]. 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."[24]

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[25] "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."[26]

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."[27] 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."[28]

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."[29] "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."[30]

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."[31]

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[23] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

[24] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

[25] 488 U.S. at 502.

[26] *Id.*

[27] 488 U.S. at 509.

[28] *Id.*

[29] 488 U.S. at 509.

[30] *Id.*

[31] 488 U.S. at 492.

22. *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 following and interpreting *Adarand I* and *Croson* 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 local and state government MBE/WBE/DBE programs and the Federal DBE Program by local and state government recipients of federal funds.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state and local government programs, and federal social and economic disadvantaged business 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.

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.[32] 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.[33]

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.[34] 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.[35]

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[32] *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) ; *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *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; *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).

[33] *Adarand I*, 515 U.S. 200, 227 (1995); *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *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; *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).

[34] *Id. . See also, Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021).

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

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.[36]

The Sixth Circuit Court of Appeals in *Vitolo v. Guzman,*[37] which involved a challenge to a federal social and economic disadvantaged business program, recently stated that government has a compelling interest in remedying past discrimination 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 Sixth Circuit noted, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.[38]

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."[39] 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).[40] 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.[41]

- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private

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

[37] *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021)

[38] *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021)

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

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

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

sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor's work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.[42]

- **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.[43]

- **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.[44]

- **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 of 2021, 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 airport-related markets," federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE and DBE Programs.[45] Congress also found in the Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, 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.[46]

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

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

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

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

[46] *Id.*

The Federal DBE Program Implemented by State and Local Governments Instructive to the Study. 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 the application of disparity studies. The cases involving the Program and its implementation by state and local governments are informative, recent and applicable to the legal framework regarding 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.[47] 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").[48] In December 2015, Congress passed the Fixing America's Surface Transportation Act ("FAST Act").[49] In October 2018, Congress passed the FAA Reauthorization Act.[50] Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 11101) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.[51]

As noted above, the U.S. Department of Justice in January 2022 recently issued a report that updated the 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

[47] 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.

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

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

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

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

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 state and local government federal aid recipients and how recipients of federal funds implement the Federal DBE Program for federally-assisted contracts. The federal government and Congress have 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 local and state government 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.[52]

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

The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45. These regulations, and their interpretation by court decisions are instructive to local and state governments for many reasons, including if they are considering the development and implementation of MBE/WBE/DBE programs that satisfy the strict scrutiny standard and are narrowly tailored to remedying specific identified findings of discrimination in their marketplace.

Provided in 49 CFR § 26.45 are regulations regarding how local and state governments as recipients of federal funds should set the overall goals for their DBE programs, which are instructive to local and state government MBE/WBW/DBE programs. In summary, the state or local government establishes a base figure for relative availability of DBEs.[53] This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.[54] Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.[55] There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients

[52] 49 CFR § 26.51; see 49 CFR § 23.25.

[53] 49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).

[54] *Id.*

[55] *Id.* at § 26.45(d); Id. at § 23.51(d).

consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.[56] This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.[57]

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.[58] A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.[59]

State and local governments are to certify DBEs according to their race/gender, size, net worth, and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.[60]

Thus, the implementation of the Federal DBE Program by state and local governments, the application of the strict scrutiny standard to the state and local government DBE programs, the analysis applied by the courts in challenges to state and local government DBE programs, the evidentiary basis and findings relied upon by Congress and the federal government regarding the Program and its implementation, the U.S. Department of Justice's January 2022 report "The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence," and court decisions regarding federal social and economic disadvantaged business enterprise programs are informative and instructive to state and local governments and this study.

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.[61] If the government

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[56] *Id.*

[57] 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

[58] 49 CFR § 26.51; 49 CFR § 23.51(a).

[59] 49 CFR § 26.51(b); 49 CFR § 23.25.

[60] 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39

[61] *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).

makes its initial showing, the burden shifts to the challenger to rebut that showing.[62] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[63]

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.[64] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[65] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[66]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[67] "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"[68] Anecdotal

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[62] *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.

[63] *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.

[64] *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.

[65] *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).

[66] *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.

[67] *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).

[68] *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); *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).

evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[69]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[70] 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.[71] 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.[72]

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.[73] 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.[74] Conjecture and unsupported criticisms of the government's methodology are insufficient.[75] The

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[69] *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).

[70] *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).

[71] *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).

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

[73] *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.

[74] *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 ("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).

[75] *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); *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); *Geyer Signal,* 2014 WL 1309092.

courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.[76]

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.'"[77] 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.[78] 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.[79] 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.[80]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.[81] "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."[82]

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[76] *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).

[77] *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).

[78] *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; *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).

[79] *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).

[80] *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).

[81] *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, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal,* 2014 WL 1309092.

[82] *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).

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.[83] 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.[84] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[85]

Other considerations regarding statistical evidence include:

- **Availability analysis**. A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.[86] There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,[87] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[88]

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[83] *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).

[84] *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).

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

[86] *See*, *e.g.*, *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *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).

[87] *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).

[88] *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).

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[89]

- **Disparity index.** An important component of statistical evidence is the "disparity index."[90] 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."[91]

- **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.[92]

Marketplace discrimination and data. It is instructive to review the Tenth Circuit Court of Appeals decision in *Concrete Works,* which held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.[93] 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.*[94] 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."[95] In *Concrete*

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

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

[91] *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.

[92] *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.

[93] *Id.* at 973.

[94] *Id.*

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

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."[96]

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.[97] Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.[98]

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.[99] 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.[100]

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.[101] 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.[102]

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.[103] ("[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.*"[104] 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."[105] The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private*

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

[97] *Id*. at 973.

[98] *Id*.

[99] *Id*. at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

[100] *Id*.

[101] *Id*. at 974.

[102] *Id., citing Adarand VII*, 228 F.3d at 1166-67.

[103] *Concrete Works*, 321 F.3d at 976, *citing Adarand VII*, 228 F.3d at 1166-67.

[104] *Id*. (emphasis added).

[105] *Id., quoting Concrete Works II*, 36 F.3d at 1529.

construction market in the Denver MSA" was relevant to the local government's burden of producing strong evidence.[106]

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."[107] 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.[108]

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."[109]

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.[110]

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 the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[111]

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[106] *Id., quoting Concrete Works II*, 36 F.3d at 1530 (emphasis added).

[107] *Id*.

[108] *Concrete Works*, 321 F.3d at 976, *quoting Croson*, 488 U.S. at 492.

[109] *Id*. at 977, *quoting Adarand VII*, 228 F.3d at 1167-68.

[110] *Id*. at 977.

[111] *Id*. at 979, *quoting Adarand VII*, 228 F.3d at 1174.

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.[112]

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.[113] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[114] 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.[115]

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.[116]

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[112] *Id*. at 979-80.

[113] *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).

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

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

[116] *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); *e.g.*, *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, *see Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic,* 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

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.[117]

As an example of the use of anecdotal evidence, the Fourth Circuit Court of Appeals in *H.B. Rowe* stated that in addition to statistical evidence it "further require[s] that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'"[118] 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.[119]

The Fourth Circuit 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."[120] The court in *H. B. Rowe* held that anecdotal evidence supplements statistical evidence of discrimination.[121]

The court in *H.B. Rowe* found that North Carolina's anecdotal evidence of discrimination sufficiently supplemented the State's statistical showing.[122] The survey evidence exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors.[123] The court held that the State could conclude that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action.[124]

The court in *H. B. Rowe* concluded the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the disparity study.[125] Thus, the court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.[126]

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[117] *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).

[118] 615 F.3d at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

[119] *Id.* at 249.

[120] 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

[121] *Id.* at 249.

[122] *Id*.

[123] *Id*. at 251.

[124] *Id*.

[125] *Id*. at 251.

[126] *Id.*

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 Sixth 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.[127]

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.[128]

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[127] *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; *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*, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021); Geyer Signal, Inc., 2014 WL 1309092.

[128] *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 Sixth Circuit Court of Appeals in *Vitolo v. Guzman* stated that 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.[129]

Similarly, the Sixth Circuit 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.'"[130]

The Eleventh Circuit described the "the essence of the 'narrowly tailored' inquiry [as] the notion that explicitly racial preferences … must only be a 'last resort' option."[131] 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."[132]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[133] 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."[134] The Court found that the District failed to show it seriously considered race-neutral measures.

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[129] *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021)

[130] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000); see, also, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021).

[131] *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).

[132] *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; *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021).

[133] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

[134] 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); *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021).

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

Race-, ethnicity-, and gender-neutral measures. To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[135] 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.[136]

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."[137]

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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[135] *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; *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; see also, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[136] *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); *see, also*, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[137] *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.[138]

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.[139]

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.[140] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[141] (2) good faith efforts provisions;[142] (3) waiver provisions;[143]

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[138] *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; 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).

[139] See, e.g., *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, c*iting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe,* 615 F.3d 233, 252-255; *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; *see also, Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[140] *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).

[141] *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).

[142] *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.

[143] *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).

(4) a rational basis for goals;[144] (5) graduation provisions;[145] (6) remedies only for groups for which there were findings of discrimination;[146] (7) sunset provisions;[147] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[148]

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Sixth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.[149] The Sixth Circuit and Ohio courts have applied "intermediate scrutiny" to classifications based on gender.[150] Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.[151]

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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[144] *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).

[145] *Id*.

[146] *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.

[147] *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).

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

[149] *See, e.g., Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); 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*, *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); *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; *Rowitz v. McClain*, 138 N.E.3d 1241 (2019) (Ct. App. Ohio 2019*); State v. Thompson*, 95 Ohio St.3d 264**,** 767 N.E.2d 251 (S.Ct. Ohio 2002).

[150] *Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Montgomery v. Carr,* 101 F.3d 1117, 1121 (6th Cir. 1996)*; Rowitz v. McClain*, 138 N.E.3d 1241 (2019) (Ct. App. Ohio 2019)*; State v. Thompson*, 95 Ohio St.3d 264**,** 767 N.E.2d 251 (S.Ct. Ohio 2002). *see, e.g., 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); *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)) ; *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000).

[151] *Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Montgomery v. Carr,* 101 F.3d 1117, 1121 (6th Cir. 1996)*; H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *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, e.g., Serv. Emp. Int'l Union, Local 5 v. City of Hous*., 595 F.3d 588, 596 (5th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *Rowitz v. McClain*, 138 N.E.3d 1241 (2019) (Ct. App. Ohio 2019*); State v. Thompson*, 95 Ohio St.3d 264**,** 767 N.E.2d 251 (S.Ct. Ohio 2002).

Substantially related to the achievement of that underlying objective.[152]

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.[153]

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.[154] 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.[155]

The Sixth Circuit has stated that 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.[156]

The courts in Ohio have said that between the rational basis and strict scrutiny tiers of review, an intermediate scrutiny applies when a discriminatory classification based on sex is at issue, which employs a heightened or intermediate scrutiny and requires that the classification be substantially related to an important governmental objective.[157] The party seeking to uphold the

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[152] *See, e.g., Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *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); *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); *Concrete Works*, 36 F.3d 1513, 1519 (10th 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.").

[153] *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*.

[154] *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); *Concrete Works*, 36 F.3d 1513, 1519 (10th 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.").

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

[156] *Vitolo, et al. v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

[157] *See*, *e.g*, *Rowitz v. McClain*, 138 N.E.3d 1241 (2019) *(Ct. App. Ohio 2019); State v. Thompson*, 95 Ohio St.3d 264**,** 767 N.E.2d 251 (S.Ct. Ohio 2002).

legislation must then establish an "exceedingly persuasive justification" for the classification. To succeed, the defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. [158]

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 intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[159]

The Fourth Circuit in *H. B. Rowe*, found that the disparity analysis demonstrated women-owned businesses won far more than their expected share of subcontracting dollars during the study period.[160] Therefore, the court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects.[161] The court held the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires.[162]

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."[163] 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.[164] 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.[165]

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.[166] Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal

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[158] *See*, *e.g*, *Rowitz v. McClain*, 138 N.E.3d 1241 (2019) (Ct. App. Ohio 2019)*; State v. Thompson*, 95 Ohio St.3d 264**,** 767 N.E.2d 251 (S.Ct. Ohio 2002).

[159] 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

[160] 615 F.3d 233 at 254.

[161] *Id.*

[162] *Id*. at 255.

[163] *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1010 (3d. Cir. 1993).

[164] *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1010 (3d. Cir. 1993).

[165] *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1011 (3d. Cir. 1993).

[166] *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1011 (3d. Cir. 1993).

evidence to establish gender discrimination necessary to support the Ordinance.[167] But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.[168] 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.[169] 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.[170] When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose."[171]

The courts in Ohio and the Sixth Circuit Court of Appeals 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.[172] This standard the courts conclude is considered quite deferential[173] and "the fit between the enactment and the public purposes behind it need not be mathematically precise."[174] So long as a government legislature had a reasonable basis for adopting the

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[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Hettinga v. United States,* 677 F.3d 471, 478 (D.C. Cir 2012); *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *Arbino v. Johnson & Johnson,* 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp*., 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006); *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.

[171] *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *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, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp*., 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006).

[172] *See, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp.,* 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006); ; *see 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); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998).

[173] *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013) ; *See, e.g., Montgomery v. Carr,* 101 F.3d 1117, 1121 (6th Cir. 1996); *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp*., 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006).

[174] *Id.*

classification—which can include "rational speculation unsupported by evidence or empirical data"—the law will pass constitutional muster.[175]

"[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."[176] 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".[177]

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."[178] Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[179]

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation, and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations ("FAR")[180].

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

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[175] *Id*. *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013) (*citing FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *see, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp.,* 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp.,* 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006).

[176] *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); *See, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp.,* 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006).

[177] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[178] *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see, e.g., Hettinga v. United States,* 677 F.3d 471, 478 (D.C. Cir 2012)*; Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp*., 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006).

[179] *Id*.; *See, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 880 N.E. 2d 420 (S. Ct. Ohio 2007); *McCrone v. Bank One Corp*., 107 Ohio St. 3d 272, 839 N.E. 2d 1 (S.Ct. Ohio 2005); *Pickawar Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 936 N.E. 2d 944 (S.Ct. Ohio 2010); *McKinley v. Ohio Bur. Of Workers' Comp*., 170 Ohio App. 3d 161, 866 N.E. 527 (Ct. App. Ohio 2006).

[180] 2012 WL 5939228 (Fed. Cl. 2012).

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."[181]

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.[182] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[183]

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.[184] The court, in an exercise of judicial restraint, found the "40 percent goal is a rational expression of the Government's policy of affording small business concerns…the maximum practicable opportunity to participate as subcontractors…."[185]

4. Pending cases and informative recent orders (at the time of this report). There are pending cases in the courts at the time of this report involving challenges to MBE/WBE/DBE type programs and federal social and economic disadvantaged business enterprise programs that may potentially impact and be instructive to the study, and key recent orders that are informative to the study including the following:

(i) ***Greer's Ranch Café v. Guzman*****,** 2021 WL 2092995 (N.D. Tex. 5/18/21).

(ii) ***Faust v. Vilsack*****,** 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).

(iii) ***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 Fla.

(iv) ***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.

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

(v) ***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.

(vi) ***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.

(vii) ***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.

(viii) ***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.

The following summarizes the above listed pending cases and informative recent decisions**:**

(i). ***Greer's Ranch Café v. Guzman, Administration of the U.S. SBA*****,** 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.
>
> Background. 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 21 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.

Strict scrutiny applied. 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."

Compelling governmental interest. 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 hearing 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.

(ii). ***Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture*****,** 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, and at the time of this report is considering the Plaintiffs' Motion for a Preliminary Injunction.

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, 109 S.Ct. 706, 102 L.Ed.2d 854 (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*, ––– F.3d at ––––, 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*, ––– F.3d at ––––, 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), 2021 WL 2580678, 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 and stayed the motion for a preliminary injunction.

Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20,2021, requirinng the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which is a class action.

(iii). *Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, 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.

Wynn v. Vilsack is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (N.D. Wis. June 10, (2021) case pending in the district court in Wisconsin.

The court in Faust granted the Plaintiffs' Motion for Temporary Restraining Order and the court in Wynn granted the Plaintiff's 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, 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."

Background. In this action, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), which provides debt relief to "socially disadvantaged farmers and ranchers" (SDFRs). 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. 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.

Application of strict scrutiny test. Compelling Interest. 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 said, appears less substantial than that deemed insufficient in *Eng'g Contractors v. Metro-Dade County* case (11th Cir. 1997), 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.

The Government states 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 notes 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." *Citing Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994).

Thus, 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 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 said 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. This evidence consists of substantial evidence of historical discrimination that predates remedial efforts made by Congress and, to a lesser extent, evidence the Government contends shows continued discrimination that permeates USDA programs.

The court pointed out that 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 decided that nevertheless, "at this stage of the proceedings, the Court 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, Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest."

Narrow Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court holds that 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 narrow tailoring requirement ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson,* 488 U.S. at 493 (plurality opinion). "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 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).

Here, the court found, "little if anything about Section 1005 suggests that it is narrowly tailored." As an initial matter the court notes that the necessity for the specific relief provided in Section 1005—debt relief for all SDFRs with outstanding qualifying farm loans as of January 1, 2021—is unclear at best. The court states that as written, "Section 1005 is tailored to benefit only those SDFRs who succeeded in receiving qualifying farm loans from USDA, but the evidence of discrimination provided by the Government says little regarding how this particular group of SDFRs has been the subject of past or ongoing discrimination. … Thus, 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 found, "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 group11 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." Although the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, the court finds it is not. "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 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, the court held, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, 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 case is pending in the district court. The Defendants filed a Motion to Stay Proceedings and a Motion to Stay Administratively Timely Deadlines. The court on August 2, 2021, denied the Motion to Stay Proceedings.

(iv). ***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 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 has 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. The County Commission voted on this matter in November, 2020 and approved settlement of the case with the County paying Plaintiffs $331,950 and agreeing to not enforce the MWBE program. The parties submitted a proposed Order of Settlement to the court to conclude the matter. The minority-owned business program appears will be changing from its current form.

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.

(v). ***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 denied a motion by AGC to be elevated to party status and to conduct discovery.

MTA had filed a Motion to Dismiss the Second Amended Complaint. 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.

(vi). ***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 this case arises from Defendant's MWBE 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 a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs allege 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. Plaintiffs allege 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 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 Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

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 of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, 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 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. 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 $15,000 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 decisionon each application by August 2, 2021. If the Plaintiffs were not certified as an MBE under the revised October 2020 rules, Plaintiffs reserved their right to pursue all claims relating to the decision.

(vii). ***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-qualifified 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 filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021 issued a 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 file an Answer by April 28, 2021 and set a Bench Trial for 10/11/2022 with Dispositive Motions due by 6/6/2022. 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.

(viii). ***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. Circle City and NABOB and DISH on July 29, 2021 filed a Stipulation of Facts and Dismissal of NABOB dismissing with prejudice the claims made by NABOB against DISH. Circle City and DISH consented to NABOB withdrawing from the action via a dismissal. The court has set a pretrial conference in February 2022, and the case is pending at the time of this report.

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, disparity studies, the Federal DBE Program and the implementation of the Federal DBE Program by state and local government recipients of federal funds, and federal social and economic disadvantaged programs, which are instructive to the study. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

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

1. *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 993 F.3d 353 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 $28.6 billion 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 21-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 man-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. 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" Vitolio'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 the 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 argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court said, 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. overnment policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." 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 plaintiffs are entitled to an injunction pending appeal. Since the government failed to justify its discriminatory policy, the plaintiffs will win on the merits of their constitutional claim. And like in 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 theapplicants' 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 wrongul 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 Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

2. *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.

3. *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 twenty years ago, it would not suffice to continue to justify it forever. *Id*. at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id*. at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id*. at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id*. at 738. The Court concluded the historical record contained no evidence that the Ohio legislature

gave any consideration to the· use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id*. at 738.

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

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

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

4. *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.

A program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id*.

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.

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*.

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*.

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

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

contracts with the state of Ohio. *Id*. at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id*.

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

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

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

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

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

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement

expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

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

5. *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 voluntarily dismissed in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954. This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the struct scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

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 have 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.

Upon review of all factors together, 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 lac 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 finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

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.

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 decision that upholds 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. *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.

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

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

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

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

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

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20 percent of procurement for minority business. *Id*. at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City's adoption of a disparity study. *Id*. at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id*. The study recommended that the City implement a range of MBE goals from 10 to 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.

8. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997). This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

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

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

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

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id*. at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id*. The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas … [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Id*. at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id*. at 711.

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

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id*. at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id*. at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (*e.g.*, inclusion of Aleuts). *Id*. at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Id*. at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

9. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997). *Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association* is a paramount case in the Eleventh Circuit and is instructive to the

disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

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

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

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

On appeal, the Eleventh Circuit considered four major issues:

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

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;

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

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 non-heterogenous 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.

10. *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.*

11. *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")1 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.

<u>(a) Federal Agency Reports of Discrimination in Denver.</u> 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 1.36 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.

<u>(c) Evidence of Private Discrimination in the Denver MSA.</u> 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.

<u>(d) Anecdotal Evidence.</u> 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*. at 1530. 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).

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 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* to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id*. at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id*. The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id*. at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id*. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id*.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement

that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id*. at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id*. at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id*. According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id*. Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id*. Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id*. at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id*. at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id*. at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id*. at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id*. at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id*. at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id*. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id*. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id*. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found

that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id*. 1418.

14. *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

15. *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.

16. *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.

17. *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.

18. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.). This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

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

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

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

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether

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

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

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id*. at *8. Noting that affirmative action is permitted only sparingly, the court found: "[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit." *Id*. The court held in conclusion, that the plaintiffs were "substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause." *Id*. at *9.

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

19. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004). The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering*

Contractors Association decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 .3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id*. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id*. The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id*. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id*. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id*. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id*.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id*. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id*. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id*. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id*.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

1. Data identification and collection of methodology for displaying the research results;

Presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas;

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

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.

20. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004). This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

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

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

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

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

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

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in

the statute. Rather, the State of Florida argued that the statute is "permissive." The court, however, held that "there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute 'induces an employer to hire with an eye toward meeting … [a] numerical target.' *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

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

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

21. *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, $27.5 million, 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).

22. *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.

23. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001). Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act ("MBE Act"). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id*. at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id*. at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-

based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id*. The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. *Id*. at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id*.

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." *Id*. Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." *Id*. The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. *Id*. at 1240, *citing* to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." *Id*. at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." *Id*. In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. *Id*.

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id*. at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id*.

The court also found that the Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id*. The district court stated that the Intervenors did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id*. The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id*. at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id*. at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id*. at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id*. at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id*.

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id*. at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id*. at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily

informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id*. at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id*. at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id*. at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id*. at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id*. at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id*. at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id*. at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id*. at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id*. Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id*. The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id*.

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id*. Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id*. at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id*. at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id*. at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id*. at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id*.

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id*. at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id*. In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id*. at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id*. at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id*. at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business

enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id*. The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state's Central Purchasing Act with no time limitation. *Id*.

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

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

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

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

24. *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 percent 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.

25. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam, 218 F.3d 1267 (11th Cir. 2000). This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

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

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id*. at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id*. at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id*.

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id*. at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id*., *citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id*. at 1368, *citing Eng'g*

Contractors Assoc., 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id*. at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id*. at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id*. Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id*. The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id*. However, the court found that the Brimmer-Marshall Study contained no such data. *Id*.

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id*. at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id*. The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id*.

The court next considered the County's post-1994 disparity study. *Id*. at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id*. The court explained:

> Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id.

The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id*. at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id*. at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id*. at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id*. Additionally, the court found that the County's standard deviation

analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id*. (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id*. at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id*. The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id*. The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id*.

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id*. at 1380, *citing Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id*. at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id*. The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity …. *Id*.

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id*. The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id*. at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id*.

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id*. The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id*.

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id*. at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id*.

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id*. On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

26. *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 Instructive to the Study

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. *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 on April 22, 2019, which was denied on 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 against 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. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (Not for Publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). Note: The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

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

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

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.,* MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of

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

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

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

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

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

Mountain West, 2014 WL 6686734 at *2, *quoting Western States*, at 997-998, and *Mountain West,* 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, *quoting AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

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

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

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

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

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

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages

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

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

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

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see,* 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West's expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services

contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

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.

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.

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.

Mountain West argued that Montana incorrectly compared the proportion of available *sub*contractors 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.

3. *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.

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.

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).

4. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al*., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al*., 2016 WL 193809 (Oct. 3, 2016). Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over $52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id*. at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id*. Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately,

IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77 percent contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-

owned businesses distinguishes the IDOT DBE Program from other cases. *Id*. Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id*.

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over $52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, *quoting Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and

interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id*. The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

5. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al*., 713 F.3d 1187 (9th Cir. 2013). The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business initial Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California

transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

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

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

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

> "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination."

Id. at 1191, *citing Western States Paving Co*., 407 F.3d at 997-998.

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

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

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id*. at 1192.

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

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

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

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

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

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id*. at 1193.

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

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

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

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

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

against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id. (quoting Adarand III*, 515 U.S. at 237.)

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

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

A. Application of strict scrutiny standard articulated in Western States Paving. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving.* The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (*quoting Western States Paving,* 407 F.3d at 997–99).

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

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

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id*. at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id*. The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data

based on capacity to perform work and controlling for previously administered affirmative action programs." *Id*. (*citing Western States,* 407 F.3d at 1000).

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

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id*. at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination … may vary." *Id.* at 1197 (*quoting Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (*citing Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

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

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

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

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

and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id*. at 1198, *citing Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id*. The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

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

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id*. at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African

American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

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

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, *citing Grutter v. Bollinger,* 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

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

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

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to

benefit only those groups that have actually suffered discrimination. *Id*. at 1200. The Court then dismissed the appeal. *Id*.

6. *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.

7. *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*.

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. *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 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id*.; 49 CFR § 26.51(f)(3).

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

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social

and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

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

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

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

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to

DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.).

10. *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

11. *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.*

12. *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 DBE's 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 DBE's 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 three years; ordered Restitution in the amount of $85,221.21; and a $30,000 fine. The case also was terminated on March 13, 2018.

13. *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).[186] In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al*., 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 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

[186] 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.

of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id*. The court took judicial notice of the existence of Congressional hearings and

reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id*.

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id*. The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id*. The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.,* 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727*, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id*. Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor

market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE

subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id*. at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id*. Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT,* the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, *citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the

construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730.The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731.For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under $500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories,

and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal–Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal

regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non–DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its

burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race–neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. *Id*. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id*.

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as–applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not

narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. *See*, 840 F.3d 932 (7th Cir. 2016) discussed above.

14. *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.

<u>Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.</u> 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.

15. *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.

16. *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al*., 2013 WL 4774517 (D. Mont.) (September 4, 2013). This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id*.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent

DBE subcontractors (although the court points out that Weeden's bid actually identified only 0.81% DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id*. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id*. at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id*. at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id*.

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

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

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id*. The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id*. The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id*. The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id*.

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id*. at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id*. at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id*.

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

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

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

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

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

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

17. *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.*

18. *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.

19. *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.

20. *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.

21. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion). This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

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

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

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

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact

"specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

22. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007). This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

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

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

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

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

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

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

IDOT considered three reports prepared by expert witnesses. *Id*. at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id*. The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id*. The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id*.

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

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

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id*. She testified that DBE goals have no effect on the award of prime contracts

but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id*. at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id*.

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

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

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);

Reviewing the criteria for prequalification to reduce any unnecessary burdens;

"Unbundling" large contracts; and

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

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

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

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

forced to pay higher insurance rates due to racial and gender discrimination." *Id*. at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id*.

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

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

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

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id*. at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." *Id*. The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id*. Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id*.

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

The court further found:

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

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

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

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

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

Id. at *23.

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

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id*. at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and

accepted. *Id*. The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id*.

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

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

23. *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, 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 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.

24. *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*.

25. *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.

26. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002).

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact 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* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied

rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions 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* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but

found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id.* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id.* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id.* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id.* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id.* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id.* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. *Rothe Development Corp. v. U.S. Dept. of Defense, et al*., 545 F.3d 1023 (Fed. Cir. 2008). Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantages individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe,* 413 F.3d 1327

(Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the contract. *Id*. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id*. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id*. at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id*. at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id*. at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id*. at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id*. at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id*. at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id*. The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id*. The court declined to adopt a "bright-line rule for determining staleness." *Id*.

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id*. at n.86. The court also stated that it

"accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id*. at 839, *quoting* 61 Fed.Reg. 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id*. at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id*. at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id*. at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id*. at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id*. at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id*. at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id*. at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id*. at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id*.

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id*. The

court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id*., *quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and

Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id*. The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id*. The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id*. at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id*.

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id*. at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id*. at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied

on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id*. The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id*.

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing* to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id*.

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on

statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson*'s evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id*.

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id*. at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id*. at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041, *quoting* the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id*.

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id*. However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller

MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id*. at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id*. The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id*. at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id*. at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id*. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id*. The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id*. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id*.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed

over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 545 F.3d at 1049, *quoting W.H. Scott Constr. Co*., 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016). Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense ("DOD") and the U.S. Small Business Administration ("SBA") (collectively, "Defendants") challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d

237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

***DynaLantic Corp. v. Department of Defense*.** The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id*. at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions

were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id*. Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, *citing DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the

statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id*. at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id*. The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id*. at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014).

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id*. at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id*. at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id*.

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.,* 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id*. at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id*. Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id*. DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *DynaLantic,* at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id. quoting Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10, *quoting Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected DynaLantic's argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, *citing Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id*. The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id*.

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id*.

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not

probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that

fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that

discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id*. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id*. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id*.

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic,* at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id*. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts

and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id*.

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id*.

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id*. The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id*. The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal

Defendants agreed to pay plaintiff the sum of $1,000,000; 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

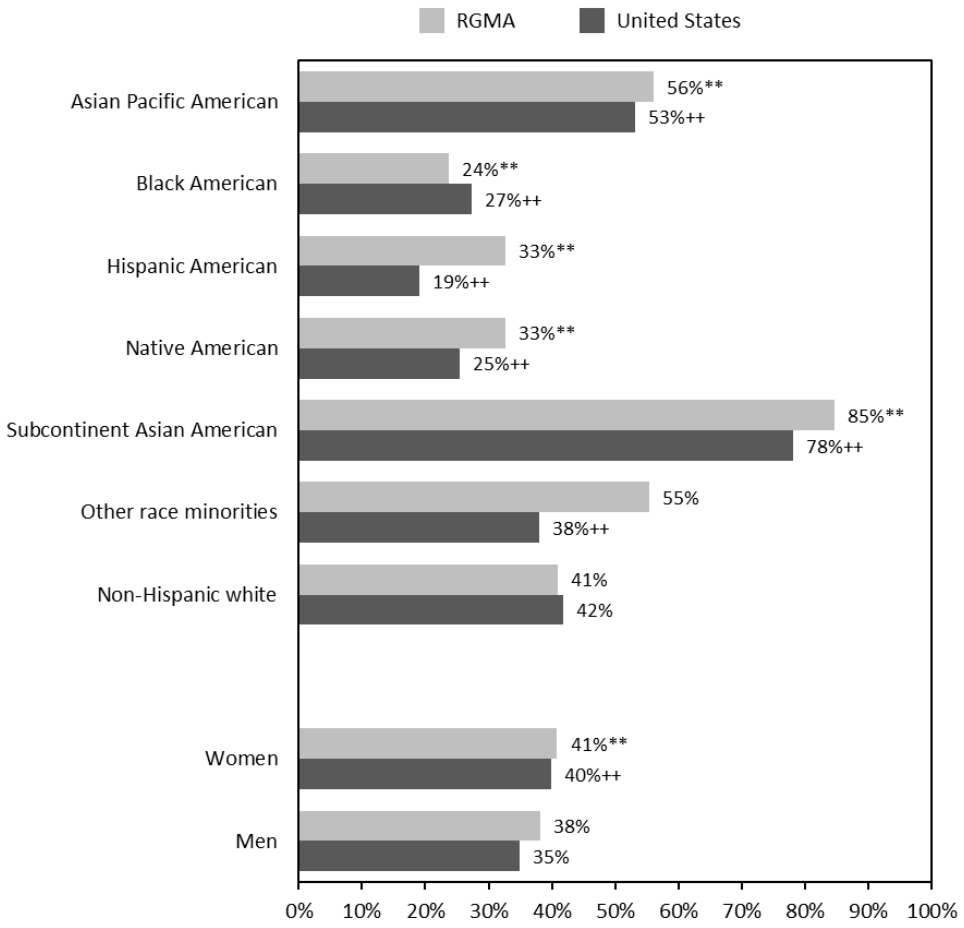
BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in Hamilton County's (the County's) *relevant geographic market area* (*RGMA*) to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the local marketplace that make it more difficult for minority- and woman-owned businesses to compete for County contracts and procurements. BBC defined the RGMA for the County as Hamilton, Butler, Warren, and Clermont Counties in Ohio and Boone, Campbell, and Kenton Counties in Kentucky. BBC made that determination based on the fact that the County awards the vast majority of its contract and procurement dollars to businesses located within those geographical areas (approximately 90% of relevant contract and procurement dollars).

BBC examined local 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 non-Hispanic whites and men; 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.
Percent of all workers 25 and older with at least a four-year degree in the RGMA and the United States, 2015-2019

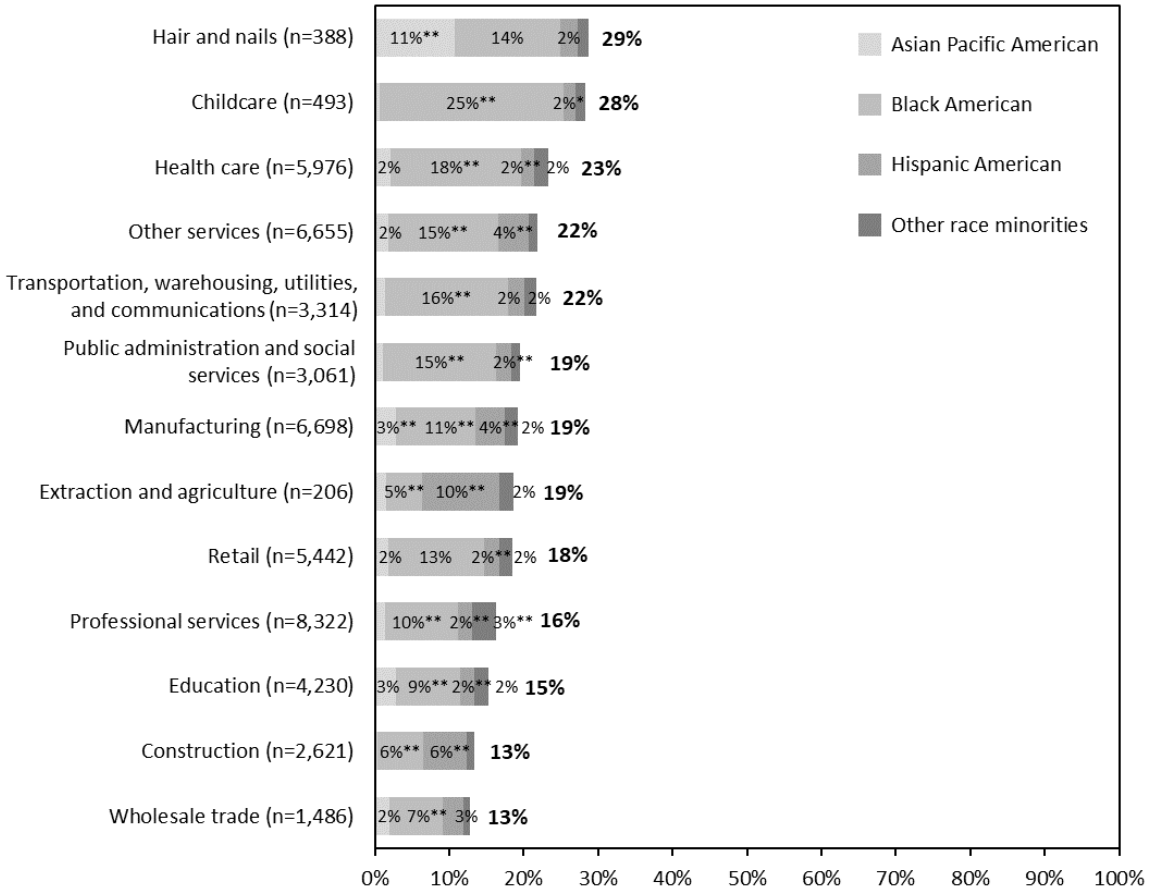


Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level for the RGMA and the United States, respectively.

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 Black American, Hispanic American, and Native American workers than non-Hispanic white workers have four-year college degrees in the RGMA.

Figure C-2.
Percent representation of minorities in various industries in the RGMA, 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 local workers is 2% for Asian Pacific Americans, 13% for Black Americans, 3% for Hispanic Americans, 2% for other race minorities, and 19% for all minorities considered together.

"Other race minorities" includes Subcontinent Asian Americans, Native 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.

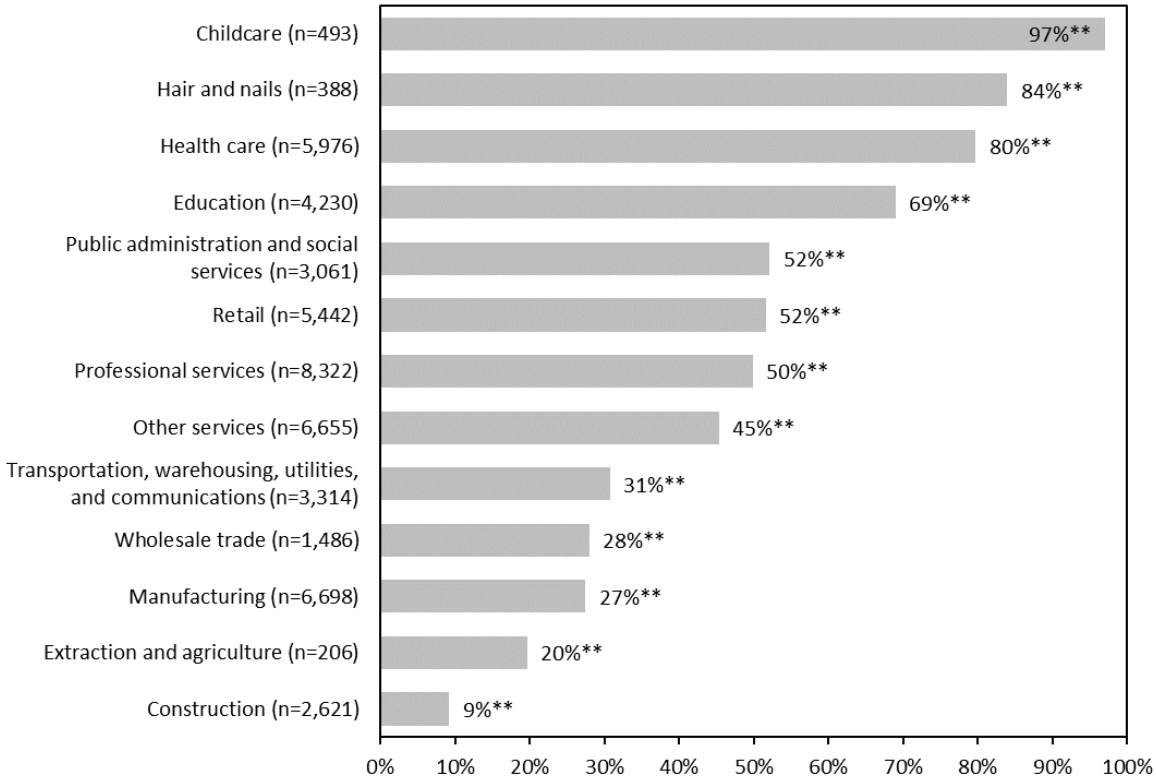
Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

All labels lower 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/.

Figures C-2 indicates that the local industries with the highest representations of minority workers are hair and nails, childcare, and health care. The industries with the lowest representations of minority workers are education, construction, and wholesale trade.

Figure C-3.
Percent representation of women in various industries in the RGMA, 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 local workers is 48%.

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/.

Figures C-3 indicates that the local 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 manufacturing, extraction and agriculture, and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries in the RGMA and the United States, 2015-2019

RGMA Group	All Industries (n=49,211)	Construction (n=2,621)	Professional Services (n=1,504)	Goods and other services (n=1,097)
Race/ethnicity				
Asian Pacific American	1.9 %	0.4 % **	1.2 % **	1.1 % **
Black American	12.6 %	6.1 % **	5.3 % **	17.2 % **
Hispanic American	2.8 %	5.9 % **	2.3 %	4.1 %
Native American	0.5 %	0.5 %	0.4 %	0.3 %
Subcontinent Asian American	1.2 %	0.2 % **	2.5 % **	0.4 % **
Other race minorities	0.1 %	0.3 %	0.2 %	0.2 %
Total minority	**19.2 %**	**13.3 %**	**11.9 %**	**23.4 %**
Non-Hispanic white	80.8 %	86.7 % **	88.1 % **	76.6 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender				
Women	48.2 %	9.2 % **	38.2 % **	33.7 % **
Men	51.8 %	90.8 % **	61.8 % **	66.3 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**

United States Group	All Industries (n=7,818,941)	Construction (n=485,217)	Professional Services (n=225,738)	Goods & Other Services (n=178,579)
Race/ethnicity				
Asian Pacific American	5.0 %	1.8 % **	5.8 % **	2.9 % **
Black American	12.6 %	5.9 % **	7.1 % **	14.2 % **
Hispanic American	17.3 %	28.6 % **	10.3 % **	26.1 % **
Native American	1.2 %	1.3 % **	0.8 % **	1.1 % **
Subcontinent Asian American	1.6 %	0.3 % **	2.6 % **	0.7 % **
Other race minorities	0.2 %	0.3 %	0.2 % **	0.4 % **
Total minority	**37.9 %**	**38.3 %**	**26.9 %**	**45.3 %**
Non-Hispanic white	62.1 %	61.7 % **	73.1 % **	54.7 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender				
Women	47.2 %	9.7 % **	38.2 % **	38.7 % **
Men	52.8 %	90.3 % **	61.8 % **	61.3 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**

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.

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-4 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans, Black Americans, and Subcontinent Asian Americans work in the local construction industry. In addition, a smaller percentage of women work in the local construction industry.
- Smaller percentages of Asian Pacific Americans and Black Americans work in the local professional services industry. In addition, a smaller percentage of women work in the local professional services industry.
- Smaller percentages of Asian Pacific Americans and Subcontinent Asian Americans work in the local goods and other services industry. In addition, a smaller percentage of women work in the local goods and other services industry.

Figure C-5.
Percent of non-owner workers who worked as a manager in each study-related industry in the RGMA 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.

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/.

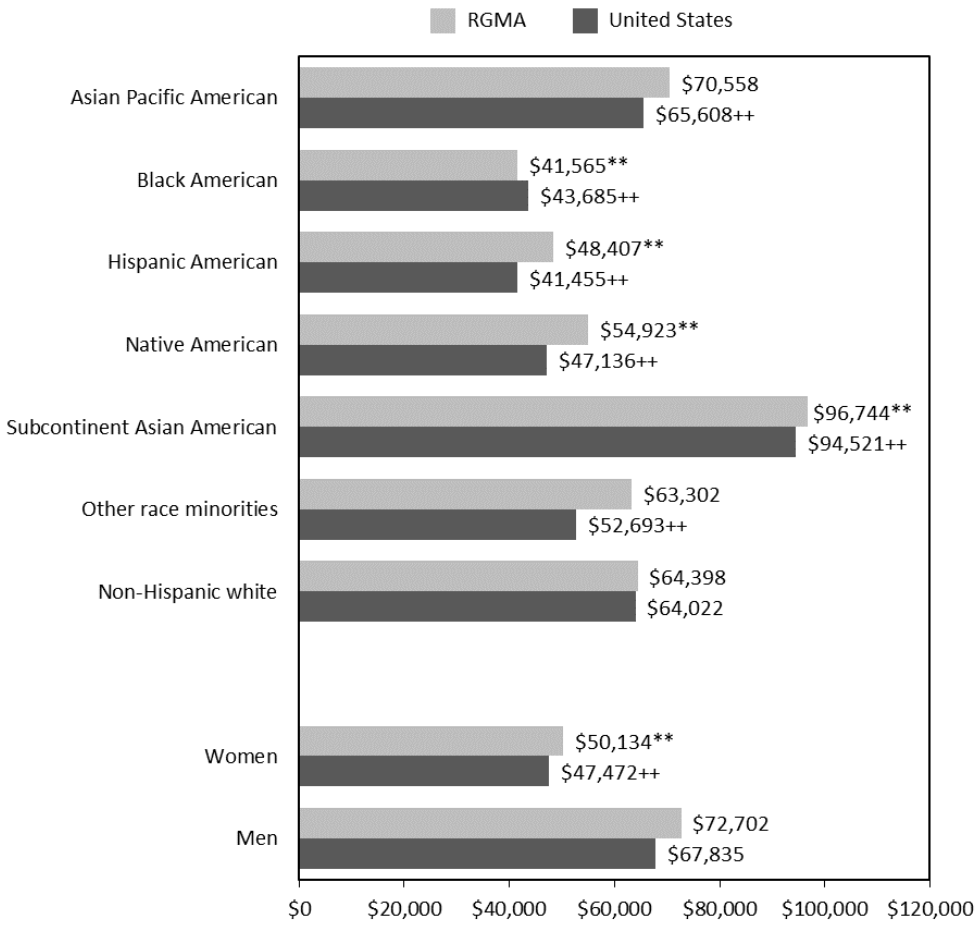
RGMA			
Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	0.0 % †	13.1 % †	0.0 % †
Black American	5.2 % *	3.3 % **	1.1 % **
Hispanic American	3.0 % **	10.9 %	0.0 %
Native American	0.0 % †	0.0 % †	0.0 % †
Subcontinent Asian American	0.0 % †	0.0 % †	0.0 % †
Other race minorities	0.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	9.2 %	10.3 %	5.0 %
Gender			
Women	5.9 % *	11.3 %	3.2 %
Men	8.8 %	8.6 %	4.4 %
All individuals	**8.5 %**	**9.7 %**	**4.0 %**

United States			
Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	8.1 % **	6.9 % **	3.3 %
Black American	3.4 % **	9.6 %	1.0 % **
Hispanic American	2.6 % **	9.7 %	1.0 % **
Native American	5.3 % **	10.4 %	2.1 % **
Subcontinent Asian American	10.4 %	6.2 % **	3.7 %
Other race minorities	2.4 % **	8.5 %	1.8 % **
Non-Hispanic white	9.2 %	10.0 %	3.7 %
Gender			
Women	6.4 % **	11.2 % **	1.4 % **
Men	6.8 %	8.6 %	3.2 %
All individuals	**6.7 %**	**9.6 %**	**2.6 %**

Figure C-5 indicates that:

- Compared to non-Hispanic whites, smaller percentages of non-owner Black Americans and Hispanic Americans work as managers in the local construction industry. In addition, compared to men, a smaller percentage of non-owner women work as managers in the local construction industry.
- Compared to non-Hispanic whites, a smaller percentage of non-owner Black Americans work as managers in the local professional services industry.
- Compared to non-Hispanic whites, a smaller percentage of Black Americans work as managers in the local goods and other services industry.

Figure C-6.
Mean annual wages in the RGMA 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 the RGMA and the United States as a whole, respectively.

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-6 indicates that, compared to non-Hispanic whites, Black Americans, Hispanic Americans, and Native Americans in the RGMA earn substantially less in wages. In addition, compared to men, women earn substantially less in wages.

Figure C-7.
Predictors of annual wages (regression) in the RGMA, 2015-2019

Notes:

The regression includes 28,332 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.

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.

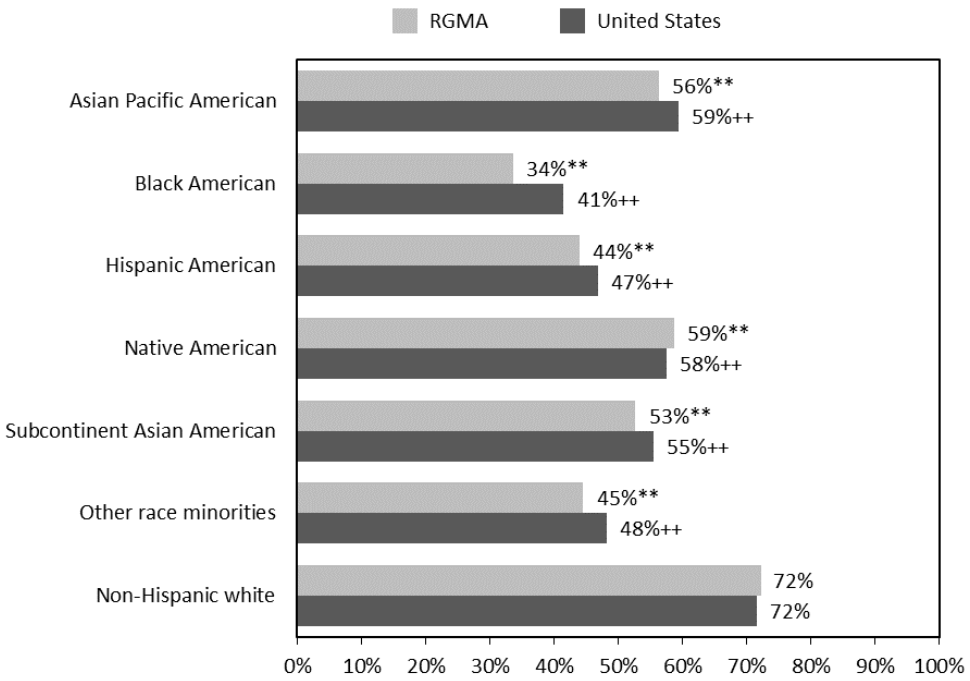
Source:

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	7902.565 **
Asian Pacific American	0.930
Black American	0.824 **
Hispanic American	0.874 **
Native American	0.977
Subcontinent Asian American	1.052
Other race minorities	0.874
Women	0.793 **
Less than high school education	0.811 **
Some college	1.190 **
Four-year degree	1.691 **
Advanced degree	2.241 **
Disabled	0.844 **
Military experience	0.991
Speaks English well	1.482 **
Age	1.055 **
Age-squared	1.000 **
Married	1.141 **
Children	1.017 **
Number of people over 65 in household	0.892 **
Public sector worker	1.110 **
Manager	1.279 **
Part time worker	0.340 **
Extraction and agriculture	0.834 **
Construction	0.864 **
Wholesale trade	0.906 **
Retail trade	0.713 **
Transportation, warehouse, & information	0.912 **
Professional services	0.953 **
Education	0.585 **
Health care	0.959 **
Other services	0.665 **
Public administration and social services	0.707 **

Figure C-7 indicates that, compared to being non-Hispanic white American in the RGMA, being Black American or Hispanic American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately $0.82 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, compared to being a man in in the RGMA, being a woman is related to lower annual wages.

Figure C-8.
Home ownership rates in the RGMA and the United States, 2015-2019



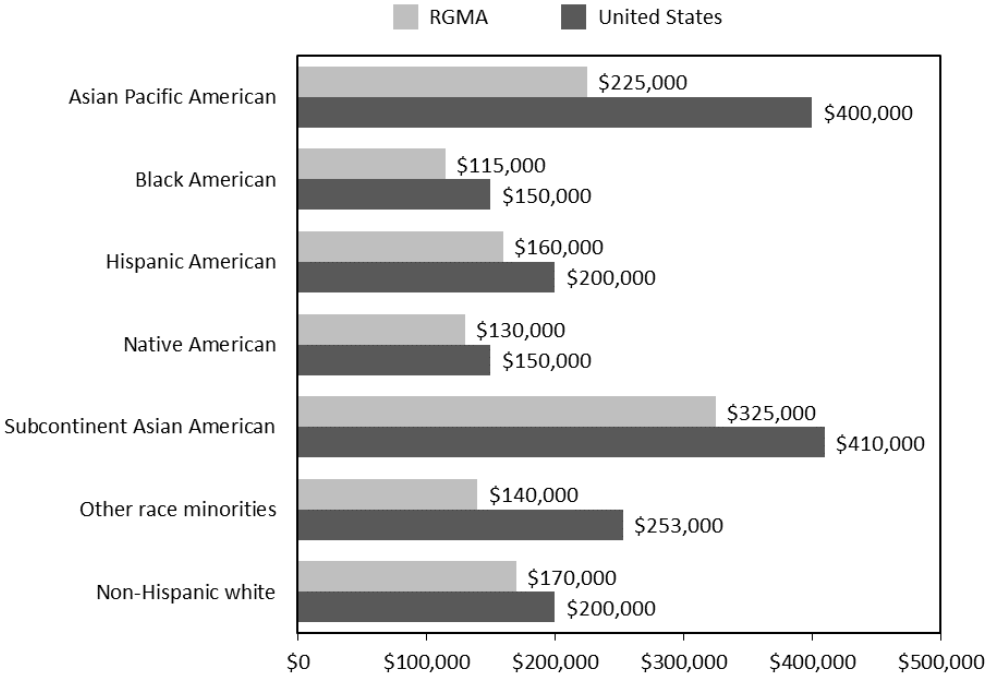
Note: The sample universe is all households.

**, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for the RGMA and the United States as a whole, respectively.

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-8 indicates that all relevant minority groups in the RGMA exhibit homeownership rates lower than that of non-Hispanic whites.

Figure C-9.
Median home values in the RGMA and the United States, 2015-2019

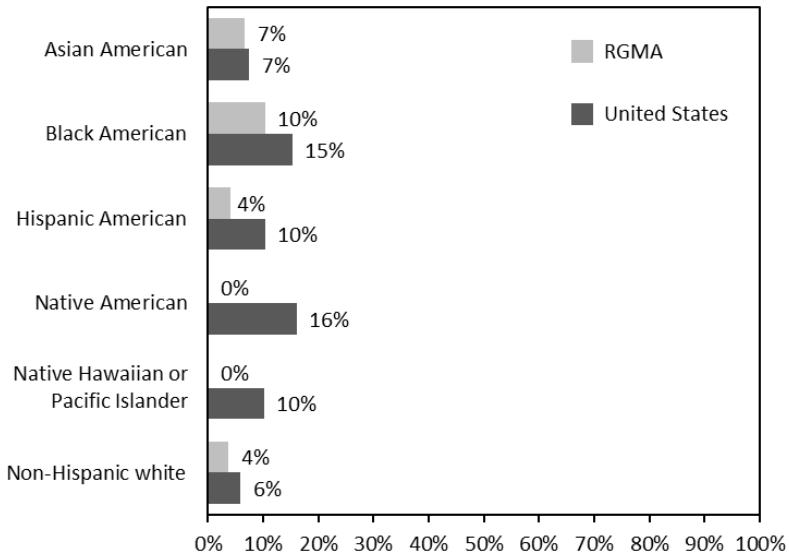


Note: The sample universe is all owner-occupied housing units.

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-9 indicates that Black American, Hispanic American, Native American, and other race minority homeowners in the RGMA own homes that, on average, are worth less than those of non-Hispanic white homeowners.

Figure C-10.
Denial rates of conventional purchase loans for high-income households in the RGMA and the United States, 2019



Note:

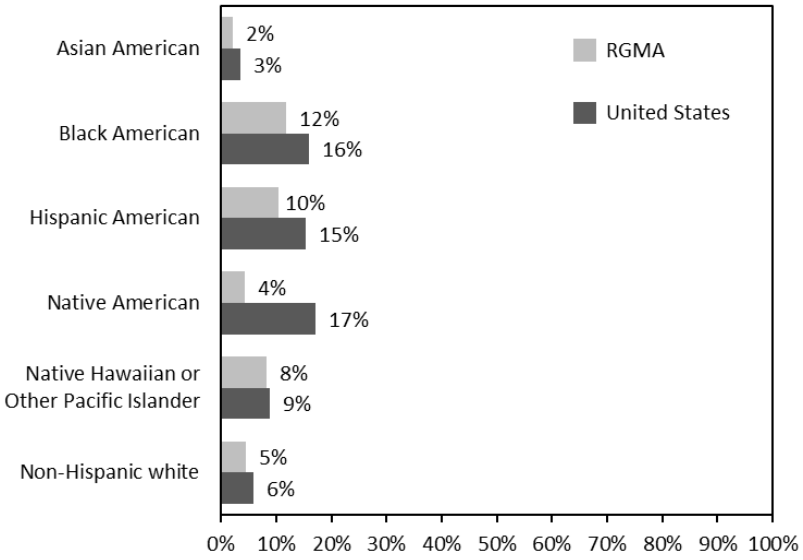
High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). For 2012 and forward, the MFI data are calculated by the FFIEC. For years 1998 through 2011, the MFI data were calculated by HUD.

Source:

FFIEC HMDA data 2009 and 2019. The 2009 raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: https://www.consumerfinance.gov/data-research/hmda/. The 2019 raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: https://ffiec.cfpb.gov/data-browser/.

Figure C-10 indicates that Asian Americans and Black Americans in the RGMA appear to be denied home loans at higher rates than non-Hispanic whites.

Figure C-11.
Percent of conventional home purchase loans that were subprime in the RGMA 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.

Source:

FFIEC HMDA data 2009 and 2019. The 2009 raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: https://www.consumerfinance.gov/data-research/hmda/. The 2019 raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: https://ffiec.cfpb.gov/data-browser/.

Figure C-11 indicates that Black Americans, Hispanic Americans, and Native Hawaiian or Other Pacific Islanders in in the RGMA are awarded subprime conventional home purchase loans at greater rates than non-Hispanic whites.

Figure C-12. Business loan denial rates, East North Central 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 East North Central Division consists of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Source:

2003 Survey of Small Business Finance.

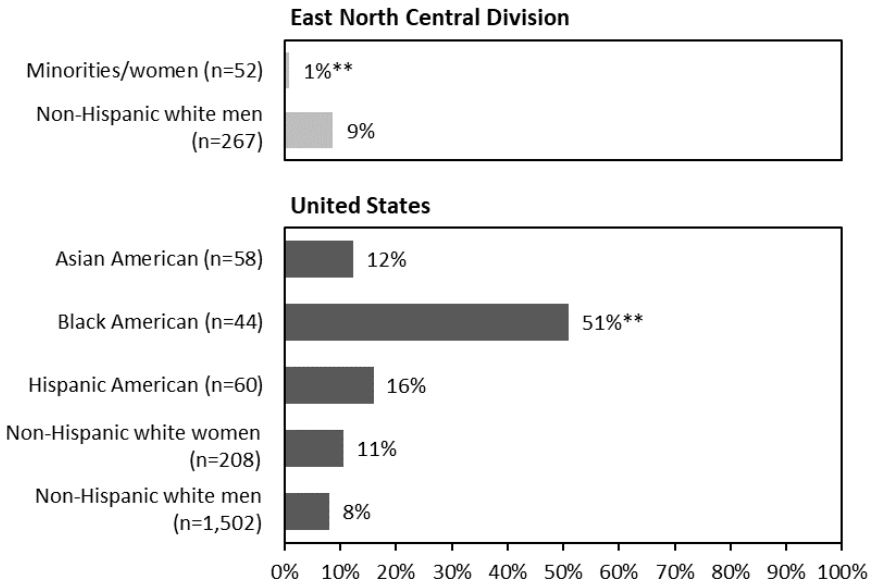
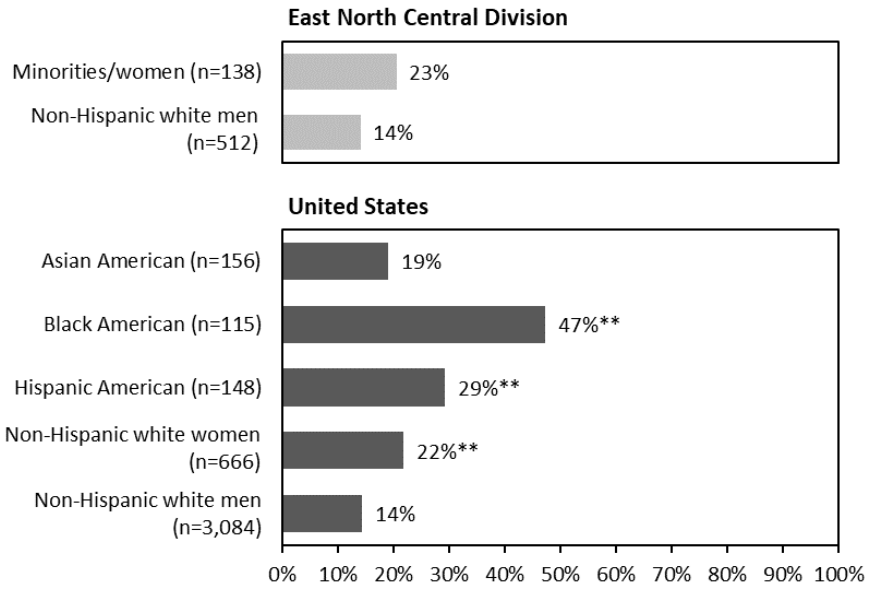


Figure C-12 indicates that in 2003 in the Eastern North Central Division, minority- and woman-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

Figure C-13. Businesses that did not apply for loans due to fear of denial, East North Central 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.

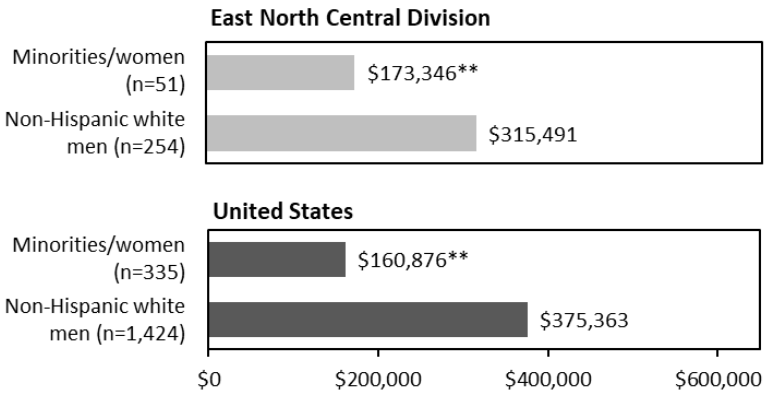
The East North Central Division consists of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Source:

2003 Survey of Small Business Finance.

Figure C-13 indicates that in 2003, Black American-owned businesses, Hispanic American-owned businesses, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-14.
Mean values of approved business loans, East North Central 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 East North Central Division consists of Illinois, Indiana, Michigan, Ohio, and Wisconsin.

Source:

2003 Survey of Small Business Finance.

Figure C-14 indicates that in 2003, minority- and woman-owned businesses in the East North Central Division that received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-15. Self-employment rates in study-related industries in the RGMA 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.

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/.

RGMA			
Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	22.0 % †	11.1 % †	24.1 % †
Black American	23.7 %	11.1 %	6.9 %
Hispanic American	18.0 %	13.3 %	11.8 %
Native American	22.0 % †	45.0 % †	20.5 % †
Subcontinent Asian American	14.6 % †	29.6 %	0.0 % †
Other race minorities	77.0 % †	0.0 % †	0.0 % †
Non-Hispanic white	21.4 %	17.2 %	11.1 %
Gender			
Women	15.2 % **	16.8 %	12.3 %
Men	22.1 %	17.2 %	9.6 %
All individuals	**21.5 %**	**17.1 %**	**10.5 %**

United States			
Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	22.5 % **	14.2 % **	11.0 % **
Black American	16.4 % **	15.0 % **	7.7 % **
Hispanic American	17.8 % **	14.3 % **	16.1 % **
Native American	19.6 % **	20.2 % **	14.1 %
Subcontinent Asian American	20.9 % **	12.1 % **	8.1 % **
Other race minorities	26.3 %	16.2 % **	23.2 % **
Non-Hispanic white	25.3 %	22.6 %	15.2 %
Gender			
Women	16.0 % **	18.9 % **	19.0 % **
Men	23.2 %	21.4 %	11.1 %
All individuals	**22.5 %**	**20.4 %**	**14.2 %**

Figure C-15 indicates that, compared to men, women working in the local construction industry own businesses at a lower rate.

Figure C-16.
Predictors of business ownership in construction (regression) in the RGMA, 2015-2019

Note:

The regression included 2,373 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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	-2.7765 **
Age	0.0598 **
Age-squared	-0.0004 *
Married	-0.0894
Disabled	-0.1198
Number of children in household	-0.0080
Number of people over 65 in household	0.0580
Owns home	0.1055
Home value ($000s)	0.0002
Monthly mortgage payment ($000s)	0.0287
Interest and dividend income ($000s)	0.0012
Income of spouse or partner ($000s)	0.0014
Speaks English well	0.1291
Less than high school education	0.2467 **
Some college	0.0028
Four-year degree	0.0218
Advanced degree	-0.2220
Asian Pacific American	0.2724
Black American	0.1643
Hispanic American	0.0830
Native American	-0.3825
Subcontinent Asian American	-0.4382
Other race minorities	1.1153
Women	-0.3901 **

Figure C-16 indicates that being a woman is associated with a lower likelihood of owning a construction business in the RGMA compared to being a man.

Figure C-17.
Disparities in business ownership rates for local construction workers, 2015-2019

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	14.4%	26.9%	53

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team 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-17 indicates that non-Hispanic white women own construction businesses in the RGMA at a rate that is 53 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

Figure C-18.
Predictors of business ownership in professional services (regression) in the RGMA, 2015-2019

Note:

The regression included 1,425 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

"Speaks English well" and "Other race minorities" omitted from the regression due to small sample size.

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	-3.6283 **
Age	0.0588
Age-squared	-0.0004
Married	0.0953
Disabled	0.1177
Number of children in household	0.0820
Number of people over 65 in household	0.3033 **
Owns home	0.1020
Home value ($000s)	0.0002
Monthly mortgage payment ($000s)	0.0846
Interest and dividend income ($000s)	0.0054 **
Income of spouse or partner ($000s)	0.0009
Speaks English well	0.0000 †
Less than high school education	0.3080
Some college	0.1281
Four-year degree	0.1239
Advanced degree	0.3731
Asian Pacific American	-0.0422
Black American	-0.0051
Hispanic American	-0.2690
Native American	1.2574 *
Subcontinent Asian American	0.6224
Other race minorities	0.0000 †
Women	0.0354

Figure C-18 indicates that being a minority or a non-Hispanic white woman is not associated with a lower likelihood of owning a professional services business in the RGMA compared to being non-Hispanic white after various race- and gender-neutral factors are taken into account.

Figure C-19.
Predictors of business ownership in goods and other services (regression) in the RGMA, 2015-2019

Note:

The regression included 982 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

"Subcontinent Asian American" and "Other race minorities" omitted from the regression due to small sample size.

The referent for each set of categorical variables variable 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	-4.3080 **
Age	0.0611 *
Age-squared	-0.0005
Married	0.2154
Disabled	-0.2702
Number of children in household	0.0076
Number of people over 65 in household	-0.0828
Owns home	-0.0932
Home value ($000s)	0.0005
Monthly mortgage payment ($000s)	0.0300
Interest and dividend income ($000s)	0.0025
Income of spouse or partner ($000s)	0.0009
Speaks English well	1.0468
Less than high school education	0.3212
Some college	0.0590
Four-year degree	-0.0890
Advanced degree	0.0023
Asian Pacific American	1.0216
Black American	-0.1225
Hispanic American	0.3117
Native American	0.4048
Subcontinent Asian American	0.0000 †
Other race minorities	0.0000 †
Women	0.2019

Figure C-19 indicates that being a minority or a non-Hispanic white woman is not associated with a lower likelihood of owning a goods and other services business in the RGMA compared to being non-Hispanic white after various race- and gender-neutral factors are taken into account.

Figure C-20.
Rates of business closure, expansion, and contraction, Ohio 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.

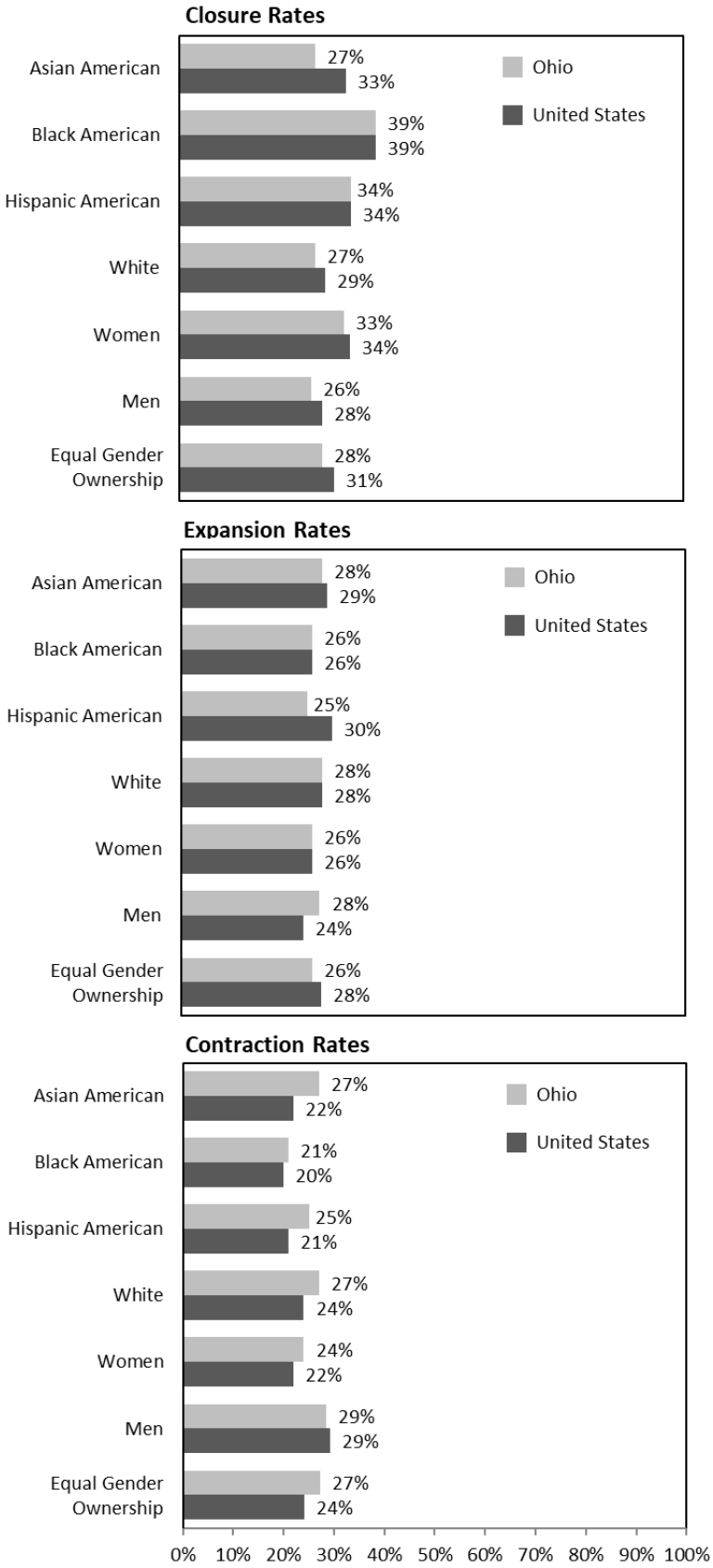
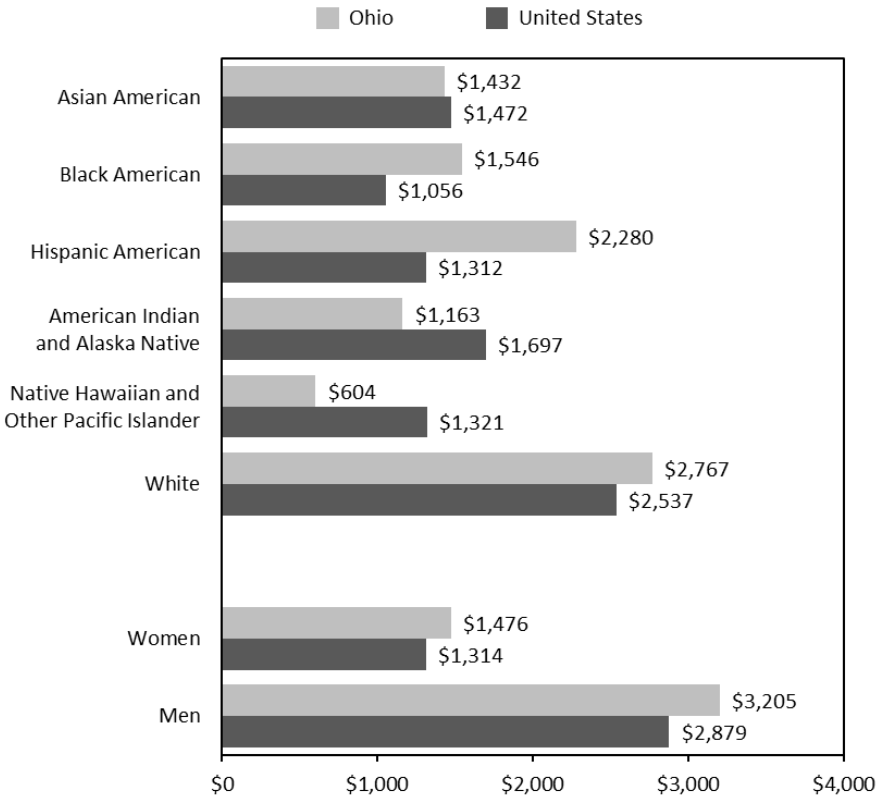


Figure C-20 indicates that Black American- and Hispanic American-owned businesses in Ohio appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at a higher rate than businesses owned by men. With regard to expansion rates, Black American- and Hispanic American-owned businesses in Ohio appear to expand at lower rates than non-Hispanic white-owned businesses. Woman-owned businesses appear to expand at a lower rate than businesses owned by men. Finally, Black American- and Hispanic American-owned businesses in Ohio appear to contract at lower rates than non-Hispanic white owned businesses. Woman-owned businesses in Ohio appear to contract at a lower rate than non-Hispanic

Figure C-21.
Mean annual business receipts (in thousands), Ohio and the United States

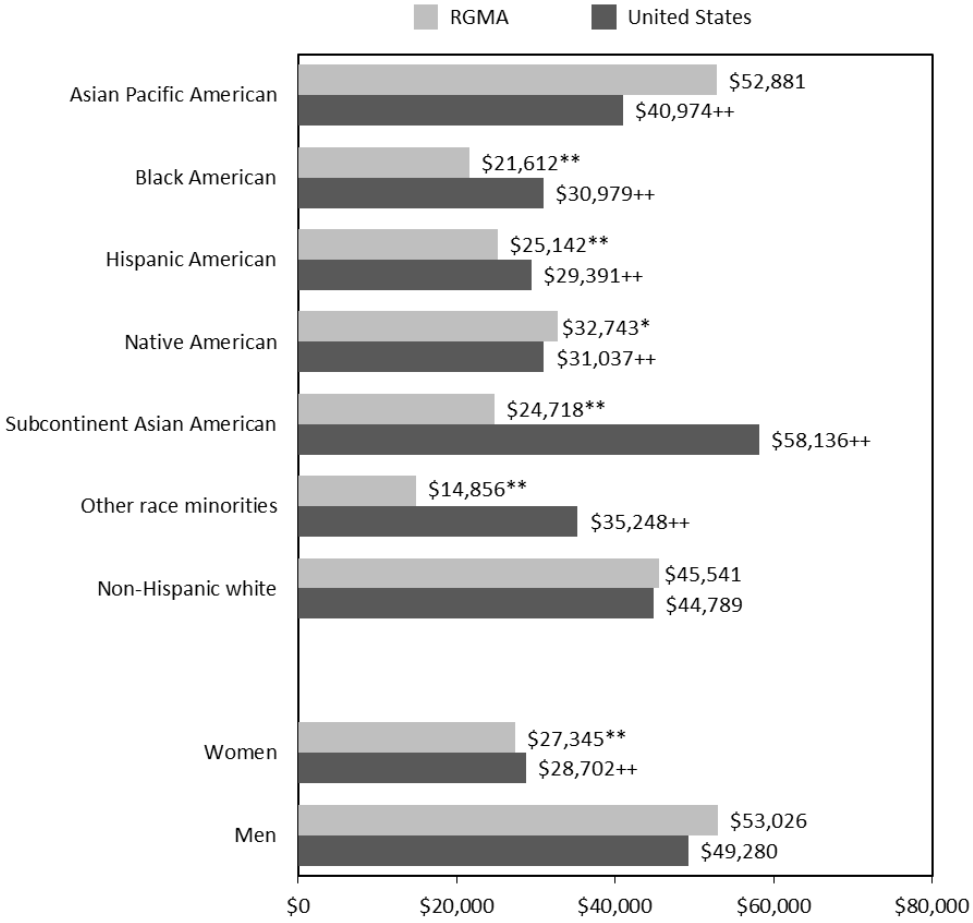


Note: Includes employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Source: BBC Research & Consulting from 2018 Annual Business Survey.

Figure C-21 indicates that in 2012 all relevant minority groups in Ohio showed lower mean annual business receipts than businesses owned by non-Hispanic whites. In addition, woman-owned businesses in Ohio showed lower mean annual business receipts than businesses owned by men.

Figure C-22.
Mean annual business owner earnings in the RGMA, 2015-2019



Note: The sample universe is business owners age 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 the RGMA and the United States as a whole, respectively.

Source: BBC Research & Consulting 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-22 indicates that Black American, Hispanic American, Native American, Subcontinent Asian American, and other race minority business owners in the RGMA earn less on average than non-Hispanic white business owners. In addition, businesses owned by women in the RGMA earn less on average than businesses owned by men.

Figure C-23.
Predictors of business owner earnings (regression) in the RGMA, 2015-2019

Notes:

The regression includes 2,184 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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	201.933 **
Age	1.158 **
Age-squared	0.999 **
Married	1.267 **
Speaks English well	2.939 **
Disabled	0.854
Less than high school	0.755
Some college	1.055
Four-year degree	1.314 **
Advanced degree	1.868 **
Asian Pacific American	1.664
Black American	0.604 **
Hispanic American	1.092
Native American	1.349
Subcontinent Asian American	1.687 **
Other race minorities	1.396
Women	0.494 **

Figure C-23 indicates that, compared to being a non-Hispanic white owned business owner in the RGMA, being a Black American business owner is related to lower earnings. Similarly, compared to being a male business owner, being a woman business owner is related to lower 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 Hamilton County Disparity Study. Appendix D summarizes the key themes that emerged from their insights, organized into the following sections:

A. **Introduction** describes the process for gathering and analyzing the anecdotal information summarized in Appendix D;

B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;

C. **Ownership and certification** presents information about businesses' statuses as small, disadvantaged, minority-, and woman-owned businesses, certification processes, and business owners' experiences with the City of Cincinnati (the City) and other local certification programs;

D. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;

E. **Doing business as a prime contractor or subcontractor** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with small, disadvantaged, minority-, and woman-owned businesses;

F. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with Hamilton County (the County), MSDGC, and local agencies and identifies potential barriers to doing work for them;

G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in Ohio and what it takes for businesses to be successful;

H. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;

I. **Information regarding effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects small, disadvantaged, minority-, or woman-owned businesses;

J. **Insights regarding business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in the Hamilton County area;

K. Insights regarding race- and gender-based measures includes business owners' comments about current or potential race- or gender-based programs; and

L. Other insights and recommendations presents additional comments and recommendations for the County and MSDGC to consider.

A. Introduction

Throughout the study business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with the County, MSDGC, and other organizations in the region. That information was collected through one of the following methods, which the study team facilitated between August 2021 and March 2022:

- In-depth interviews (44 participants);
- Availability surveys (932 participants who submitted anecdotal information);
- Focus groups (2 focus groups with 11 participants)
- Oral or written testimony during a public forum (8 participants); and
- Written testimony via fax or e-mail (0 participants).

1. In-depth interviews. From August 2021 to April 2022, the study team conducted 44 in-depth interviews with owners and representatives of Ohio businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, the City of Cincinnati's certification program, and businesses' experiences working, or attempting to work, with other public agencies in the Hamilton County area.

Interviewees included individuals representing construction businesses, professional services businesses, and goods and other services suppliers. BBC identified interview participants primarily from a random sample of businesses stratified by business type, location, and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. All of the businesses that participated in the interviews conduct work in the Hamilton County area.

All interviewees are identified by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a Small Business Enterprise- (SBE-), Disadvantaged Business Enterprise- (DBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Veteran-owned Business Enterprise- (VBE-) or other certified business.

2. Availability surveys. The study team conducted availability surveys for the disparity study from October 2021 to March 2022. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the Hamilton County marketplace. A total of 235 businesses provided anecdotal information as part of the surveys. Availability survey comments are denoted by the prefix "AV."

3. Focus groups. The study team conducted two focus groups with minority- and woman-owned business representatives. During the focus groups the study team asked participants to share their insights about working in the Ohio marketplace and with public sector and private sector organizations. Comments from the focus groups are denoted by the prefix "FG."

4. Public forums. The County, MSDGC, and the study team solicited written and verbal testimony at two public forums for the disparity study held in Cincinnati, Ohio. The meetings were held on August 30th and 31st of 2021. The study team reviewed and analyzed all public comments from the two meetings and included many of those comments in Appendix D. Those comments are denoted by the prefix "PT."

B. Background on the Construction, Professional Services, and Goods and Other Services Industries

Part B includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size of businesses;
5. Growth of the firm; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, from well-established firms to newly established firms, and worked on small-to-large contracts in the Hamilton County marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 22 construction firms, 15 firms providing professional services, and 8 firms supplying goods and services.

Twenty-two firms worked in the construction industry [#10, #11, #12, #13, #14, #15, #17, #18, #2, #23, #25, #26, #27, #28, #29, #37, #38, #39, #41, #42, #FG1, #FG2]. For example:

- The owner of a majority-owned construction company stated, "Well, I am state-licensed in Ohio for HVAC and also state- licensed for refrigeration. And I also maintain a journeyman plumber car." [#12]
- A representative of a WBE-certified construction firm stated, "We'll do anything basically that has a wire. So, we'll do anything electrically. We do voice data, security cameras, audio, solar, all that would fall under our work description." [#14]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "We are a general contractor company that provides property preservation needs. Most of the time, we don't do anything structural, unless it's demolition primarily renovations and lead abatement, things like that. We may do some grounds

keeping. For instance, we do snow removal in the wintertime, and we do mulching and stuff in the spring to keep everything consistently going around." [#17]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "It's an integrated supply company of construction materials. We do not sell to the public, and we do not sell to individuals. Only contractors, general contractors and construction managers." [#23]
- A representative of a WBE-certified construction company stated, "Power line construction. And then we also offer traffic control, flagging." [#25]
- The Black American male owner of a construction company stated, "We offer residential insulation services, so we insulate homes. We blow cellulose. We spray foam. We install fiberglass batting for homes. And then the bulk of my company is mechanical insulation, so we insulate HVAC systems, which includes duct work and piping. And then we insulate plumbing systems as well, which is mostly piping. And then we insulate equipment as far as chiller systems for HVAC systems and pumps and tanks." [#26]
- The co-owner of a WBE-certified construction company stated, "Commercial painting, and some light industrial painting, and then commercial janitorial." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We offer structural and miscellaneous steel fabrication and erection. We're a construction company, so we do both the fabrication and erection of materials needed for specific project designs." [#29]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "We do asphalt and concrete flat work." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We provide service for heating and air conditioning and plumbing to keep the units functioning. But we are a large commercial, industrial and institutional general construction and mechanical construction company." [#41]

Fifteen firms worked in the engineering and professional services industry [#3, #4, #5, #7, #8, #9, #24, #32, #33, #35, #36, #40, #43, #FG1, #FG2]. For example:

- A representative of a Black American-owned professional services company stated, "organizational development and culture building, and other things that make organizations great." [#3]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "We're an architectural firm. We do design." [#7]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "Part of our engineering services encompasses health, safety and environmental." [#9]
- A representative of a majority-owned professional services firm stated, "We provide power engineering services, which basically, anything to do with the electricity of an organization. We provide design services, we provide engineering studies, we can do field testing of electrical apparatus, and we also do construction of our designs." [#24]

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "[We do] video production services, marketing services, community engagement services, and public relations services." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "We offer professional administrative support services and some IT technical services, specifically on the software side." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Our primary piece is temporary and professional placement." [#35]
- A representative of a majority-owned professional services firm stated, "Managed services, managed security services. We provide consulting services of all manner for our data center clients. Are able to resell hardware and software to all clients. And I've got partner companies that I work with for everything that we don't do directly." [#36]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Information technology support services. This includes network support services, infrastructure support services, cyber security services." [#40]

Eight firms worked in the goods and services industry [#16, #19, #20, #21, #22, #44, #FG2]. For example:

- The owner of a majority-owned goods and services company stated, "I have two brands actually … [one is] my small format, traditional print, marketing services, mailing, those sorts of things, design. The [other] is a sign business I picked up a few years ago and that's primarily wide formats, such as vehicle graphics, wall to floor graphics, signage, event, that sort of thing." [#16]
- The owner of a majority-owned goods and services company stated, "We started just selling used furniture 22 years ago." [#19]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We provide essential products to a variety of different types of companies. Basically, what those types of products are anywhere from toilet tissue to wax, to sanitizer, food service products … all in all, I would say that we in the janitorial/sanitation arena, but also doing food service products, some MRO, Maintenance Repair Operation products. And as well as some, what I would call bathroom products as well in terms of petitions, faucets, mirrors, host of a variety of different things." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We are a manufacturer of commercial print, apparel, and promotional items." [#22]
- The woman owner of a goods and services company stated, "I do anything that you would want to a logo on it. So, apparel, mugs, pens, bags, anything that you want to promote for your company, indoors trade show event supplies, to outside flags, sky's the limit." [#44]
- The Hispanic American owner of a goods and services firm stated, "Manufactured paper products, sanitary paper products, toilet tissue, paper towels, also automotive supplier to the automotive industry." [#FG2]

- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, “We are a distributor of office supplies, classroom supplies." [#FG2]

Years in business. Twenty-nine businesses reported their date of establishment. The majority of firms (21 out of 29 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Seven out of the 38 businesses had been in business for between five and ten years. One firm was newly established, having been in business for less than four years.

One firm reported they had been in business for fewer than four years [#5]. For example:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We have four [employees] and they're all of the, what I'll call the either direct shareholder or shareholder combined unit." [#5]

Seven firms reported they had been in business for five to ten years [#11, #17, #20, #21, #26, #4, #42]. For example:

- The Black American woman owner of a professional services company stated, "I started that in 2014. 2013, I was incorporated." [#4]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "We've had it about six years now." [#11]
- The co-owner of a majority-owned goods and services company stated, "[We’ve been] in this business eight years." [#20]

Twenty-one firms reported they had been in business for more than ten years [#1, #2, #3, #6, #7, #8, #9, #10, #13, #14, #15, #16, #18, #19, #22, #23, #28, #38, #43, #FG1, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "It was my great grandfather's business. So, 140 [years], thereabouts." [#2]
- A representative of a Black American-owned professional services company stated, "We started the business in '92." [#3]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "[Our company] will be celebrating their 40th year of being in business come January." [#7]
- A representative of a majority-owned construction firm stated, "More than 35 years." [#18]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I bought it in 2013 … I've been running it for 10 years, and it hasn't gone under yet … [it’s been open] since '94, so that's 27 years." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I started the company in 1993." [#23]
- A representative of a Black American-owned construction firm stated, "The corporation started in 2018, company started in 1994. I formed the company in 1994." [#38]

- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "I started in 2008 here in Ohio." [#43]

2. Business formation and 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 who discussed their business's founding 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 [#19, #22, #24, #26, #27]. Here are some of the founder stories from interviews:

- The owner of a majority-owned goods and services company stated, "I grew up in a family business in Cincinnati, that spanned back four generations. We sold office supplies and office furniture. We sold that company … And I started this business in 2000." [#19]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Full-time, I've been with them since 2007. I bought it in 2013. I took over management of it in 2011 from the old owners, and then in 2013, I bought the majority shares." [#22]
- The Black American male owner of a construction company stated, "I started off in a union. I learned a trade and I always knew that I was going to start a business because I didn't want to work for anybody." [#26]
- The co-owner of a WBE-certified construction company stated, "The company was started by my husband's grandfather back in 1926. And it was him and his brother, and they were just painters. … then his dad and his uncle took the business over. Then, at one point my husband became part of the business. I started working in the business when I was in college. I didn't become president until 2007." [#27]

Other motivations. There were also other reasons and motivations for the establishment of their business [#4, #26, #42]. For example:

- The Black American woman owner of a professional services company stated, "That's the reason I actually started the business is because I wanted to do customer service from home. I was [in] customer service and I just saw it as a perfect opportunity when I saw that there was a company that was allowing me as a business owner, they called us IBOs, independent business owners, to partner with them and perform services for some clients that they had such as Sears, T-Mobile, the cable companies, things like that. So, I got certified as a client care professional. Now, in terms of license and things like that, I have been licensed as a mortgage broker, but that stayed with that brokerage firm. I'm also licensed-"[#4]
- The Black American male owner of a construction company stated, "Well, when I first started the business, I didn't know how to bid work. So, I didn't know how to write up a quote. I didn't actually know the customers that I was kind of ... I didn't know my market, really. I just jumped out there. So, I just jumped out here, and I went to the Small Business Development Center and started my business. I had a business partner in the beginning

stages of the company. He the one that actually had the residential division, but my background is commercial industrial through my trade affiliation. So, I just kind of jumped out there and I had to learn the hard way. I just had to figure it out. I didn't go after the customers that when I was in a union, that the people that I worked for, I didn't go after none of their customers. So, I had to figure out who was open shop customers or who would potentially give me opportunity outside of the customers that I worked for through Thermal Solutions."[#26]

- The owner of a majority-owned construction company stated, "I went to school for accounting and finance, and I actually worked for five years being auditor. So, I used to audit big companies and stuff, but then wanted to do my own business, and saw opportunity in trucking and started it. So, I drove just to get the experience, so I knew what drivers go through." [#42]

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.

Five firms reported working on contracts with an average value under $50,000 [#6, #12, #16, #22, #28]. For example:

- A representative of a majority-owned professional services company stated, "Well, we're probably in the two to $20,000 range." [#6]
- The owner of a majority-owned construction company stated, "On the commercial side, anywhere from five to 15,000. Now, I'm happy to take jobs smaller than that. That's just you know, my average." [#12]
- The owner of a majority-owned goods and services company stated, "We'll do something as small as a single order of business cards for $33, all the way up to we're doing some work with Kroger, for their click ship distribution centers. Those are $40,000 projects. A monument sign can be $20,000, or we could do a vehicle for $2,000. It's the whole wide range." [#16]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We only have two signed contracts. Those orders vary in different quantities, but overall, [one] contract is worth about a quarter of a million dollars a year, or less. … [the other] probably only spent $50,000 with us maybe a year, but it's over different projects. So, our average order intake for our whole entire company is like $47." [#22]
- The owner of an SBE-certified construction company stated, "I would say average size would be plus or minus $20,000." [#28]

Five firms reported working on contracts with an average value between $50,000 and $100,000 [#17, #21, #27, #34, #39]. For example:

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Right now, we're doing a hundred thousand dollars project. I think the largest amount at one time that we worked on was probably about 120, 125,000 project at one time. Right now, we have out probably about $80,000 worth of jobs. We do around like 300,000 to about $400,000 a year." [#17]

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We bid on quite a few, a variety of different things I would have to say in terms of sizes. We bid on something as much as … about $2 million. But I would have to say most of the stuff that we end up getting might be around 50 to $100,000." [#21]
- The co-owner of a WBE-certified construction company stated, "I would say probably the average size, is probably 50,000." [#27]
- A representative of a majority-owned professional services firm stated, "They range everywhere from working for a private individual, for a two-hour job, which would be under $300 up into above 100,000." [#34]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "We try to keep it under $100,000. That's pretty much within our capacity to handle." [#39]

Thirteen firms reported working on contracts with an average value between $100,000 and $500,000 [#1, #3, #10, #14, #15, #23, #25, #26, #29, #36, #37, #38, #44]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "There has been no typical outside of government, we have done projects as a prime with the construction value as high as 40 million. The 250,000 to a million [is average]." [#1]
- A representative of a Black American-owned professional services company stated, "Value wise, we've had contracts as small as $10,000. We've had contracts as large as $275,000." [#3]
- The woman owner of a construction firm stated, "I would say, from probably half a million dollars is the biggest that we've done. Down to down to practically nothing, as far as service calls for school districts, repair lighting." [#10]
- A representative of a WBE-certified construction firm stated, "I'll go from anywhere from a quarter million to a couple hundred [thousand]. We've got estimators and project managers that'll do million-dollar projects." [#14]
- The owner of a majority-owned construction company stated, "Some of the jobs for are in the couple of hundred thousand range." [#15]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I would say about 500,000." [#23]
- A representative of a WBE-certified construction company stated, "Probably half a million dollars and under." [#25]
- The Black American male owner of a construction company stated, "The lowest amount is $500. We try not to get into projects under $500. … Generally, before this client came around, we were doing probably ... They probably were no bigger than $400,000 projects. So, it was $500 to $400,000 projects that we have done in the past. But now I'm getting into million-dollar projects now." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We normally bid and perform on work that ranges

anywhere from $1,000 to $1.5 million. We try to stay between $255,000 and $500,000. Those are our sweet spots. But pretty much anything from $1,000 to $1.5 million we'll go after." [#29]

- A representative of a majority-owned professional services firm stated, "I don't know, last year I almost did $1 million just with a single client. My smallest client, they do some very basic monthly services with me, and they're only 55 bucks a month. It's another sole practitioner like myself. The range is pretty broad." [#36]
- A representative of a majority-owned construction firm stated, "We've done projects [that] bill over half a million dollars. But typically, our average project is going to be smaller than that." [#37]
- A representative of a Black American-owned construction firm stated, "We can bid most, I'd say anything under a million dollars for a project we bid. We haven't done a job that large, but we can bid jobs that big." [#38]
- The woman owner of a goods and services company stated, "I try bidding on contracts that were $200,000 with the Ohio Business Gateway." [#44]

Four firms reported regularly working on a contracts worth more than $1 million [#2, #24, #35, #40]. For example:

- The co-owner of a majority-owned construction company stated, "That varies quite a bit. I'd say our size range contracts would be anywhere from, I'll say a million to 20 million. I know that's a big range but based on our type of work, which is heavy highway civil, those highway jobs vary in size pretty substantially." [#2]
- A representative of a majority-owned professional services firm stated, "Well, the largest I've ever bid was $23,000,000 but the typical business levels, the highest orders we get are in the $4,500,000, $5,000,000 range." [#24]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I think the largest one we've ever had has been … six million." [#35]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "We bid various sizes. And I'll just say that we'll do a small one to get in the door to get a large one to expand. The small one is the entryway in for especially someone that doesn't know us. But once corporations know us, our contracts go from 50,000 up to millions that are renewable." [#40]

Ten firms reported working on contracts solely within one-hundred miles or less of Hamilton County [#2, #6, #12, #21, #26, #28, #29, #34, #35, #37]. For example:

- The co-owner of a majority-owned construction company stated, "Currently, I'd say a hundred miles from Cincinnati." [#2]
- The owner of a majority-owned construction company stated, "Well, I normally stay in Butler, Warren, and a little bit of Greene County." [#12]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "That we seek to obtain? I would have to say, mostly on a regional basis, is

what we really focus in and what regional basis that is for us, I would have to say, within 100-mile radius of Cincinnati." [#21]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We try to stay within a two-hour radius of Cincinnati, unless we have a partnership in place with a company that we already know locally in this region. But pretty much we try to stay in a two-hour radius of Cincinnati." [#29]
- A representative of a majority-owned professional services firm stated, "We have provided service all through Ohio and into Northern Kentucky, but I've recently allowed those Kentucky license to, I've withdrawn from those. We are just for work in Southwestern, Ohio currently."[#34]

Eleven businesses reported working in the tri-state area [#14, #16, #22, #23, #24, #27, #32, #36, #38, #39, #41]. For example:

- A representative of a WBE-certified construction firm stated, "We will work in a Tri-state. We will not go national, but we will travel as far as Columbus, as far south as Lexington. What keeps us from doing that mostly is the [union] jurisdiction. So, I've got a jurisdiction that I try to stay in inside … anytime I leave that jurisdiction, I have to register in the other local jurisdiction. Sometimes they like that sometimes they don't." [#14]
- The owner of a majority-owned goods and services company stated, "Pretty much the whole Tri-state area here. I did a small acquisition in Lawrenceburg a long time ago, so I've still got two or three clients in Lawrenceburg. We do business in Northern Kentucky. We also have some clients up in Dayton, so primarily the Cincinnati Metro area in Northern Kentucky. But again, we can do regional things also." [#16]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Just in this region. We ship all over the country, but even the jobs that we do business with that are all over the country, they generally have a footprint here in this area." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The farthest we've been away, it's kind of constant, because we're on the skirt tails of Messer, is Louisville, Kentucky." [#23]
- A representative of a majority-owned professional services firm stated, "We seek business mainly regionally, in the three-state region. However, we do business all over the nation because we are power engineers nationally for companies... we'll travel to any other plants in the North American region." [#24]
- The co-owner of a WBE-certified construction company stated, "We go as far as Northern Kentucky, or just south of Dayton, and then to the Indiana border, that direction." [#27]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Mostly just in the Tri-state region." [#32]
- A representative of a majority-owned professional services firm stated, "I typically focus on the 275 loop plus 10 miles, that's kind of the home turf. But we've got clients in other states as well." [#36]

- A representative of a Black American-owned construction firm stated, "Well, the answer to the question would be local because that's what we prefer, but we have a capability to do more jobs, typically under 600 miles away from Cincinnati, which is pretty feasible to handle, but we've done jobs [nationally] … it just really would depend on the project … distance isn't so much the problem, it's is it worth doing?" [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I guess the tri-state area. So, we will go into Northern Kentucky, some of Indiana, and Southern Ohio." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We are regional. Old company, we work the largest national service contractor in the country, but with my new company we stay within 100-mile radius because we have what is called the double breasted, meaning half of the company's union, half of it is non-union and it is hard to go with the union company too far and take the travel time and so on, because they would be not ethical to charge the customer that much. We have some clients that have told us irrespective of what the cost is they want us to do the work. So, we go to Tennessee or Carolinas or somewhere like that, outside to take care of them. But typically, we stay around 100-mile radius of Cincinnati." [#41]

Three businesses reported working in the Eastern United States [#15, #17, #25]. For example:

- The owner of a majority-owned construction company stated, "I travel all the way down into Florida and as far as out west, really, Illinois is about the breaking point." [#15]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "[We] go as far as Indiana." [#17]
- A representative of a WBE-certified construction company stated, "East of the Mississippi." [#25]

Nine businesses reported working in the Hamilton County marketplace and with clients nationally [#]. For example:

- A representative of a Black American-owned professional services company stated, "We have physically work in 46 or 47 states of the United States. Five continents and 30 countries to date." [#3]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We have a client in San Francisco. We have a client in Minneapolis. We have a client in Dallas, Texas. We have clients in Georgia, and up and down the coast, and plenty in Ohio, Kentucky, and Indiana. What we do, from a consulting perspective, COVID really opened up the opportunity to gain business really with no geographical boundaries because you didn't have to hop- The reason why we didn't do much out of our North Carolina or Ohio footprint is it didn't make sense to hop on a plane and spend 800 bucks to fly somewhere for an hour or hour and a half meeting, if you got that long ... The ROI just wasn't there with how long sales cycles are to spend that kind of money. Through COVID and the use of Zoom, Teams, GoToMeeting, whatever, you can do a meeting like this and there's no expense to meeting someone, and the time that you go to meet them isn't the same." [#5]

- A representative of a majority-owned professional services company stated, "We're not registered in Alaska, Hawaii, California, Nevada, and Oregon. Other than those five states we're registered in all the others." [#8]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "We do national and international. Because we follow our major customers. So, there are few, but we work with them globally. We do coast to coast, wherever there's facilities. And then around the globe." [#9]
- A representative of a woman-owned, DBE-certified construction company stated, "National, from New York to Florida, to California, to Washington, everywhere in between." [#13]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Nationally." [#40]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Oh, it doesn't matter. We're not done any business in Ohio, but today we've worked out as far as Oregon, on the west coast." [#33]
- The owner of a majority-owned construction company stated, "United States, all 48." [#42]
- The woman owner of a goods and services company stated, "Nationally." [#44]

4. Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (25 of 28 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.

The majority (20 of 28) of businesses had 1-10 employees [#1, #6, #9, #10, #11, #12, #13, #15, #16, #17, #19, #20, #21, #23, #28, #39, #42, #43, #44, #FG1]. For example:

- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "Right now I have two, because of the COVID." [#9]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Right now, we keep two... they're like seasonal workers and whatnot. But majority of all our workers are other companies. We do contract out to them." [#17]
- The co-owner of a majority-owned goods and services company stated, "It's just me and my husband." [#20]
- The owner of an SBE-certified construction company stated, "Normally, I have as many as 10 W2s a year. Right now, I think there's only about three or four of us." [#28]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "We generally keep anywhere from four to seven employees." [#39]
- The owner of a majority-owned construction company stated, "If we count the drivers too, around nine, ten." [#42]
- The woman owner of a goods and services company stated, "Just me." [#44]

Four interviewees reported that their businesses had 11-25 employees [#3, #8, #18, #22]. For example:

- A representative of a Black American-owned professional services company stated, "One W-2, and about 21 1099 [employees]." [#3]
- A representative of a majority-owned professional services company stated, "There's 12 people here in the company." [#8]
- A representative of a majority-owned construction firm stated, "[We have] 12 employees." [#18]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We have 21 [employees]." [#22]

One business had 26-50 employees [#14]. For example:

- A representative of a WBE-certified construction firm stated, "Right now we've got 45 [employees] and we'll be in a 54 to 60 range in the summer." [#14]

One business had 51-100 employees [#13]. For example:

- A representative of a woman-owned, DBE-certified construction company stated, "We have a pool of part-time guys who work for different companies on a contract basis to where we have probably 50 or 60 people that we use, depending on what part of the country we go to or what particular job we're going to do." [#13]

Three interviewees indicated that their firm had more than 100 employees [#2, #7, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "Roughly 200 [employees]." [#2]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "We are at 279 [employees]." [#7]
- The Hispanic American owner of a professional services firm stated, "We have over 230 employees." [#FG2]

5. Growth of the firm. Business owners and managers mentioned the growth of the firm over time [#2, #4, #5, #7, #10, #11, #15, #19, #21, #23, #24, #25, #26, #29, #34, #35, #36, #37, #38, #39, #40, #44]. For example:

- The co-owner of a majority-owned construction company stated, "It's a big number just to pass those thresholds [to no longer qualify for this type of certification], from our perspective it's a big number. Really, with the help of the programs, we blew right through them so that's good."[#2]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "I spend my time knocking on those doors, sending emails, meeting with people. Much like a sales call with a prospect, I'm having those same conversations about value-add

with potential partners, so they know who we are and that when they have an opportunity, that they're calling us before they call someone else ... We started out with about 25 diverse organizations. We're up to about 53 or so diverse organizations now, in the last two years. Even with the increase in diverse organizations in the program, if you will, we are still, in most cases, the number one call. Even when they have a diverse partner in their region, they call us first because I've communicated our value to them, and spent that time with them, and executing when we show up on ... They're like, 'That group, they're something else,' so we deliver at that same level that we talk about delivering, and our clients communicate the same thing to our partners and our prospects." [#5]

- The woman owner of a construction firm stated, "Anyone who is ambitious and has some integrity about them can be successful. And we've done that pretty much for 32 years, or 30 years. So, we've been up as big as 16 men, and we are down to just three right now." [#10]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I would say it is, and has been, and continues to be access to talent. You know, it seems like that's a problem with every single skilled trades group that I know. And other owners is, there's as hardly anyone coming into the skilled trade nowadays. So that's been the hardest thing for us, for growth is everyone that we get, we're starting from scratch with. And a lot of these kids nowadays, man they can't even read a tape measurer. So it's like, you're literally starting from ground zero and that's a big investment." [#11]
- The owner of a majority-owned construction company stated, "If I wanted to, with [my consistent local contract], I could hire 20 more guys and buy 20 more work trucks and keep them busy all year round. It's just, for me, it's too much of a headache. I'm not here to get rich. I'm here to make a living, put my time in and retire. To me it's more important spend time with my family and my kids and enjoy the things that I like to do in my younger years than work 24/7, like I did when I first started the business." [#15]
- The owner of a majority-owned goods and services company stated, "We started just selling used furniture 22 years ago And our target market was basically small offices. When, I mean, small, I mean, like 15 people or less, startups, nonprofit organizations, local government agencies that were trying to save money. And we kind of quickly realized that when somebody came into our showroom they liked, for instance, looking at a conference table with eight chairs around them, that was all used and everything, but they might say something like, 'Well, I like this used conference table, but I don't like these used chairs. Do you have anything else?' And typically, we did not. So, we started bringing in new chairs. Which led to other new furniture, such as desks, and conference tables, and workstations. Which really helped propel our business forward. Today, we probably sell about 90% new and 10% used And so we've kind of grown to work with bigger companies and government agencies. In 2004, we opened up a second location I mean, we have intentionally stayed, I guess, somewhat small only because I never wanted to grow big just to be growing big." [#19]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We've been on a steady incline. Besides, well, things were going up until COVID really hit. And things are pretty much falling off, I would have to say, the growth plan [has] slowed tremendously based on what we're dealing with now, especially now with the

supply chain issues. … we're at a crunch. With most people that I've talked to in this business, [they] just can't get products." [#21]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I retired from [my other job at a construction company, where I was vice president] last March. But during that time that both companies was running, I had someone run the company for me. … we just did enough to keep it going, and didn't do a lot of marketing… The only reason why it's stayed the same, because we are known in the construction industry, but that's kind of a knife in the back type thing, because the growth is just the same clients over and over again. Now, the projects may change." [#23]
- A representative of a majority-owned professional services firm stated, "Increased other than a little downturn at COVID. So, take out the COVID years, it's increasing year over year. Primarily the market conditions … there's a whole series of things that help promote growth in a company, but mainly it's resources that are bottle necking certain things." [#24]
- A representative of a WBE-certified construction company stated, "We started off with myself and two employees, [now we're] up to 14 employees. And then we also started with two junk trucks, and we have upgraded our trucks. And now we have 11 vehicles total." [#25]
- The Black American male owner of a construction company stated, "Ever since the pandemic, things had taken a turn for the worst as far as employment, as far as employees. I went from having 15 to 20 people before the pandemic to now I have four employees, currently. So, I sub out a lot of my work right now. 90% of my work is being subbed out because I cannot find people that want to work." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "2014 was our turning point. So, since 2014, we pretty much have remained stable, able to maintain the same amount of employees and do the same amount of revenues." [#29]
- A representative of a majority-owned professional services firm stated, "In 2008, when the economy was so bad, we changed directions for the company. At that point, we probably had eight employees. And over the course of that year and a half or two years, we ended up having to lay everybody off. And so, when we started things back up, we made the choice not to grow back to that size again. So, that was one of the major things. But then in the last couple of years, my workforce has aged, and a number of key people have retired... We certainly could be growing, but we've made a choice not to." [#34]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "The growth has been negative." [#35]
- A representative of a majority-owned professional services firm stated, "I've been focused a lot on smaller companies the last couple of years. Those are usually pretty small contracts. The bigger companies won't talk to those folks, even if they call them, so that's made the sales cycle a little easy. The hope was to grow by volume instead of going and getting some whales right out of the gate." [#36]
- A representative of a Black American-owned construction firm stated, "Definitely increased. The first year, but our first year, the second year was pretty taxing because of the pandemic.

2020 was terrible, but I rebounded very well much the next year. So yeah, we're growing quite a bit." [#38]

- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "It's kind of been about the same. I mean, we generally keep anywhere from four to seven employees. We have been on the rise of generating more projects in the last several years, probably due to the fact of COVID. People are staying at home, not able to travel as much, so they've got more money to spend on their home." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "It has during the pandemic increased … as a result of the need to go remote and do that rapidly, we've had an increase in growth. And we also expect our business to grow even more so because of the supplier management platform we've developed." [#40]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals [#2, #3, #4, #8, #12, #13, #15, #16, #18, #19, #21, #22, #23, #24, #25, #28, #29, #32, #33, #34, #35, #36, #37, #38, #39, #44]. For example:

- The co-owner of a majority-owned construction company stated, "From that program, we did learn a lot about marketing ourselves and resume building and putting on the dog and [pony] show, so to speak. In our world currently, that's really only relevant if we're marking ourselves to general contractors. It tends to be a new movement, which is CMAR job contractor. CMAR is Construction Manager At Risk project, and other negotiated jobs where, although in the owners we deal with, counties, cities, et cetera, those options aren't available typically, unless it's a large enough job to where whatever department deems it most efficient for them. Point is, so for probably if maybe 80% of the work we do was all just low bids still." [#2]
- A representative of a Black American-owned professional services company stated, "I did not launch a website until 2020 … marketing the business, I didn't have a marketing budget, I didn't do advertising. I had leaflets, and I had portfolio binders that we would go in in the day, when you go in and do a presentation." [#3]
- The Black American woman owner of a professional services company stated, "Marketing myself is usually just through conversations with people that I know. Conversations at parties I'm at, conversations... And just in spaces that physically, I'm there." [#4]
- A representative of a majority-owned professional services company stated, "We don't work really hard to gain access to new clients. I would say in the last 25 years, probably two or three times, we've actually done something with the intention of growing new clients. Most of our client base, if not all of our client base comes from referrals and extensions. An architect works for a firm that uses us, really likes working with us. They start their own firm, or they go to another firm, and they try to get that firm to change over to us, that kind of thing. So, it has tended to be more a word of mouth or quality of work thing that we have let drive as much as anything. As a result of that, we don't do a lot of marketing so that firms know who we are and where we are and so forth." [#8]

- The owner of a majority-owned construction company stated, "Word-of-mouth, Facebook. I have a webpage. Nothing that's real expensive." [#12]
- The owner of a majority-owned construction company stated, "People appreciate it, and then they give your name out. I've never advertised. I've always been word of mouth. It's just running a good business and treating people fair pays off." [#15]
- The owner of a majority-owned goods and services company stated, "Again, being part of a franchise, and it's a great franchise to be part of, they have offered a lot of that sort of thing for us, and they continue to offer that. For example, I could have my own website, but they have a website which I use, which we put content up on it and they do the SEO and SEM for us … it works well for me. I think local search has been a huge thing for us and as I say that that's another thing that perhaps the County could do for small aspiring business people, is help with resources for getting a website and getting them set up with certainly SEO, so they don't have to spend the money up front for pay per click." [#16]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Right now, word of mouth is what we do." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We do we have a website, we have social media. We have sales staff, we do networking, and we do email campaigns." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "We keep a company brochure. Within that brochure, we have projects, our successes, no failures, of course, but we don't have failures." [#23]
- A representative of a majority-owned professional services firm stated, "Our primary method of marketing right now is in our website, SEOs. For new business, existing businesses, or relational, existing client base. So, we just call them up. We have a rotating phone log and the project managers, and the management company just call up different customers every week and just says, 'hi, what's happening? Do you have anything coming?'. Like I said, it could go two years without a project and then there's a project there." [#24]
- The owner of an SBE-certified construction company stated, "I've got what would probably be considered an IT guy, that does the website, puts pictures up. I've in business for the 51 years, so almost everybody already knows me. If they don't know me, somebody does know me, that they know. I don't have to really market myself. Once upon a time, I had to spend a whole lot of money. My marketing budget used to be over $20,000 a year, advertising and marketing and stuff, but it's substantially less now. I mean, it's still thousands of dollars." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Basically, [our] marketing is through networking events. Of course, we have online presence with websites and some social media. But for us, our key marketing is getting out there in the outreaches … being in a place where the work is being done and being able to meet the contractors and our owners that are advertising that they're going to be building this or doing that." [#29]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "It's been on a serious decline. Finding it difficult to find

opportunities to bid on and then to be successful in that. And COVID really has changed [things]. I used to travel to do marketing and now that's not happening." [#33]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "We do snail mail, we do electronic email, we attend different events, we do commercials, we advertise." [#35]
- A representative of a majority-owned professional services firm stated, "Oh man, I've tried everything I can think of. I've done in-person cold calls, I've done cold calls over the phone, I've sent out postcards, I've done trade shows, I've done email stuff. If I meet somebody at a networking group or whatever, I'll ask them if I can add them to my newsletter, or something like that. I do some stuff on LinkedIn. And of course, I have a website. I'm starting to learn more about using landing pages, so when you're doing any of the above, folks have a specific place with a specific call to action. Instead of just going to your generic website where it's like, 'Okay, well I already knew the name of the place and some of the basics.'" [#36]
- A representative of a majority-owned construction firm stated, "That's something we're working on currently, at least the marketing aspect of it, because previously our business model was a little more, like I said old fashioned. So, to speak, it was just on the ground, face to face meeting clients, that type of business model. In this new world we live in, it's become, a lot more digital and we are slowly, slowly going that way. So, there's been some barriers there, but nothing that would hold us back necessarily." [#37]

C. Ownership and Certification

Business owners and managers discussed their experiences with the City and other certification programs. This section captures their comments on the following topics:

1. The City and other certification statuses;
2. Advantages of certification;
3. Disadvantages of certification;
4. Experiences with the certification process; and
5. Comments on other certification types.

1. The City of Cincinnati and other certification statuses. Business owners discussed their certification status with the City and other certifying agencies and shared their opinions about why they did or did not seek certification. For example:

Eight firms interviewed confirmed they were certified as SBE, MBE, or WBE with the City of Cincinnati [#5, #21, #22, #23, #28, #32, #38, #39]. For example:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We have the City of Cincinnati certification." [#5]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We're MBE certified with the City of Cincinnati, [for] three years." [#21]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We do have a DBE, and we're also certified as a small business and a WBE inside Cincinnati. And then DBE is the federal government and then WBENC is the WBE." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "SBE was difficult. DBE is very difficult. City of Cincinnati, not that bad. It's just bothering. So, they all have their negative points. I don't know why we have to go through all this. I really don't." [#23]
- The owner of an SBE-certified construction company stated, "I'm a Cincinnati SBE. One time we filed for MSD, which you get automatically. Originally, you had to have both certificates, but then eventually, to the best of my knowledge, you became an MSD SBE if you were a Cincinnati SBE." [#28]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "[We are] an SBE and a WBE and an SLBE from the City of Cincinnati." [#32]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "SBE with [the] City of Cincinnati. I thought that would bring more opportunities. That was some of the red tape that was required to bid on some of the City and County work, so that was the reasoning behind getting certified." [#39]

Sixteen firms interviewed confirmed they were certified with another certifying agency [#1, #3, #5, #7, #9, #11, #13, #17, #21, #22, #23, #25, #32, #33, #39, #43]. For example:

- A representative of a Black American-owned professional services company stated, "I am re-certifying with Ohio Minority Supplier Development Council. I was certified for a number of years, and then the certification lapsed. And then they have subsequently changed their certification model. So, I am preparing to re-certify. I am currently considering certifying with other entities, like the state of Ohio, like the City of Cincinnati." [#3]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We have an NMSDC certification." [#5]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "I get one for Ohio. I only get a letter from Kentucky. But when we talk about DEI for the City Cincinnati or whatever Hamilton County's going to do, it would be nice to actually the certification I can hang on the wall." [#7]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "I have the National Minorities Supplier Development Council. And I have the EDGE." [#9]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I think the only certifications we have is through the state of Ohio where it's a woman, small woman-owned business. … It was pretty smooth. I remember the tax forms and things like that, that the state of Ohio was requiring was pretty extensive, but yeah, I'm sure that's just so they can validate 100% that it is a minority owned business, but it was fine, a few extra hoops to jump through." [#11]

- A representative of a woman-owned, DBE-certified construction company stated, "We are working on the federal woman-owned, but we are recognized by ODOT." [#13]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "We have a woman-owned certification at the state level, we have a section three certification at the federal level, and that's it right now. We are going for the City of Cincinnati right now, I think, the minority and woman-owned cert." [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "[We're an MBE] with the state of Ohio, as well as the National Minority Supplier Development Council. And we are also DBE certified here in Ohio, Kentucky, Indiana, and South Carolina." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "The City of Cincinnati. And then DBE is the federal government and then WBENC is the WBE." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "We have our DBE certification through ODOT that's being reviewed right now, so we hope they have that in the next month or so. And we have our MBE." [#23]
- A representative of a WBE-certified construction company stated, "I think the biggest challenge we faced was getting WBE [from] the Ohio River Enterprise Women's Council." [#25]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I used to have a DBE, but like I said, it didn't really seem to be doing anything for me, so I let it go." [#32]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "I have the 8a. If you go through the agent, chances are very high that you will get through the certification. So that's what I heard. And I did find a good agent and it went through. But when I look back, if I would have done probably myself, I probably wouldn't have gone through the whole 8a process. It's a third-party support system. They help you to put all the documents together properly. They know what SBA is looking for. And so, they going to know their niche. So that's how agents are helpful." [#43]

Two companies interviewed were not certified but were in the process of applying [#4, #17]. For example:

- The Black American woman owner of a professional services company stated, "I downloaded the application because I wanted to hand write out everything and be sure that I've got everything, all the information answered and answered correctly. I also downloaded the N-A-C-I-S [list] if I'm saying that right." [#4]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "We have a woman-owned certification at the state level, we have a Section 3 certification at the federal level, and that's it right now. We are going for the City of Cincinnati right now, I think, the minority and woman-owned cert, and we are going for the state-level minority cert, as well. For some reason, when we apply for the minority cert and a woman-owned cert at the same time, at the state level, they denied one but accepted

the other. … When we applied for the minority cert for the City of Cincinnati, the [previous] disparity study said that there were no Hispanics or Native Americans that were disproportionate in this area. So therefore, we could not get the minority cert, because they said nobody spoke up during the disparity study. So, they said we had to wait for the next disparity study to come around to be considered minorities at all." [#17]

Thirteen business owners and managers explained why their firms had not pursued certification. Many uncertified firms were unaware of the certification or its benefits [#2, #4, #6, #8, #9, #10, #16, #24, #34, #36, #43, #44, #FG1]. For example:

- The co-owner of a majority-owned construction company stated, "We did [hold a certification] in the past, but we do not now." [#2]
- The Black American woman owner of a professional services company stated, "I don't have any certifications in terms of women-owned or minority business." [#4]
- A representative of a majority-owned professional services company stated, "We, at one point we were a small business enterprise with Hamilton County. We worked on a project back a number of years ago. I'd have to look to see how long ago it was... And we teamed up with another structural engineer. And when we did that, we got certified as a small business enterprise. I believe that we no longer have that designation. I think you have to go through a process each year or something like that. And we did not do that after that project was over." [#8]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "Yeah. I used to have the City [certification], but I discontinued that. I had it for a while." [#9]
- The woman owner of a construction firm stated, "If we got that certification, would that help us with getting any kind of job, say, at a County-wide, a public sector kind of thing? I really didn't look into it a lot but [I] couldn't really find what we needed to do to get that certification, and how involved that would be. If it's a lot of paperwork, a lot of fees involved with it, I don't know that that would be something a small business like us would be interested in." [#10]
- The owner of a majority-owned goods and services company stated, "I do not. I am a veteran, but I've never applied for veteran small business or veteran owned status. Because I'm part of a franchise, I don't think I can file for some small business things because I am part of a franchise, I believe." [#16]
- A representative of a majority-owned professional services firm stated, "[We do] not have a certification. But we could qualify … in Northern, in Kentucky, it's not an impedance to do business with the government. Okay. So, I think that's probably why. The owner's from Northern Kentucky, he's lived here and he doesn't think across the river. I actually started pushing him last year about let's get this certification done so that we can potentially have more opportunities to bid elsewhere. But again, it's like anything else, when your existing client base keeps your engineering hours consumed, you're not pressing that. And that's really the only reason it's not done. Because at this point, all our hours continue to be consumed by existing clients." [#24]

- A representative of a majority-owned professional services firm stated, "I had chosen not to pursue the public work and those certifications don't mean anything in the private world." [#34]
- A representative of a majority-owned professional services firm stated, "I don't know enough about it. It wasn't clear to me what that would do for me. I know it may, maybe I should have looked into it more." [#36]
- The woman owner of a goods and services company stated, "[I've] heard about opportunities always being offered to people who have priority because of certain situations, if you know what I mean, like if you're women-owned or a disability, I like to be able to get contracts, and I wish there were ways just based on your ability. I'm not a registered women-owned business. I'm a women-owned business. I talked to the Small Business Association about that, and it's like $600 a year, I think … I thought it costs money to be certified as a women-owned business." [#44]
- The Black American woman owner of a professional services firm stated, "I found out from you about these opportunities. So, I don't know how that works." [#FG1]

2. Advantages of certification. Interviewees discussed how DBE/MBE/WBE/SBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification [#1, #2, #3, #7, #13, #14, #21, #22, #23, #25, #26, #27, #29, #33, #35, #38, #39, #AV, #FG1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "I guess they do because they come out with goals. So, we're trying to get those goals." [#1]
- The co-owner of a majority-owned construction company stated, "It was quite a challenge. The other project we've had, you submit a bid … It's more based on your qualifications, just to allow you to get the bonding capacity to do it. So, to some degree it's based on work history and the whole myriad of things that would qualify to do that. Conversely, when you get into those HUBZone programs, now you're submitting big resumes. A big learning curve of how to play that game, or how to get the right information to the right folks. Most of those folks being military, I think background, they're so regimented in checking boxes. You could clearly be the best contractor, the best choice, but if you failed to check even half of a box, so to speak, your bid was out, and the opportunities, to some you and far between for a local contractor to find the ones that fit his niche. That was our concern. We'd see maybe two or three a year, but the learning curve would be okay, we missed this one, here's why, and it would take months and a lot of research to figure out why we missed. Conversely, once we were in, then we were on the inside and looking out and then those barriers, as much as they pained us to get in, they were our best ally. Like, oh, this is great. Keep competition away, so to speak." [#2]
- A representative of a Black American-owned professional services company stated, "I think all the certification processes honestly, are advantageous. And I don't want to disparage the state or the City, or our NMSDC. I don't want to disparage any of them in regard to the certification, otherwise, I wouldn't have pursued the one that I did. I think all of them are beneficiary." [#3]

- A representative of a Black American-owned, MBE-certified professional services firm stated, "If you're certified with the City, you're certified with Hamilton County, but I really haven't seen any evidence of that. I've heard some lip service, but I wasn't... Not 100% sure. I was told I was on a list for Hamilton County." [#7]
- A representative of a woman-owned, DBE-certified construction company stated, "In the private sector, no. I think that really [comes] into play on government contracts or to a large corporation that might get some tax benefits from it." [#13]
- A representative of a WBE-certified construction firm stated, "I think it has helped us when we've bid some of these public projects. I don't know that it's ever hurt us. I mean, it's not... it's been pretty uneventful of us being a woman owned business to be honest with you." [#14]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I was told that these would help you get contracts. And would have to say what the MBE, I would have to say that has not existed in terms of getting the contract, but then a DBE that has come into play for us in South Carolina. I got these before with the hope that future opportunities would exist. Well, hopefully there will be in the future. But as you probably know, is that a lot of people say if you don't have it, then you won't get the opportunity. So, we're certified, and we'll see what happens." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I always say that my favorite thing about certification is the knowledge that it unlocks. I get a lot of educational seminars and things that I get because that I'm certified. And then I think I opened up to more networking, which I think leads to more business. But by far, hands down, no matter when I'm talking, I always talk about the education component. I just think I'm afforded a lot more opportunity to learn." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "There is only when it's needed, only if the end user say, okay, I want to have this 20%, MBE, 15% WBE, or so many percent SBE, then it's a benefit. Other than that, it's not a benefit." [#23]
- A representative of a WBE-certified construction company stated, "[If a large prime] hires us, they get... I believe they get grants. But for us, ourselves, it really hasn't helped us in our industry, like we thought it would. I guess the main benefit is when we... when people see it on our emails and stuff like that, but I think that's about the only real benefit is they see that we're WBE and they're, 'Oh, okay, cool.' That's about it." [#25]
- The Black American male owner of a construction company stated, "If I didn't have this MBE/EDGE, I probably wouldn't have work. So, certification for us as minorities is very important to be in business, and that's sad to say." [#26]
- The co-owner of a WBE-certified construction company stated, "I do think there are benefits to be in certified. I firmly believe that it can give you opportunities. I don't think anybody gives you anything. I think you earn it, but I think it does help to level things, which is all anybody wants, is an opportunity to be able to participate. So, I think it's very important for that." [#27]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "I believe that at least by being certified, you are more apt to getting an invite to the table. Again, just the being the fact that when they need to hit diversity goals, it gets you a look from maybe even other companies from the corporations themselves. And at least it gives you the look, it gives you the opportunity to get the look." [#29]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "On the City of Cincinnati, Hamilton County side, I'm not too familiar with that. On the federal side, I am. There were not a lot of woman-owned opportunities. I am seeing, since President Biden announced a focus on that, I'm seeing more of those opportunities out here recently. Then the question comes, okay, if you can do that now, why hadn't you done that in the past? So, I am seeing a change on that front. If this was next year, because I do plan on trying to do business in Ohio again, in some way or fashion. I just thought it was best for me to be armed with the certifications, given things that I've attended in the past, where that seemed to be the avenue to have a better chance of success." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I'm not sure if there's any benefits." [#35]
- A representative of a Black American-owned construction firm stated, "That is why I'm on the map. They know we're here now, and I do get a lot of information and Ohio's done a good job to try to keep me informed of what's going on in the marketplace." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "It's definitely beneficial. It kind of forces you to understand your business as well when you're getting the information for them to be certified. And it kind of gets you in front of certain people who are decision makers, and they tend to believe that since you're certified, you meet all the qualifications." [#39]
- A representative from a Black American-owned construction company stated, "It is hard to get a shot at demolition with big company if you are not minority certified." [#AV58]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#2, #3, #6, #9, #21, #23, #27, #29, #32, #35, #38]. For example:

- The co-owner of a majority-owned construction company stated, "The challenges with, at least with the HUBZone program is, we have to travel. To participate in the program, we really to travel quite a bit. Most of those contracts are let through the... Huntington, West Virginia, Louisville, Kentucky. But conversely, those contracts they oversee are for statewide options. At times we had to go to Mississippi and New Orleans, that area. Those were, they call MATOC contracts, which is Multiple Award Task Order contracts, I believe. Like a big, giant maintenance contract. You get yourself qualified to do it and they come to you and say, okay, we've got these two projects or whatever, in Louisiana, wherever it is throughout their region. But the regions are so big. If you don't react to those, you're not going to stay on their list." [#2]
- A representative of a Black American-owned professional services company stated, "The thing that I have always been both warned against, it's good when it's good, but the

administrative side of reporting... Even if you're awarded the contract, the administrative side of reporting can be so cumbersome and so laborious because of their own internal inefficiencies and how they are not technologically set up to handle information. That is not profitable. Sometimes, there are, particularly with City contracts, or with municipal contracts, or County even, again, there are all of these stringent mechanisms to demonstrate performance. But because your system is inadequate, technologically wise, you're asking me to fill out all of these laborious forms. And then submit them. Well, if the forms are 15 pages, that's not 15 minutes of work. That could be two to three days of work, because you're asking me to submit attachments, or you're asking me to submit evidence, or you're asking me to submit this. And the way that those attachments or the way that those supporting documents have to accompany the overall document, is not a quick upload." [#3]

- A representative of a majority-owned professional services company stated, "We don't have someone specifically assigned doing things like that. It would be, we'd have to be taken away from the work that we're doing to do that [get certified]." [#6]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "The gatekeepers … that's one of the reasons I left the Cincinnati MBE and whatever, because the gatekeepers are not technical. They will direct you, give you a chance to go speak to the technical folks that will understand what you're talking about. And so, they tend to frustrate you. They don't understand what your services you're providing. And I think that's the biggest barrier. The private companies that I work with globally, I go directly to the engineering folks. They connect me that. So, they know we talk the same language. They understand. It simplifies it and it has clarity of purpose between both parties. Yeah, because for me, why I pulled out of Hamilton County, I came for a renewal. I've been with them for years. And this person, I'm sure they're new or something. Then they were asking me to send them a purchase order, which is not relevant. Send them a physical purchase. I'm saying, 'What are you going to do with my purchase order?' Would I lie to you, I'm not in business? What are you trying to prove? And I was in the middle of a project. I just say, 'Return my document.' I won't do that. I told my folks here; I won't send you purchase order. Why would I send you my... these are my vendors and don't want to expose my client information." [#9]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I'm not going to lie to you, it has never happened once… we thought that would open up more doors, we even went through like the federal government certification process for that same kind of certification. And we've never secured one job because of that. I mean the only thing it really has helped for, and it was a very small percentage difference, was in like the SBA loans whenever we've needed, additional funding for something that's really been about it. That process to get the loans was a little bit smoother because you already had the certification, but as far as jobs, no, never once which I was kind of shocked about, really." [#11]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The biggest disadvantage is the time consuming of getting all this stuff done every year or every two years. It just takes away from your everyday activities, and your everyday activities should be trying to make money, trying to bid on work, try to get work

done. It's just a cog in the whole wheel of things to slow you down. You got to take people, and it takes not one person, but takes a few people to get all this information they're asking for together and submit it for their approval of the certification. Time consuming." [#23]

- The co-owner of a WBE-certified construction company stated, "I guess the biggest disadvantage is people assuming that you'll just run things through your company so that they get the benefit of it. Or sometimes I have said to some people in the private sector, 'By the way, I am a WBE, if you're interested in having the documentation.' And have gotten scuffed at for that, but that's their problem, not mine." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Pretty much trying to make sure that you have all the documentation that they're asking for. A lot of it is, I'm not going to say obsolete, but they take you back to the beginning. And let me say the initial process is very difficult. Being able to upload drawings or make copies or making sure you have all the documentation that they're asking for, answering questions 15 different ways and the fact that you're doing it for each certification instead of it being something that's general. Different certifications are asking for different things. So, the certification process is a bear. The re-certification process can be a bear for most of them, which to me is just ridiculous. Nothing has changed other than I can understand needing updated financials and if there's any changes. But other than that, why do I need to try to find things from 15 years ago and this obsolete piece of paper and all that stuff. So no, the certification process pretty much sucks. … I mean, they cost a lot of money and it's takes a lot of time to get them." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "It takes time. That's the biggest disadvantage." [#32]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I'd say they ask for too much information. I think it's difficult." [#35]

4. Experiences with the certification process. Businesses owners shared their experiences with the City's certification processes [#1, #7, #9, #16, #23, #32, #38, #39, #FG2, #PT1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "Majority companies do not understand the additional hoops that we have to go through. The certification processes, and some of them can be quite intrusive and just counting the beans constantly. They just walk in, 'Hey, Mr. so-and-so, I can do this.' And they go, 'Okay. I like that. All right. When can you start?' Everybody thinks that certification is manna from Heaven, it is not. You still have to get out there and find the work that it's just another couple of layers on top of what you already have to do and to just keep that certification up. So, I know that there are those that think, oh, once you get that, you should be rolling. Rolling in what?" [#1]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "It was pretty exhaustive, the City of Cincinnati's DEI process to get certified with the City. And I'm not going to complain because I guess you should have some type of filtering process so that it means something to have a footprint, have a square footage, brick and mortar, and also show that you are a non-white Black American ... We filled out, I don't

know, eight pages and had two interviews and had them tour the space. And at the end of the day, that was respectful, and you felt like, well, if anybody gets your certificate, then that they're legit, for all the questions you just asked us. Income and all those kinds of things. So, I felt like they had a very thorough... What, I guess I'm not 100% on board with is the renewal. I think is every two years. And I think once you've passed that, as long as there's no major changes, you should be somewhat left alone and continue on with your life." [#7]

- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "Why I pulled out of Hamilton County, I came for a renewal. I've been with them for years. And this person, I'm sure they're new or something. Then they were asking me to send them a purchase order, which is not relevant. Send them a physical purchase. I'm saying, 'What are you going to do with my purchase order?' Would I lie to you, I'm not in business? What are you trying to prove? And I was in the middle of a project. I just say, 'Return my document.' I won't do that. I told my folks here; I won't send you purchase order. Why would I send you my... these are my vendors and don't want to expose my client['s] information." [#9]
- The owner of a majority-owned goods and services company stated, "I did for a job years ago that I was bidding on and I was getting all the way through, and it seemed like I was heading there, but then at the end they said, 'I'm sorry, you're a franchise. So, you do not qualify as a small business.' Even though I am independently owned, and I've got... Again, I'm responsible for this business here because I'm part of this franchise organization. They consider the whole franchise as the business." [#16]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "But you got to [go through] these other hoops. We just got through getting re-certified for the City of Cincinnati. It makes me so mad. The City calls you... 'It's time for your recertification. All we got to do is...' Copy and paste. And then they want to come and see your building. 'Because you moved last year.' But hell, came and saw my building last year. They've got to keep it on the record, so is that my fault? I got to take out time to show you around the building. And I'm not trying to be rude. It's just that we go... Being minorities and SBEs, we jump through too many hoops. White people don't do that. While we're jumping through hoops, they're out making business." [#23]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "It's a pain in the butt, but now that one, because I've been with the City so many years now, more than 10 years, it's not that hard to renew. But when you're first going through it, it's really onerous I think to go get all that paperwork and all those statements. And especially when you're a small business like me, like one person, I don't have a board, I don't have board meetings. I don't have minutes. There is a lot of things you got to say, explain why you don't have it. It's just kind of a pain in the butt." [#32]
- A representative of a Black American-owned construction firm stated, "It was long. And they wanted a lot of information. It was probably one of the longest processes ever. Because I had been certified with Ohio years ago and I hadn't done it in a while, and they've changed it, and it was very drawn out. I can't complain about how difficult it is to not say that it's still important because it is important that you know the companies truly are minority companies and are not shell companies or a shadow company, however you want to put it. So, it is important that you keep a tight range on how it's done." [#38]

- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I mean, it's not difficult. Again, we've been in business for a while, so a lot of things that they want, we have that established. It's just lengthy." [#39]
- A representative from a public meeting stated, "We thought we were going to really be successful being into this program. And as the young lady said on the chatline, you have to put in all these types of [codes]. What is that you have to apply for the MBE's [certification]? All these certifications, you know … it's just mind boggling because everybody wants all this paperwork. And it's a stick to it type of situation. So, what I've done in my situation is like put a date for whenever it may come up again. And I kept copies of the paperwork because it's a repetitive thing." [#PT1]

Six businesses owners described their experiences with the certification process in negative terms [#8, #16, #27, #33, #AV, #PT1]. Their comments included:

- A representative of a majority-owned professional services company stated, "The process I went through with the small business enterprise before, I found it to be a very winding path through a labyrinth of offices and paperwork and so forth. It wasn't that it was impossible to do. I mean, we eventually made it work, but you had Ms. So-and-So over in this office who tells me I need to do such and such, and then I try to do that. And then Mr. So-and-So over in this office says, 'Well, you didn't file such and such. You always have to do that first.' And there's not a lot of friendliness in the whole thing. It's a very different process. Again, it's almost like they don't need me at all, I'm an irritant. As opposed to, I'm trying to provide you with the service that you need. It's not a pleasant process. And I think that's the reason why we lost our status is that once we were in, it's not like there's an easy process to even stay in. It was like the next time it came up; it was this whole bureaucratic process again. And I thought, why do I want to bother with this? It's just not worth the effort. Because since we aren't typically in a prime position, we weren't really getting opportunities to bid on projects. And when we did get opportunities, they weren't right projects for us. Like we would get a Hamilton County, or the Metropolitan Sewer District, would send us a thing for a road replacement, which has nothing to do with our qualifications. And that's not what we had indicated on our paperwork that we bid, is almost like they just saw engineer and said, 'Okay, we'll send them this bid.' I would characterize it as the barrier for me is there's just a lot of paperwork and effort for what I perceived to be a minimal return on that investment." [#8]
- The owner of a majority-owned goods and services company stated, "It surprised me a little bit because I thought, 'Wait a minute, I'm a small business.' 'Well, not really, not in our definition because you get support.' And it's fair, as a franchisee, as I've been saying, I get a huge amount of from the franchise, which if some guy or woman comes up and wants to start a business of some sort, a small business here, 'I've got an idea, and this is what I want to do.' They don't have any of that support. So that would be helpful to be able to have that from the local level." [#16]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "The process was okay. I'm used to a lot of forms and paperwork, given my of background on the federal side. It was just that I never heard back once I submitted everything, There was no email saying it's been received, no letter. So eventually,

just last month, towards the end of last month or beginning of this month, I actually called to just make sure because I'm expecting some kind of acknowledgement." [#33]

- A representative from a Black American-owned goods and services company stated, "I have experienced difficulties with MSD & SBE Program with the City." [#AV298]
- A representative from a Hispanic American woman-owned goods and services company stated, "I have a hard time becoming certified as a minority contractor in Cincinnati and also certifying as an 8(a) certification. We are still pursuing that, and our application has been sent back a few times." [#AV299]
- An attendee from a public meeting stated, "We have been having a branch office here in Hamilton County for the past seven years. And out of the past seven years, based on the City's definition, a bona fide office for the past four and a half years. … So originally MSD Cincinnati accepted [8a] certification from the federal government, and we're going to graduate in October this year. So, I went and applied for the SBE program with the City. I did that last year about June, knowing that we're going to be graduating. And about this year June, I was told that you need to take the application back. There's not enough evidence, based on the review that we have bona fide office. Now we have leased office and I submit a lease and everything. The thing is though, I talked with the lady from the online chat that the certificate process is cumbersome. It's not clear as to what exactly defines a bona fide office. And it says, simply you need to submit the lease. And we did. And then, so it took almost 10, 11 months to tell us that we're not qualified. And I'm not asking for an opportunity, give me work. I'm saying, give me access to the work. And do I need to be going through the process for 11 months to become certified of a small business? I mean, it took 11 months from the federal government because they kept asking questions about things. And I went through that. At least I got qualified for nine years now, I'm graduating. But with the City, I thought it was going to be, I'm not, I mean, I answered all of the questions. And I'm left, I'm disappointed. … I think the process need to be simpler because it's only provides you with opportunity, exposure to opportunity. Then you got to go market yourself and show your qualifications, your experience, and then win projects. That's totally a whole different, I mean, just to get there itself is, these are departments they are to help these small businesses, MBE and WBE and small businesses, but seem to be really sucking up time and energy. And at the end of the day, you don't get clear answers. And just being very disappointing to say the least. You know, we have multiple offices, and we have other cities and we're doing businesses where it is straightforward process. You know, you submit the application you qualify, and you go forth. Then you market. I'm not going to get projects if I'm not qualified with MSD Greater Cincinnati. So, the point is that these certification processes can be simpler and more straightforward and that should not be taking this long to approve or disapprove."[#PT1]

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process [#1, #3, #4, #9, #10, #17, #21, #22, #23, #25, #26, #29, #32, #33, #35, #40, #43, #AV, #FG2, #PT1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "All the financial information, I think it's just as personal and it's your business and because a lot of businesses may not be corporations, so they're sole

proprietors or escorts. Then that means you've got to look at all of that, which means that your personal information gets drugged into that. … when you go to a bank, then you're looking for a loan, you are looking for them to entrust you with some money, then you got to fill out a personal financial statement because they want to know, 'Okay, well, if you don't do well on this, then we need to know how we recoup our money.' But that's not the case with these certifications. If people would just be honest about, okay, I own it or I don't own it. How we got to this is just, we're the minority who has to have the certification is suffering the brunt of the problems that have surfaced in the past of a majority person, trying to claim that they're only responsible for a minority share of this company when actually they're doing 90% of everything [fraudulently presenting the firm as an MBE]. Every five years, 10 years, or whatever and you don't even have to do all of that. But say if there's somebody that okay a company that all right, there's been some questions raised maybe you do look at them a little harder, do a little bit more of [investigation]." [#1]

- A representative of a Black American-owned professional services company stated, "I would tell you that what I enjoyed about the revising of the Ohio Minority Supplier Development Council, which was different than when I first certified, is they now allow in terms of workforce size, they now allow you to count your subcontractors or your 1099s as a part of your workforce. I really think that's innovative. I do. Why? Because sometimes people will look at that one employee as a W-2 and say, 'You can't handle this work. Why are you even bidding?' 'You have no capacity. I can give you the work and you can't do it.' Because of the old mentality of one contract will keep you in business, the second contract will put you out of business." [#3]
- The Black American woman owner of a professional services company stated, "The resources, the information, it seems like to a certain degree, when I started looking more into these government contracts and I'm about to submit an application to be certified as a DBE. … I didn't know about that until you contacted me. … I would say some of the barriers were the information. I would love to talk to somebody who could break this DBE thing and what's expected of it. Wait, wait, wait. Walk me through the steps of properly applying for the certification, walk me through the steps of properly... There's so much information. There's so many different blocks that you could click on. And I'm like, 'That's information overload for me,' okay? I would love for someone... Even with my skillset, if somebody could just give me a process flow worksheet at this point … Well, I understand what the DBE is, but just, I don't know, more information of why this thing got put in place. What was the mission for this whole act or a reason for the DBE? What was the mission behind that? What was their philosophy? Why did they put this opportunity in place? What's expected of a DBE? What qualifications are expected going through the door? Or what would I have to prove later? I would say, definitely because we're referred, with the DBE, we're referred to the ODOT website. And like I said, I do understand that you want to educate yourself on any endeavor that you get yourself into, but it's just not clear. I would want somebody to tell me... I've thought about wanting to call my friend's lawyer and ask him if he could just give me the one, two, three, four of what I need to be looking for, what I need to know." [#4]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "They have to streamline it." [#9]

- The woman owner of a construction firm stated, "It's not fair to us, who have gone through 50 years of experience in the industry, to say XYZ over here gets this job just because he is a Native American-owned company. And there's a lot of that going on yet today; and that's a waste of taxpayers' money, in my opinion." [#10]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "I think they should target the areas where they go. If you just go to Hispanic grocery store and put up a sign and say, hey, in order to be considered a minority business, these are the plus and minuses of becoming a minority business, it'll help out your fingerprint in your community. I think they would go for that. They have nothing wrong with filling out paperwork and getting ahead either, just like anybody else. I think it's just the point of reaching out... For instance... we do lead abatement on our construction line. Well, some of the guys don't read English very well, and... we can't send them to courses, because they need a translator to translate the course over, and there's nobody that teaches lead classes that speaks Spanish in Ohio, Kentucky, Indiana area. … The amount of certification paperwork. If it was a one-stop shop, like, hey, all I got to do is plug in this number and you get my whole profile, what I've done... I even came up with an idea. I was like, they should come up with a dog tag system. Like, just a number that you can just plug in, and it gives you your whole profile, everything that's going on with your company, how it's being put in, and that's it. It shouldn't be this redundance of every single place you go, you have to keep filling out the same profile over and over. That kills me. To me, that makes me bring in another worker just to do my paperwork, because I hate it so much. It's really redundant. A person thinks because they're a minority, they think that once they own a business, that they're... it's legit, and that's the case [that they're considered an MBE]. I have to explain to most of those people who say that, that did you go through a year process of waiting first? And they'll be like, 'No, I just started my business last month.' I'm like, 'Well, you're not minority-owned at all. You have to go through a year just [doing] anything before you do that.' A lot of times, I'm not going to lie, I've had people who said they were a business, and then they didn't have an EIN, or an LLC. I'll sit right there with them before we even do any business together, and I'll incorporate them myself. I'll go through, help them with the paperwork, EIN. I did probably about five LLC's last year, just on people who were going to be contracting with us, so that they have the proper paperwork to go forward." [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Recommendations is don't do it. So just take somebody else's and let it roll with that … I think I should just partner with the City and let everybody just grow from there. I think there needs to be another piece of paper that we need to fill out." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "What I would say is see if they can do reciprocal certifications with either WBENC or the City of Cincinnati. The City of Cincinnati and WBENC won't work together so I have to do those certifications twice. It'd be nice if they just all would get on the same page and be nice and polite, and play together in the sandbox and say, 'Okay, you've done it once, you don't need to submit all your paperwork multiple times.' You're talking to small businesspeople who generally are lacking staff and time, and yet every department wants you to fill out certification. So, get in the sandbox and all play together and have us fill out our paperwork once so we don't have to constantly do paperwork. That is number one." [#22]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "My philosophy is, if you're going to be an MBE, all you need do is show your birth certificate, proof that you own the company, and that should be it. DBE and SBE and MBE, if they see my, my yearly statements, such as my profit and loss statements and my balance sheet, that should be enough. They want to know about your personal business. And it's just that's personal, it should stay personal. Stay out of people's personal business. The main thing is knowing what the balance sheet is, knowing what the loss and, whatever, your bank statements, if you're a minority, the color of their skin, and that should be about it. So, you can establish that you are a legitimate company. The main thing, too, is also do you have an office space, or in some cases a storefront? We don't have a storefront. In the state of Ohio, you got to have a storefront to be an SBE. You got to have a storefront. You got to have a truck. Well, hell. Walmart don't have a truck. In some cases, Home Depot don't have trucks. They lease them. I ordered some... My wife ordered some stuff last year, and we're looking for whoever she bought it from on the back, on the side of the truck, they come up with a leased truck. They're leasing. So why do we have to have a storefront? Why do we have to have trucks? Why do we have to have overhead that we really don't need to be in business? Why can't we have is the overhead to be competitive, like all the other big businesses do? If I have a truck at my office, I'm paying for the truck, I'm paying for the insurance. I'm paying for the fuel. I'm paying for the operator to drive the truck when I could just lease it." [#23]
- A representative of a WBE-certified construction company stated, "You would start with your safety record and then go with your minorities, the lowest minority and work your way up. I also believe in myself, capping a business. If somebody comes into Hamilton County and they make $15 million by August, I think, they should be capped there. Then another company be able to come in. If they can man the work then that... I think that would be ideal for not only small businesses, but... or any kind of minorities. We all know that big companies are pushing everybody around. It would be ideal to have a... I don't want to say salary cap, but the company can only make so much. For instance, [this large company], in Northern Ohio, right? Last year, I worked for them personally, the guy cleared $277 million. He won't give the small companies a week's worth of work. I think, there should be a cap where they're cut off. Like listen, you can make 15 million, then we're going to put it about... if they make $15 million off City of Hamilton, then they should be cut. Well, put it out for rebid. Then, if another smaller company or minority can man it, then they have it. If they can't, then obviously the other contractor that was just there, can start the job back up." [#25]
- The Black American male owner of a construction company stated, "In this industry, people don't like minority businesses on their jobs if it don't require it." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "If the County would have a certification process? My recommendation of course would be ... I think making sure that people aren't just grandfathered in. Even though I said the process should not ... you're asking 50,000 things, but there's people that are certified that I know that should not be certified. So being able to weed that out, which I think the City tried to do. But if they're going to put a certification in place, Hamilton County's going to do that or what have you, they need to do it with intentionality of being able to use those who they are certified."[#29]

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I felt like if government entities are serious about giving opportunities to small business, that they would utilize and appreciate people who've gone through the process to get these certifications and give them some extra credit, basically when you're going up against firms that are not. And while you do get that extra credit with the City, and I believe you do with CMHA, you don't get anything with County. County doesn't at all look at that. I would recommend that instead of reinventing the wheel, the County use the City's certification process, or just acknowledge the firms that are already certified with the City, so they don't have to go through it all over again. And then if they want to do something else or companies that are in the County, but not in the City, I don't know. I just would hate to see them reinvent the wheel when it's not necessary." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I would say make sure it's streamlined and online, versus... I think with the MBE, WBE and EDGE, part of it was online, but the other part, I mean, you actually had to email everything and, again, never got any kind of... And it just said, 'Make sure your email's not too big.' But you never got any kind of acknowledgement back. So having a portal, kind of gets rid of all that mystery, where you can automatically just upload everything, fill out as much as possible and upload the documentation that's required." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Again, if you listen to some of my other answers, I don't think it's necessary. If I can do the work, whether I'm black, white, or Chinese, let me do the work. I mean, we're pretty good at what we do when we have that opportunity. So let me do it." [#35]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "It's difficult and I think it asks for information that's not necessary. The process can be streamlined. The most difficult part should be the first year I apply. But all the information you ask of me. And if I say, 'No-no,' it should be that easy after that. Because I still am who I am, nothing has changed. So why should I go through that every year if nothing has changed. Why ask me for my tax returns if indeed, I'm telling you nothing has changed in my business. Some of this information from a business perspective is not relevant. The reason for certification in the beginning was to validate one, I am who I say I am, and that's typically down to ethnicity and gender. So those two things. I've already proven that. The other one is now, am I still in business? And I said, 'Still in business.' The rest of that in my opinion is not necessarily relevant. Now, after three years, you then ask me what you asked for me now, which is tax returns and all of that to justify that I'm still in business. But I'm still who I said I am, if you need me to prove that here I am, here's my driver's license and birth date and all of that. But every year to ask me of that, I don't think it's necessary. So, I believe it can be streamlined significantly." [#40]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "They should allow to have a family member also to get 8a. If somebody's doing hard work and performing well, if I'm graduating, I should be allowed to have my family member, if they qualify enough, should get the 8a also so at least I can continue at least work. so, let's say my wife opens a business. And she gets 8a, when time comes for my contracts to end at least I have another avenue to bid on it. So that way I can continue all the

task force I have and maybe expand and get more people hired because... And business increases. It's not only profit for me. It's also I hire more people. So, it's more employment for the people as well." [#43]

- A representative from a majority-owned construction company stated, "We're section 3 certified company but they did change the requirement making it more difficult to stay certified." [#AV47]
- A representative from a Black American woman-owned professional services company stated, "We just got our first contract with Hamilton County about a month ago, and so far, so good. It's difficult. I just found out that my certification for Cincinnati does not include Cincinnati Metro. I did not know that the City and the sewer district were not connected, so that I would be notified of opportunities with the sewer district." [#AV202]
- The Hispanic American owner of a goods and services firm stated, "How do we navigate your website? … One certification would be awesome, wouldn't it? I know the City of Dayton recognizes the state, but not a lot of the cities and the counties have that reciprocal agreement with the state. Once you're certified I mean, I was certified by the state, I was certified by the national minority supplier development council, and if we just had one universal one, it'd be great. It would be a lot less work for us, small businesses." [#FG2]
- An attendee from a public meeting stated, "Another thing is the City's, the SBE requirement orders personal net worth. Right? When I started from, it was 750K, I'm still qualified, okay? I'm not a millionaire. So don't worry about that. But what I'm saying is 18 years ago, it was about the same dollar. The federal government has revised twice or thrice afterwards. So, the City seemed to have the same exact dollar amount of personal growth that was set. I mean way before 18 years. So that's something need to be considered. You talk about just inflation of those 18 or 20 years ago, you put two, two and a half percent per year inflation. That's going to be way beyond that 750K." [#PT1]

5. Comments on other certification types. Interviewees shared several comments about other certification programs [#25]. For example:

- A representative of a WBE-certified construction company stated, "It would be Ohio River Enterprise Women's Council. We applied for it and never heard anything back. … Went for about six months. We called them because we knew it was a long process. Called them back. We'll have you something within the next three or four weeks. Six weeks went by. Called them back. Well, the person that we had in charge, quit. We can't access their computer. I'm thinking, 'Is that the only computer in the entire building that has... I mean, they should all have the same program', you know? That was the problem with them is that 'Well, that person quit and then we'll have something for you again.' They called us two weeks later and what they had for us was nothing. It was completely blank. We've never even seen you guys. Somehow, they found our file and pretty much just pushed us through because I have no clue what had happened with that lady and getting in her computer and stuff. It was just... That's what happened. That was our whole experience. It took us almost a year to get certified." [#25]

D. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work**.** Section D 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. Experiences getting work in the public and private sectors;
4. Experiences 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 [#1, #10, #15, #24, #26, #27, #29, #38, #39, #41, #AV, #PT1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "It does vary sometimes, and it depends upon trends. In the early 2000s there was a lot of K-12 schoolwork in the state … Healthcare has always been a segment that just provide some continuity … Right now, offices are coming into a change over a remix. There's a lot of multifamily housing. So, a lot just depends upon the economy and where the dollars are flowing on a national level. Because a lot of these things are not just specific to Cincinnati, but you can see these trends taking place all over the country." [#1]
- The woman owner of a construction firm stated, "I don't think we have any real direction, as far as going one way or the other. It's who is it that needs help? … It's mostly service and repair kind of stuff that we are good at. And so, when people call because they have a problem; something's down, they need somebody right then, that's what we're good at: going and fixing things and getting people up and running. So, whether that comes from the privacy sector or the public sector, to me, it doesn't matter." [#10]
- A representative of a majority-owned professional services firm stated, "It's about the same always for us. We're not expanding, we're probably expanding more in the private sector than we are in the public sector, but again, that's, I can't say we're making an effort to market to either." [#24]
- The Black American male owner of a construction company stated, "I don't even look for it [public work] at this point because I mean why am I going to spend time looking at a job that I'm probably not going to get? It's like a 99.9% chance I'm not going to win that job, so I don't spend resources and time and effort and energy on a job like that. If you send me a job and it's open shop, I feel like you just want my number so you can give it to the next guy to see if he can do it at that price. You're not about to play me like that." [#26]
- The co-owner of a WBE-certified construction company stated, "I guess there's been a little bit of a trend away [from private], certainly with the pandemic, but we've gotten comfortable in the public sector part learning how things work and just, the more you do, the comfortable you get with the bidding process and whatnot." [#27]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We are trying to get away from private sector work and do more public work by leveraging our certifications. That is one of our goals for this year, but it has not happened yet. But that is definitely the direction we want to go." [#29]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "We kind of take what's given to us and the trend has been that we're not going away from it, but more to it." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Private people have the luxury to pick whom they want to work with, public companies they cannot. City of Cincinnati, Hamilton County, State of Ohio. Anybody can bid on their jobs as long as they put a bond up and meet the qualification. Same thing with the federal government versus on private things, they can choose who they want and pick the companies that they feel are qualified and can do the work properly and on a timely basis. So, we are moving more and more toward private versus the public." [#41]
- A representative from a majority-owned construction company stated, "I do not want to get into bidding wars. Growing and a lot of residential customers." [#AV312]
- The woman owner of an MBE-, SBE-, and EDGE-certified construction company stated, "We did better when we decided to change our whole focus... [to private]." [#PT1]

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.

Five business owners or managers explained that their firms only engaged in private sector work [#11, #12, #13, #18, #34]. For example:

- A representative of a woman-owned, DBE-certified construction company stated, "North of 95%, probably 99% [in the private sector]."[#13]
- A representative of a majority-owned professional services firm stated, "Currently we're a 100% in the private sector. In the past, say six years ago, five years ago, we would've been about 40, 60, 40 public, 60 private."[#34]

One business manager explained that their firms only engaged in public sector work. [#33]. For example:

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Right now, it's all federal government." [#33]

For eighteen firms, the largest proportion of their work was in the private sector [#1, #3, #6, #8, #9, #10, #16, #19, #21, #22, #24, #34, #36, #37, #39, #40, #41, #42]. For example:

- A representative of a Black American-owned professional services company stated, "I do have clients that are colleges and universities, that are public colleges and universities. I also have some private colleges and universities. I also do work with school districts across the country. I have a collaborative partnership with another firm, as a strategic alliance,

where we do school districts across the country. That would be the most public sector work in terms of taxpayer related work that I do." [#3]

- A representative of a majority-owned professional services company stated, "After you lose so many jobs on these public sector things, and you see the same firms getting them over and over and over again, it's easy to do it. If it was a matter of going in and filling out a webpage and hitting send, I probably would bid on more of them, but it's not that process. It's a much more involved process. And again, depending on the entity can be a very involved process. So, the risk reward aspect again, is what kind of pushes me away from it. … The public work that we do is usually we're not dragged into it kicking and screaming, but it's pretty close to that just because of our past experiences not being very good in that regard. So usually when we do public work … we're just a sub. And so, I say, 'Sure, I'll be willing to do it. You do all the paperwork and here's my fee and I'm working for you, not for the City or not for the County.' So that's usually how it goes." [#8]
- The owner of a majority-owned goods and services company stated, "Oh gosh, public sector might be 5% and private sector would be 95%. And it's really mainly because, again, I haven't made the time or have the bandwidth to try to bid on more, to more public sector work. I don't have a particular reason not to. It's not like I've made this philosophical decision that I don't want to do public sector work because it's still good work. So, it's just that I haven't made the time to try to do the bidding." [#16]
- A representative of a majority-owned professional services firm stated, "It varies anywhere from five to 10% is public sector. I mean in this year that's going to go up because I just had a big project from [client], that was, 400 something thousand dollars project, again it just depends." [#24]
- A representative of a majority-owned professional services firm stated, "Have I attempted to? Maybe 10 or 12 years ago, I had some discussion with, I can't even think of the name of your stormwater group down there. With the metropolitan or in general, again, I am looking for in choosing jobs that I have control over the scheduling for, and that fit the workforce size that I currently have. That would be the number one reason. Because I've scaled back the company, I don't take on those bigger jobs like that anymore." [#34]
- A representative of a majority-owned professional services firm stated, "Almost 100% is private sector Since I'm not on the GSA list, I don't have the ability to go after a lot of that stuff as a prime [in the public sector], and limited ability to go into it as a sub, since I don't know primes." [#36]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "60 to 70% would be private, 30% public. When I say public, we do a lot of work for Hamilton County. We do a lot of work for federal government, but we do a lot of work with hospitals and of course, high rises and those. So, you could have a one large project with skew the percentage, but typically the lion share of our work is private."[#41]
- The owner of a majority-owned construction company stated, "So in our business, that's zero, we don't do anything with government. A lot of government contracts are distributed, or probably dealt with like bigger companies I'm guessing, because we use a load board that you go, there are so many brokers that they post their loads. And we are trucking companies, we go, and you call them, you negotiate the rate and then you haul. Unless some

out of blue, some government lane pops up, you don't see them. I don't know how government does that portion; I have no idea. You don't see that kind of load a lot. So, it's all private." [#42]

For sixteen firms, the largest proportion of their work was in the public sector [#2, #5, #23, #25, #26, #27, #28, #29, #32, #35, #38, #44, #FG1]. For example:

- The co-owner of a majority-owned construction company stated, "We've accelerated quite a bit in the past five years. It currently probably 60, 40. 60 public sector and 40 private sector. It was [a lot more public when we were HUBZone certified], probably 90% public." [#2]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We're about 60% what I'll call public sector." [#5]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Right now, about 90% of our work come from the public sector. They're the ones with the money, that's the thing. It's, if they [the private sector] required more minority participation, we would get more private work." [#23]
- The co-owner of a WBE-certified construction company stated, "Percentage-wise, wow. Probably 80-20, and 80 being public now. In fact, that's what I think saved us during the pandemic. We were very fortunate that we were working for the City." [#27]
- The owner of an SBE-certified construction company stated, "It depends on the year. I tear down a movie theater or showcase cinemas for 100, $200,000, then that year it could be more private than City. Generally, in Cincinnati, the majority of the work you're going to do is going to be for the City. There's not, generally, not that much private demolition down there due to lot values, and stuff like that. Most everything happening down in Cincinnati is publicly funded in some rich way or the other partially or totally." [#28]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "Government is what we kind of do more of because they have to take the little bid. They have to take the best price. Sometimes you have to be more inclusive." [#FG1]

Two 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, #FG1]. For example:

- A representative of a WBE-certified construction firm stated, "I would probably say 50% [in each sector]. We try to stay diverse as we can. I hate to put on my eggs in one basket." [#14]

3. Experiences getting 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 Hamilton County 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 [#15, #21, #22, #34, #37, #39, #44, #FG1, #FG2]. For example:

- The owner of a majority-owned construction company stated, "We always knew there was a lot of paperwork when I was involved with the City work. There was tons of extra paperwork with that. That was another reason why it just got to the point where it wasn't worth it to me. I went with the easier [projects] that took less work." [#15]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Much easier on the profit side. Again, there's just a lot of hoops and things that you had to go through [with public work]. And I don't want to fill out one more bid if I didn't have to." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Lots of times with private sector, they just go with you because they know that you're going to do the job well. In the public sector, you end up getting caught doing bidding all the time for larger projects. I would say it's easier to get it in private. Because I think in private, you can meet someone at a networking event, and they may have a project, and so they can try you on that little project. And they don't have to go out and source, it's just your way in. Whereas with a public sector, they always end up having to bid you. So, you can meet them, but then you have to go through the bidding and make sure that you pass through the hoop of being the cheapest, and they can't find out the reason you're not the cheapest is because you have much better quality and customer service, et cetera. Whereas in the private sector, if they give you a try, they find out with all value adds that you give why your price is not the cheapest." [#22]
- A representative of a majority-owned professional services firm stated, "It's generally a person making that decision [in the private sector]. So those relationships are easier to build, and a lot of the work comes down to a relationship rather than just a contractual thing. And it's easier to make a client happy and have them pass your name on to another client, a potential client and have the fact that you've got a reputation established in that private sector travel with you. I guess maybe I never stayed in the public sector long enough for that to be part of how I operated there." [#34]
- A representative of a majority-owned construction firm stated, "Most of the time in the private sector, if you do get somebody who's looking for a project, then it's just them shopping around. They're going to get more than one quote and they should get more than one quote. And so, that's totally normal, but in the public sector, it's not only that there's a whole different [set of] requirements that are involved with it and it's significantly, I think more difficult than just going in. And like the private sector, you put your bid into the client, and they decide where they want to go. Whereas, with our experience in the public sector is... Usually there's with requirements in the application processes and things it becomes a little more difficult with everything." [#37]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "The private sector is just easier from my standpoint. The public sector tends to be a lot of red tape." [#39]
- The woman owner of a goods and services company stated, "With private there's the trust. There's the communication. It's not an interview every time you do a bid. They're like family." [#44]

- The owner of a WBE- and SBE-certified professional services firm stated, "It's much faster, usually. It's quicker. When you work with someone you... I'm working on a project they're doing right now. A lot of times like they mentioned, public work can take... it can take years." [#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "What I think I like about private in our experience is that if you have a competitive advantage, we create benefit for them, they can decide to do business with you. They can make a deal because they want you included. They want inclusion, they can just go make that happen. And they're not strapped by some of the rules that government is." [#FG2]

Twelve business owners elaborated on the challenges associated with pursuing public sector work [#14, #16, #19, #21, #29, #36, #37, #39, #44, #AV]. Their comments included:

- A representative of a WBE-certified construction firm stated, "The biggest thing that I can notice in public work it is the process and the paperwork that's associated with it. That tends to slow projects up. It's the red tape, it's crossing the T's dotting the I's, that kind of thing. The work in the field is exactly the same if it's public or private, the work is performed exactly the same. So that's the only thing I see is, it has to filter through so many people to get an answer and I'm sure that's because it's public money," [#14]
- The owner of a majority-owned goods and services company stated, "I haven't made the time or have the bandwidth to try to bid on more, to more public sector work." [#16]
- The owner of a majority-owned goods and services company stated, "Typically we would stay away from government business. Because it was always on a bid type basis. And … the bid business can be tricky. Because one of our competitors would write the specs to some product that we don't carry, and we never even heard of … it always seemed somewhat unfair to us and other people that were bidding on the government procurement job of office furniture. Because somebody had already written the specs. And had written them in such a way that no substitutions were allowed, or it had to be this product." [#19]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "All the red tape and all that you have to go through on the public side, as opposed to private … there's just a lot more hurdles that you have to pass through on the public side." [#21]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "It's [bonding] more. All the public sector, everybody wants to bond, which takes us back to one of the original questions. We're not able to provide bonding, having access to bonding, which gets back to access to capital. So that's the deterrent to do the public work without having a teaming partner or joint venture in place where someone else can pick up that bond. But that's biggest hurdle with the public work, they require bonds." [#29]
- A representative of a majority-owned professional services firm stated, "I was looking at it early on, because I know there's some incentive I guess, if I understand it right, for the public sector to utilize small business when they can. But I learned about the GSA requirement and the cost to do that. I just didn't have the money to invest in all that,

because you could go through the whole process and never get anything. You know what I mean?" [#36]

- A representative of a majority-owned construction firm stated, "The majority of our business does not come from the public sector and most of that has to do with the requirements and such. Especially for the different projects due to composition, ownership, and things along those lines. It puts us at the back the line, so to speak, with the application processes on top of them being unnecessarily difficult to fulfill the application processes and requirements." [#37]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "It's just a lot of red tape. They want you to jump through quite a few hoops to not get work. I mean, it's one thing if you can jump through the hoops and get the work, but then you jump through the hoops and don't win the bid, it's kind of frustrating." [#39]
- The woman owner of a goods and services company stated, "I kind of had a bad taste with the Ohio Business Gateway, the Small Business Association … because I felt like I just didn't have a chance without the certification" [#44]
- A representative from a majority-owned goods and services company stated, "I tried about 10 years ago to work with the government, and it was too difficult. I just don't have a warm fuzzy feeling about it seems so complicated to work with the government rather than the companies I deal with and do business with." [#AV256]
- A representative from a majority-owned professional services company stated, "It is difficult to obtain business from the state as a minority." [#AV207]
- A representative from an Asian Pacific American-owned goods and services company stated, "It is difficult to find out who does the decision making. Who are the members, and what department they are in. We have no guidance or support." [#AV305]

Four business owners and managers described public sector work as easier or saw more opportunities in this sector [#23, #25, #FG2]. For example:

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The private sector is a lot harder. [For example,] just a big company. They've been doing business for generations, and they're used to doing business with the same people. The same companies. And, and if it ain't broke don't fix it, type of thing. And they're willing to listen, but chances of you getting in the front door is kind of harder because whoever in charge of that solicitation for the private company, well, his butt is also on the rope for the success of that particular project. And he's not going to jeopardize his job because he wants to give it to a smaller company. He's going to give it to the company who had done it before. Who had done it forever. Not somebody who's just now learning how to do it. So, the private sector's a lot more [work to] break through." [#23]
- A representative of a WBE-certified construction company stated, "The public sector is a lot easier, obviously, for us." [#25]
- The Hispanic American owner of a goods and services firm stated, "It seems that it's easier do business with the state than it is with private businesses. With private businesses, I've taken a small shark tank sessions where I bring in our clients in to give a presentation on

their product. And it seems to be a little tougher in the private sector than it is doing business with the state, as far as I'm concerned." [#FG2]

- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "Doing business with the state governments and things, that's like law. So, they have lot of that written into it. They have set aside and it's in their best interest to try and facilitate those set aside because they have to explain why they didn't if they didn't. So, it's a lot easier than in the private sector. The private sector, they don't have those types of set asides or mandates. So, it's much more difficult call to be able to tap into being awarded contracts in their areas." [#FG2]

4. Experiences 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 Hamilton County area.

Four business owners discussed their experiences doing work in the private sector [#2, #5, #28, #34]. Their comments included:

- The co-owner of a majority-owned construction company stated, "The nature of [private] work … The margins are better but being a sub where we can't control our schedule, or can't control the schedule, it's a challenge to say the least. Conversely, like in Kentucky work, that's a little different over there because the asphalt contractors there, for whatever reason, they chose not to be union when they're working in Kentucky. So there, they use us as the subcontractor [on public work]. What we don't like about that is, we know if we're running a job, we can count on X number of crews or we can manipulate, move this crew in, take that crew out, et cetera. But with those guys, we're just at their mercy … it might be we're in for two, out for four, back for two, whatever. The challenges are mostly through scheduling, and their demands. Of course, when we're the prime, we're demanding as well." [#2]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "I think, in our region, on the government side, they haven't done a good enough job [with inclusion] o n the professional services side. If it's construction, and janitorial, other material stuff, they've done a much better job of being inclusive in the process, but financial services and other kind of high-end services tend not to go through the procurement process the same way as some other things do. They're kind of excluded from that process, and because of that, at least in this region, we don't have the same shot at winning, especially solo." [#5]
- The owner of an SBE-certified construction company stated, "Private people, even if they're good people, the City will put them in jail if they don't clean up their nasty old house. So, they would rather not pay the demolition contractor civilly than to go to jail for not cleaning up the house. … these people would rather stiff me for the money than go to jail. The City, although they pay slow and they're difficult and they don't necessarily pay you what's fair, they generally do pay you." [#28]

Nine business owners discussed their experiences doing work in the public sector [#5, #7, #9, #23, #26, #34, #AV, #FG1]. Their comments included:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "Inside of our region, by and large, it's horrible. Outside of our region, it's fabulous in places you wouldn't expect to have a better experience through the bidding process and the inclusivity process. In our region, we have on the public sector side, non-profit, including higher ed, we have seven or eight clients that fit in that public sector range. The reason that we are engaged with them was through the right relationship and less about the inclusion factor, so it's right place, right time scenario. Somebody knew somebody that we did some work for and that carried through to, 'Oh, yeah. These guys can help you.' They have no incentive when their customers don't say, 'I need to see this look different for your team.' It's going to force the hand to go out and find diverse partners, because they wouldn't be able to be diverse enough, fast enough because there's not a lot of talent pool out there that can make them look diverse in a quick period of time. Pros is that if you have a good relationship and you can find that avenue, you can get work. The cons is if you are in the procurement process, the bidding process that if it's financial services or those professional services, the same rules don't apply in terms of inclusivity in that space." [#5]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "It was a fair RFP. They asked for architects and CMs to join and create a team to do a garage… I put a team together with [construction firm] … and we are very proud of our design process and know how to follow directions. … They want a historical style garage that fits in the warehouse district of downtown that can be converted to housing in future … and we won the bid. Won the job. … I'm working with those gentlemen. We had meetings for four months and we developed an SD package and a DD package and [construction company] bid it, priced it, and then the new elections happened. And the new mayor said, 'I don't want just a garage. I want condos on top of the garage.' I said, 'Okay, I get that.' New administration, new vision. We legally won the bid. But no one at the City called me or [construction] and said, 'we're going to change the program. We're going to change the budget. And we're going to add 150 condos on top of the garage.' Instead of allowing us to change our design, to follow the new administration, they went off and hired another team … And they built what you see there today. The nice condos and it kind of pops in and out. It's well done. I'm not going to fight that. But my fight is you never gave us a chance to recoup because you wanted a traditional historical look back of a garage and you changed the script to say, you want contemporary and you want to build the housing now, not later. And so [company] is sitting out here in the cold and we were never given the opportunity to respond. And I think that is on a criminal side of this fence." [#7]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "It's black box. You don't know how the evaluation is done and stuff. You submit to stuff, and you don't hear back." [#9]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Go to the outreaches, talk to whoever the key people involved, City engineers, architectural firms that work for the City, get to know them. To get to the public sector, you got to know the people doing the upfront work, the architects, the construction manager. Get to know them. The City is the end user. So, they don't really care who you use as long as you get it done per plan and specifications." [#23]

- The Black American male owner of a construction company stated, "Well, public [has] inclusion involved, so that's the big difference for me. Most public jobs have inclusion goals. So, it's easy for me to get into that job. Only time I say is when the owner is requesting that inclusion is involved as far as private. But it's all about inclusion. If somebody required and asked for inclusion, then you're pretty much in." [#26]
- A representative of a majority-owned professional services firm stated, "The delays [in payment] that come with doing it in the public sector are hardship." [#34]
- A representative from a woman-owned professional services company stated, "The workflow between private and the public sectors are so different that a company trying to enter into the public sector from having done a lot of private work, has a steep learning curve." [#AV10]
- A representative from a majority-owned construction company stated, "Too much red tape, just do what they want us to do. Have codes they set up; you have to go by." [#AV18]
- The Black American owner of a DBE-certified professional services firm stated, "I prefer to do public work outside of Cincinnati. I mean, some of my biggest nightmares have been from doing local public work." [#FG1]

5. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Fifteen business owners and managers highlighted key differences between public and private sector work [#3, #7, #8, #9, #16, #21, #24, #27, #29, #32, #34, #38, #40, #41, #44]. Their comments included:

- A representative of a Black American-owned professional services company stated, "With regard to local, what I've also discovered, which is another reason why I have opted not to bid, is that the pricing models for government and municipalities, I recognize are significantly different than corporate. But they're dramatically different in their expectations. So, the scope of work is, we want you to do everything that you do for the corporate sector, but we want you to do it for half the price, or two thirds of the price. And so, when you put in best and lowest, those are almost oxymoronic." [#3]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "The public work projects definitely want to see a diverse team. So, we've got to be more sensitive to who our team is. So, our problem is we're already black." [#7]
- A representative of a majority-owned professional services company stated, "There's a process that we go through that is part of our normal process of we're contacted, we provide a proposal, we do certain things. Anytime that the government is involved, that ramps up substantially in the amount of paperwork it takes just to provide a quote for the project. I understand why. I mean, it's not that I think it's inappropriate or wrong or anything. I mean, governments have to do things a certain way because they have a different set of obligations to fulfill. So, I understand why there's more paperwork perhaps, but the process itself is even different… it's always a very frustrating process because there's a lot of hoops to jump through, a lot of paperwork. It has to be submitted in a very specific form. There's some very draconian language about if you don't submit it properly,

your bid will just be thrown in the trash, and you won't be told that your bid was... You're not given a second chance. It's like, you didn't do it right so you're out. So, there's already a risk involved in the time and effort you're going to spend on a proposal that you know you might not get. When you add onto it a layer that if you don't do it right, it's thrown out and you add onto that a layer that there's twice as much paperwork as usual. And then you add things like the point systems that are often used, it makes it less attractive for a firm like mine. It's easier to just say, 'You know what, that's fine. They can just work with these bigger outfits or small outfits that want to build into their costs, the overhead to handle all of that.' … one competitor I know of, I mean, they're a firm of only, I think it's eight people and they have one person that all she does is writes proposals for their projects. By contrast, I have 12 people and I have zero people to write proposals. I do hire, or the other fellow that owns the 20%, one of the two of us does every proposal. And our average time on a large project is probably two hours. By comparison if we go after a government project, it's usually more four or five hours minimum. And frequently, those are not different size projects. I've done projects that are $20 million builds that I've done a proposal for it in 30 minutes. And then I've had other ones where it's a $1 million school edition and I spend four or five hours doing that same proposal only to find out that we lost the job. And a lot of times through the grape vine you hear it was kind of already decided ahead of time. They were just going through the motions because everybody knew that so and so was going to get the job because it's their turn or whatever. So those are the kind of things that have always made me reluctant to work very hard to get into those positions." [#8]

- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "It's black box [in the public sector]. You don't know how the evaluation is done and stuff. You submit to stuff, and you don't hear back." [#9]
- The owner of a majority-owned goods and services company stated, "A good example of that would be either local search or pay per click inquiries coming in. Those inquiries coming in, whether it's for sign, wide format or small format, that's a specific thing. They said, 'I have a business, I need some signage. This is what I think I'm looking for. Can you give me a call?' It's very, very specific and I can call them, it's a person I know to call or an email to call back. And that gets the ball rolling. And so that's, again, it's a very targeted, very specific ask. Whereas the bidding process, again, when I've looked at these in the past for either City or County work, it's a bid package and there can be a lot in it. And some of it can be stuff that it's a great fit for me. Some of it's stuff that they're asking for on the same bid is not a good fit for me. And so, it's much more complex to do, which is probably why I shy away from it. … in my mind, generally, I don't think I'm going to be the lowest bidder because I've got costs and overhead that some other smaller or some other non-franchise-oriented printer or marketing company may have. And so, there's that underlying hesitation on my part because of those things." [#16]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Government stuff has tendency again, to be a little bit lengthy in terms of what they're putting out there. Private sector, give me your best prices and we're done. The government is going to be very lengthy, very wordy, and again, probably not necessary. Well, once we've gotten work, I would have to say it's all about the same for us. It's just a matter of getting the work." [#21]

- A representative of a majority-owned professional services firm stated, "Very different in the public, from the private. It's about trust and about doing the right thing in private, on the public sector a lot of it is all public bid. … in the private sector, there are some companies that have very bad terms and conditions. Yeah, substantially because we're very capital project intensive. So, it varies just depending on who's spending what money when. And the public sector is probably more difficult at that point because it's, it gets tedious. You know, you develop a relationship with a private sector client, I know for a fact, [person] down at [company], if he has anything that comes with power, the first person he's going to call is me. You don't get that the problem with the public sector is it's always the same process. You got to go through all the bidding, you have to do all this and all that. So, you can make it easier in the private sector than the public, just through relationships. But, again, that's, it's not necessarily fair to the other guy trying to sell something, but it just depends." [#24]
- The co-owner of a WBE-certified construction company stated, "If I just go bid to paint a building, I have no parameters as far as what I'm supposed to pay that person or even some of the offices I clean that aren't linked to the City, they don't stipulate how much I have to pay. But my jobs with the City of Cincinnati, they have that living wage. And so, if you're part-time, you make a certain amount, and if you're full-time you make a certain amount. Now, they used to also have insurance in there, too. If you provided insurance for people, then you could pay the lower wage. But if you didn't provide the insurance, you had to pay a higher wage. But other than that, they're pretty much the same." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "In the public sector pretty much normally those are the ones that are out of our capacity. … It's not broken down into packages where it can be smaller. It's like, this is what we need. If you can handle it, you can handle it. If you can't, you can't. Whereas in the private sector, they tend to be more aware of if we really want to be able to have access for small business, minority business to really respond to this, we need to be cognizant of the fact that it needs to be smaller chunks. And they're more willing to break down their packages into chunks where we can respond and be responsive. Where in the public sector, that's not taken into consideration." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Bidding for one thing. You don't usually have to bid on private sector work. Private sector work you may just, like I said, it just might be a recommendation that came from someone they know or whatever, you don't have to necessarily go up against anybody if somebody wants you in the private sector, they just hire you." [#32]
- A representative of a majority-owned professional services firm stated, "With a private developer, you make a proposal for the work, they choose to hire you, start invoicing them immediately, and the work and the invoicing are on a controlled schedule, and you can plan for your expenditures, and you can plan for the workload. Anything that I've been involved with the state of Ohio or even a municipality, you make the proposal, you don't hear anything for quite a long time. And then all of a sudden you get a notice that it needs to be completed in the next 30 days. So, there you are with a big project to complete, but not the manpower left because you had other projects that you had to be able to make money. You needed to have projects in your pipeline, and then you can't invoice until the end of the

project and then not expect payment for several weeks or months. So, for a small company, managing the workload and the payment schedule can be a real detriment. … all of those things become an issue for a small company in terms of trying to gain work with the public sector and not the private sector." [#34]

- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Sales cycle in the government sector is longer than that in the private sector." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Private people have the luxury to pick whom they want to work with, public companies they cannot. City of Cincinnati, Hamilton County, State of Ohio. Anybody can bid on their jobs as long as they put a bond up and meet the qualification. Same thing with the federal government versus on private things, they can choose who they want and pick the companies that they feel are qualified and can do the work properly and on a timely basis. So, for us in August, we are moving more and more toward private versus the public thing. Public sector, typically the beauty of it is that if your bid is typically publicly open, so you know if you got the job or not, and a private sector, unfortunately they can play a lot of game. If your bids are open privately, you have no idea whether your bids sits, did you win the bid or not? That's where a lot of the games happen. So, you have a lot more chance of being played and not be treated fairly or ethically in a private versus a public." [#41]

6. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Three business owners perceived public sector work as more profitable [#17, #35, #38]. For example:

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "How does that differ for me? The amount of pay, basically. So, a public sector project is prevailing wage, and I get really excited about those. The private sector, hit or miss." [#17]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "We tend to make more off of the public than we do off the private." [#35]
- A representative of a Black American-owned construction firm stated, "If I do private sector, I have to make more money because we spend more time. I pay the guys more money because they spend more time, and they pay attention to detail, they have to be very careful what they do. Our hours are restricted to work so many hours, so they have to get paid more for that." [#38]

Six business owners and managers perceived private sector work as more profitable [#2, #15, #21, #23, #37, #44]. For example:

- The co-owner of a majority-owned construction company stated, "It's probably easier to get business in the public sector, but just keep getting cheap until you get it. The benefit we see in the private sector, the margins are substantially better. And conversely, we will be

awarded projects based on both price and ability to do work. So, we're rewarded more for what we think is our, what we can bring to the table." [#2]

- The owner of a majority-owned construction company stated, "Commercial [work is] definitely where the money is, but I do a lot of volume with the houses. It mainly keeps a lot of keeps guys working, keeps paychecks in their hands, and until all this inflation, it was good for me too, but it's more of a hassle than, really, what it's worth, but it keeps you active and it keeps guys busy but, in all honesty, if you really want to make good money, commercial [work is] where the money's at." [#15]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "My margins shrink big time when I'm dealing with the public sector. And we can be a little bit more lax on the private side, but what the public, I think they've gotten guidance sophisticated enough that they know what people are about to submit, and they drive the price down. So, whoever can get the closest to the zero for the public is the one who ends up awarding the business to." [#21]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "You can make more money in the private sector. But I would say they're not that much [more,] between 2, 3, 4% difference." [#23]
- A representative of a majority-owned construction firm stated, "I would say that the profitability in the private sector is a little bit better, mostly because they're not looking at as many bids most of the time. And being the lowest bid or the best bid in the public sector, I don't think is always necessarily the case or they go with their qualifications and whoever meets their qualifications at the lowest prices is usually where the public sector goes. Whereas the private sector … usually price is definitely the qualifying factor, but also what's being put in place. And because it's not always apples to apples … there's less competition overall in the private sector, I'd say." [#37]
- The woman owner of a goods and services company stated, "There's no profit actually in the public [sector]." [#44]

Six business owners did not think profitability differed between sectors [#1, #10, #22, #24, #25, #32]. For example:

- A representative of a majority-owned professional services firm stated, "Our profit targets on both are the same." [#24]

E. Doing Business as a Prime Contractor or Subcontractor

Part E 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 and methods for obtaining work from prime contractors; 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.

Nine 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 [#1, #5, #8, #10, #24, #25, #26, #29, #41]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "By being a sub, there are some things that we are just shielded from." [#1]
- A representative of a majority-owned professional services company stated, "Generally, we're not prime. The few times that we are prime, I would characterize as small projects where there's structure only type thing." [#8]
- The woman owner of a construction firm stated, "Most of the contracts that we do bid, we're bidding to a general; and the general does the bonding. … Years ago, there was a time when most of the contracts were bid, electricals for prime contractors, we would be bidding directly to the owner. And when it comes to working for a general on a project, they have no end to excuses why they can't pay you: they would say the work wasn't right, or that was wrong. I would much rather be a prime contractor. I don't know what happened to the industry that that all went away, because the electricals, the mechanicals, the plumbing, heating, we were all prime contractors. And then all of a sudden, everything's under this one umbrella now. I guess it's easier for the owners. And I think what drove a lot of that were the monsters like Messer, and those companies basically just took over the whole industry, and said, 'Well, everybody's going to be a subcontractor now,' is what drove a lot of that." [#10]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We are primarily a sub, but occasionally we are a prime where we are directly contracted … in the private sector with the bid packages they put out. But pretty much we are a sub, period." [#29]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "In public bids we are mostly prime contractor. In private projects we are mostly subcontractor." [#41]

Sixteen firms reported that they usually or always work as prime contractors or prime consultants [#2, #7, #9, #11, #17, #21, #24, #27, #28, #32, #33, #34, #37, #39, #43, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "In the highway world, for the most part, we're always prime, because we have to be. Occasionally there's another open shop guy that will take a job and we'll sub to him, but that's seldom. Usually we're going to be, and our preference is to be prime … Now we're the prime and we sub to the

union guys, if we need them. I'm sure that they don't like working for us as much as being the prime themselves … because they're always at someone's mercy, so to speak." [#2]

- A representative of a Black American-owned, MBE-certified professional services firm stated, "We try to do prime on all our work. We of course prefer to be prime, but our firm has grown because we've learned how to collaborate. And we're good at collaborating with other architects as well as CMs." [#7]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "We are prime in most of our work. Right now, as we are trying to grow more and build more capability after the COVID, we are now considering sub, but most of our work, because of our experience, we are the prime in what we do." [#9]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Probably about 75%, we're the general contractor, contracting out. 25%, we've been a sub." [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "When I bid on things, we're going in as a prime, so I'm not looking to sub at this point, unless I found a good partner to sub with. Again, everything we do, we're going to try to be the prime on what we're going for … unless we put ourselves in a situation where the bid is just big enough or too big for us to handle. But at this point, I think we're able to play and be aggressive. Again, being a small operation, it might behoove me to partner with someone or to be a sub. But at this point, we're going to continue to be aggressive and to see if we can be the prime and most, if not all situations." [#21]
- A representative of a majority-owned professional services firm stated, "We have a lot of other engineering business we do as a prime. So, where we have subcontractors is typically in our construction group." [#24]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "I was a subcontractor for the longest [time], and then now I'm the prime contractor for that agency. Prime is the best place because you are the control of everything." [#43]

Four businesses that the study team interviewed reported that they work equally as both prime contractors and as subcontractors, depending on the nature of the project [#3, #6, #14, #38]. For example:

- A representative of a Black American-owned professional services company stated, "50-50. Scope of work [influences the role I choose]. … sometimes, it is, quite frankly, strategically easier to serve as a subcontractor and let the prime handle all of the application process, than it is for me to bear additional resources to do that." [#3]
- A representative of a WBE-certified construction firm stated, "It all depends on a project. … Say we just got done with a big public housing remodel, and we were a sub because that fell under a general construction prime bid. So, you had a general construction company that was leading the project. Now let's say that if we were just going in and I was doing a lighting upgrade or adding new data lines or new internet service throughout the whole building, I would be prime. So, it all depends on a project." [#14]

- A representative of a Black American-owned construction firm stated, "It would depend on the customer. In other words, we would prefer to work directly for the owner rather than the prime." [#38]

Four firms explained that they do not carry out project-based work as subcontractors or prime contractors [#4, #19, #20, #22]. For example:

- The Black American woman owner of a professional services company stated, "I want to concentrate more on being a supplier." [#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.

Fourteen firms that serve as prime contractors explained why they do or do not hire subcontractors [#2, #11, #16, #17, #18, #21, #24, #26, #29, #34, #36, #37, #39, #44]. For example:

- The co-owner of a majority-owned construction company stated, "The majority of it is past relationships who we know who we are comfortable with. Frankly, the other driver of that is all the preference programs that are currently in place for the City, state, County, et cetera. We are force fed. By meeting the goals, we need to meet, it forces us outside of our normal guys we go to all the time. Those folks are the guys that we go for all the time." [#2]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "Very rarely. I'm, I'm kind of an anal-retentive control freak. I hate to sub out work because then I feel like if work is done at an inferior manner, it will reflect poorly on me because they were sub working for me." [#11]
- The owner of a majority-owned goods and services company stated, "For a lot of the bigger sign jobs, or even these COVID signs, for instance, it's not a huge team. It's not like a highway construction project, but we do have, some of the work we subcontract because it's cost effective to do that and time effective to do that." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "[The] majority of all our workers are other companies. We do contract out to them. That's all we do, is contract out to other businesses." [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I have not [subbed out work] at this point, but actually just talked about that with someone today. And when we start to look at that, actually have a meeting set up for next Monday to discuss this a little bit more aggressively." [#21]
- A representative of a majority-owned professional services firm stated, "Where we're doing an engineer procure construct, we will outsource the construction and we'll outsource the civil engineering, structural engineering and any mechanical engineering, if there is any. Because we just do electrical of course, on the... When we are a subcontractor, a lot of times it is from a company that's already embedded in a client that needs something they can't perform. So, we might get call from an electrical contractor, just got, this one's a classic

example in Seattle, Tacoma, Washington, electrical contractor needed an arc flash study done. Doesn't have the $60,000 piece of software that we do, that does arc flash studies. Okay. He's not going to go buy that for one client, but so he outsourced that to us. But we, to us, whether we're subcontracted, or a subcontractor and I got a relationship with one client where we go back and forth between being prime and sub for each other. So, it's just, there's no difference to me." [#24]

- The Black American male owner of a construction company stated, "Currently, I'm a sub subbing out probably 99% of my work right now, currently." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Very rarely. The only time we subcontract work out, and again when we're operating as a prime sub and so they put let's say glass railings in our package. We can't do glass railings, so we would have to sub that out to someone else. So only when we're forced as a prime, so less than 5% of the time when there's something specified in our package that we can't self-perform. Because basically as a subcontractor, we won't bid it if we can't do it ourselves." [#29]
- A representative of a majority-owned professional services firm stated, "No. No. If somebody needs a service that I can't provide, I do my best to encourage that client to contract directly with the other professional. So, for example, if an architect's needed for a project, I don't hire the architect, but I might help the client in their relationship with the architect, but I would not be the contractor for that." [#34]
- A representative of a majority-owned professional services firm stated, "I've got folks in my own network that have a skillset that I don't, that when I'm able to bring my friends in to help out, I'll subcontract them some work." [#36]
- A representative of a majority-owned construction firm stated, "The majority of our employees are subcontractors. So basically, if we are actually physically subbing out the work to be done by another subcontractor, it's either based on past relationships we've had with businesses that we've worked with in the past. There's somethings that just as a whole are not profitable for us to do. So, it's better for us to subcontract out the work. For instance, work like trenching work and things like that and just to rent the equipment that is easier for us to work with other vendors that we've worked with in the past to do that kind of work and just include that as part of our bid price. So, we plan for that as part of the project." [#37]

Thirteen firms that the study team interviewed discussed their work with certified subcontractors and explained why they hire certified subs [#2, #14, #17, #23, #24, #27, #28, #32, #37, #38, #39, #40, #42]. Their comments included:

- The co-owner of a majority-owned construction company stated, "Frankly, the other driver of that is all the preference programs that are currently in place for the City, state, County, et cetera. We are force fed. By meeting the goals, we need to meet, it forces us outside of our normal guys we go to all the time. Frankly, at first it was like kicking and screaming. Although early on in the program, there were waivers and allowances, or I guess waivers given for us contractors, if we could show the work in the contract is typically work we do in house and we would not subcontract that work out. We'd be given a waiver. Like, okay, if

you're normally going to sub, I'm not going to force you to sub out. So, from that perspective, then the only thing left to sub out would've been the larger work. When I say larger work, that had been specialty work. In our world, it's the asphalt work. … Conversely, when we would show the owners that there are no small/minority contractors that do this work, they do it, but not at that level because they don't have the asphalt plants. Early on, waivers were easy to get because of those two conditions. Those guys, they got all the plants, these other guys aren't competitive. We do everything else in house. So we just go waivers, and like this will work pretty well. I mean, with that said, there were certainly some small contractors in the guard rail space, and painting space, et cetera... We just reached out to those folks and then they would do the work. … we found them mainly through the lists that were available through, most cases with the City and/or Cincinnati and ODOT, DBE world, the world we lived in there for times. … We would really recognize these guys. Here are the contractors that are real contractors, to what level they could do the work we needed done. That's been a challenge. Frankly, the program's forced us to bring them under our guidance, so to speak, and say, here's what you guys need to do. We've come full circle in that. So now we're really develop or help develop more and more because the biggest challenge … we currently see is capacity of... They're playing minorities on the list. When plenty of contractors who said that check the box and be, MBE or whatever. But the folks that can really do work, and do the work in our arena, they're a bit few and far between. City, state, County, they don't care how we do it. We just got to hit whatever number we need to hit. Seeing the limitations that we see within individual companies; we're trying to just have more and more folks to reach out to. It is growing and it's been easier to do for sure. The contractor in town, [a small, certified sub], but he came from really just doing asphalt driveway, little driveway jobs. We need him to do roadways. At first, so we just tell the owner, this guy he can't do it. He doesn't have the equipment, whatever. ... We would frankly just put him in with our crew. We mix his crew with our crew … we just would go hand in hand, step by step, how we would go about doing it … From there, then he ended up buying his own paver and his own stuff … as they get more successful than they get full, because they're, to some degree, one of the handful of folks that really deliver what needs to be done, and my competitors are watching who I am using on my jobs. I see my guys are looking, who are they using on their jobs? We find out, here, this guy's qualified. He can do it, and we're reaching out to those folks. That's a fine line because we can't [ask to have an exclusive teaming relationship]. We don't want to limit their growth at all. Don't want them dependent on me because all of a sudden, we have the bad luck, or because our bids aren't where they need to be, whatever. I wouldn't want them to be outside looking in. So of course, we want the best. We want the cake and eat it too. Right. That's a challenge, the industry and it's something we recognize, but know what it is. … we stumbled across a half a dozen contractors that had different good craft people, but they haven't been able to run the business well. They're really challenged putting it all together. They were foreman for companies and knew the work, et cetera, but when they really needed to do the business management and bonding and financing, they felt the challenges there." [#2]

- A representative of a WBE-certified construction firm stated, "I know one of them is a woman owned business and you know, the rest of them are not. So, my subs are basically just one-man guys, one man crews. You know, they're just... And so, to be on honest with you, I don't know if they're woman or minority owned." [#14]

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "If we need another minority-certified contractor, I'll go to the City of Cincinnati's list of contractors that they have available. Probably about 90% of them are either Hispanic or some nationality or African American, or something like that. I think I have maybe two contractors that are white males, and that's it." [#17]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Whenever the opportunity presents itself [we use certified subs]. We've been around long enough to know what contractor or business can do. And [if] the project's too complicated for them, I won't even invite them because I don't want to be embarrassed, I don't want them to get embarrassed. Plus, some people don't know how to say no. So, if the project fits, then I'm the first one to call minorities in. For example, right now, at African American Chamber we're going to do a second-floor renovation. We're doing some work down the basement. And I looked at the job and anybody who does this work could be minority. Because it's just not that intensive and not that complicated. Birds of a feather flock together, whatever it is, and I feel it is my responsibility, especially since I get older, I had people who helped me throughout my career. People from [my former employer] they look for me, 'You need help. Let help you out, boy,' brothers and sisters from big companies, and I do the same thing. My experience has been keeping a closer eye on the minorities, the small businesses, keep a close eye. You don't want them to mess up. And I am not saying I'm the holy grail of this thing. I make mistakes, too, but you try to mentor them as much as you can. The majority contractor, I don't give a hoot if they screw up. I am going to give them the same treatment they would give me if I get screwed up. I take pleasure, and it's my commitment to myself, to the black race, to all minorities, period, some minorities anyway, to help out as much as I can. I don't want to see them get their head cut off or nose cut off to spite their face, and make sure they understand what they're doing and how they doing." [#23]
- A representative of a majority-owned professional services firm stated, "The City of Cincinnati has, I think in their website they have a list of contractors that are classified and what they're classified as. So, I've used that before too for local jobs." [#24]
- The co-owner of a WBE-certified construction company stated, "I guess if there was in between rarely and frequently, but I guess I'd have to go more with rarely. Because if the work's not conducive to having a sub or whatever. But being part of WBENC, I have a pretty big network of women-owned businesses, so that's been very helpful. I guess the only time I had a problem was unfortunately with, she was a female African American. I wanted to use her as a sub. And she had some background issues, they wouldn't let me use her. I would say that. But other than that, as far as work ethic or doing a quality job, certainly, I'd say the women and the minorities are better than just the regular guy that just makes you feel like he's taking advantage of you in some way. You know?" [#27]
- The owner of an SBE-certified construction company stated, "I would say the larger percentage of subcontracts that I give out are to WBEs, MBEs. The City of Cincinnati has generally got a list of them. You generally have to use approved minorities. You have to use approved women businesses. They have to be approved by somebody to be an SBE, to be a WBE, to be an MBE. You have to go through the approval process, which can take a year or two. Very difficult. And once they're approved, there's a list, and then you're able to choose

from the list. I mean, when that's required on a contractor, they want it, then that person's on the list. So there's no problem finding them. One of the problems is using them, because a lot of times they're on the list and approved, but they don't have any money. I've got a SBE that I use and he... I might have to buy him fuel in order for him to bring his truck down there and work. He's run out of money before he ever got to go to work. With all the rules, bonding, and all the requirements, by the time they get all the... By the time they're an SBE, they're out of money. Honestly, no lying, I've given them fuel money so they could drive their truck down to the job. They come down there, they no longer have the money for insurance. Their insurance has been canceled three times because they couldn't make the insurance payment." [#28]

- A representative of a majority-owned construction firm stated, "A lot of times if they happen to be female owned or minority owned et cetera, unless they specifically put that out there, we don't know ahead of time before we contact these businesses." [#37]
- A representative of a Black American-owned construction firm stated, "All the time. I just find them, or they find me. I didn't know that answer probably because I'm a minority too, I don't have that. they put their hearts in the job. They want to do a good job and they want to be respected as anyone else." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I have used lists before in the past, but that list seems to get smaller and smaller of qualified, I guess, businesses. I think it's people aren't into entrepreneurship as much, I guess, maybe in the construction field, at least here in Cincinnati. Years ago, I could probably rattle off 10, 15, 20 minority companies. Now it's kind of narrowed down, younger generations don't want to work. It's different in a sense [working with certified businesses]. It's more, I guess, personal. You kind of build more of a relationship with somebody that tends to look like you and is an entrepreneur and small business as well. In a larger firm, they see people come and go. You're just a number to them." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "We have a criteria similar to that at the federal government that I... A process similar to the feds and mine starts with diverse suppliers first. Then we move to small business and then we move to medium or large With diverse suppliers have the conversation of the challenges that we will face. With non-diverse firms, don't have to have that conversation because they've been in business, they haven't had the challenges that we faced, or people of color faced. But in some cases, based upon the business opportunity, I've had to inform my non-diverse colleagues that here's the challenge that we may encounter when we present." [#40]
- The owner of a majority-owned construction company stated, "So overall, whenever you get minority owners or women, it's actually a very good experience, they work hard. So overall, minority or women, it's a plus actually for us." [#42]

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 [#3, #7, #13, #15, #29, #38, #39, #41, #43]. Prime contractors shared the factors considered when selecting a subcontractor. For example:

- A representative of a Black American-owned professional services company stated, "I have known the vast majority of the persons that I source for my project work. Probably, I'd say 80 to 90% of them, I've known better than 10 to 15 years." [#3]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "We've brought [a company] into our mix because she's women-owned and we now have to be more sensitive to our percentage of minority spend. So, couple jobs we went after for head start in Kentucky, as well as a rec center for Cincinnati … there was a 10 or 18% requirement that the owner put out as we want you to build a team that is 20% diverse." [#7]
- A representative of an woman-owned, DBE-certified construction company stated, "If it works out, it's great, but that is not ... We solicit a business based on if … do they have what we need? If it turns out that they're a minority-owned business or disadvantaged business, veteran-owned business, whatever, then that's great, but that's not how we search for somebody to work with." [#13]
- The owner of a majority-owned construction company stated, "I can't to tell you how many times I've been on a big job and I'm like, crap, I need a couple extra hands and you can't find them. So, I'll call up one of my old bosses and say, 'Hey, you think you could spare a couple of your guys for a couple days and help me out on this job?' They'll send them over and we get the job done. And then, a couple months go by, and it'll be him calling me and saying, 'Hey, you got a couple guys you can spare for a couple of days?' And I'm like, 'Yeah.' You know? We repay each other." [#15]
- A representative of a Black American-owned construction firm stated, "I select them based on the need for the job that is I needed done, and if it's their particular skill, depending on what their skill is." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "Pricing mainly is kind of a big thing, or the cost for them providing trucking services, and then having some form of a relationship with that individual or firm." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Bonding is one of the biggest things how you can judge the strengths of a company. That's if you want to find a new company that they want to work with us, we ask them their bonding capacity and bonding rate. If their bonding capacity is low, or the rates are high, that tells me that they're high risk and we walk away from them." [#41]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "Mostly subcontractors are [already in] our existing network, [that] we've been working with since 2007. I know so many people, and we try to go with the people we know first." [#43]

Prime contractors described the tools they use to find subcontractors [#7, #9, #13, #14, #16, #17, #18, #20, #23, #24, #27, #32, #33, #37, #38, #40, #41, #44]. Prime contractors shared the methods used to find subcontractors. For example:

- A representative of a Black American-owned, MBE-certified professional services firm stated, "By the added value they bring to the team. If I'm doing work on a university campus, I have a go-to selection of people I like to use for MEP. If it's K12 or housing, I got another MEP consultant, mechanical electric plumbing engineer that I like to use. So, I know what they bring, why they bring, the skill sets that they have in order for me to give are very best to our client. It's performance based first. It's hard. I'm short of website searches and Googles. Thankfully, I've been around for a little while and most actually came through the door and said, 'Hey, let's get some lunch.'" [#7]
- A representative of an woman-owned, DBE-certified construction company stated, "Word of mouth, meeting people when we're on a shutdown in various mills, cross country, might be working for another company. Just word of mouth and meeting people." [#13]
- A representative of a WBE-certified construction firm stated, "I select my contractors because I've just got a relation built with the subs I've been using for years. You know, I mean, my subs always tend to be the same people, doing the same work. Typically, it's an excavating company or concrete guy or something along those lines. If I don't have a familiar contractor, say if I run across something and I haven't used a sub in a past before, I just Google it to see if I can find somebody. You know, a lot of these relationships would've been made on job sites. I would've met this guy on a job site when we were doing a job together and the conversation and been, 'Hey, I got this other job, can you go look at it,' kind of a thing. So, they're pretty always informal." [#14]
- The owner of a majority-owned goods and services company stated, "Well, if it's a new project or a new set of skills or functions that I hadn't used before, I'll probably ask around to people, say, 'Who have you used for this? Can you refer me to somebody?' So, a lot of referral basis that way, rather than anything more official than that. But then after I've worked with someone for a while, generally, if they're giving me what I consider fair are prices, and I'm able to mark them up and get the jobs, then I can count on them, in business you stay with what you know, generally, and I continue to work with a few people that I know and trust and can work with. But again, just to reiterate, on the initial, I'll ask around and see, 'Hey, who have you used for this? Who can I call for this?' That sort of thing … I would go to an organization or a chamber of commerce, I guess, or some business organization of some sort, or even, again, a public sector resource." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "So I have this big binder full of cards that I go through sometimes, but I usually go to my usual people that I sometimes use, or I'll go on City of Cincinnati's website. So, for instance, if we need another minority-certified contractor, I'll go to the City of Cincinnati's list of contractors that they have available. If it's for like lead abatement, I'll go to the state or OSHA's list for lead abatement-certified contractors and go from there. I think to be honest, if I'm answering your question correctly, being... Going to Catholic school, most of my life, I have a lot of connections, so I usually just go into my phone and scroll until I find somebody who's interested in the gig." [#17]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Oh, there's a couple of sources. I think it's called Contractor Digest. And we got the Blue Book. But there's entities that put out requests for bids for other contractors, for other suppliers. You got suppliers who want you to use their material, so they throw leads your way." [#23]
- A representative of a majority-owned professional services firm stated, "A lot of our business is based on the end client. So, when we talk to them about an overall project and we're the prime and we're going to bid this thing, we specifically ask them, do you have somebody who does electrical contracting that you like, okay, that you like to work with? Because if they do and they work with them a lot, the people are familiar with the site, their employees are familiar with their employees and life becomes really easy. Okay. Plus, that electrical contractor can steer you away from making mistakes. Cause they understand the electrical systems at that facility. So...and we'll do the same with other engineering firms. If they have a preference, we kind of let our clients dictate to us if they do, now if they don't, we have to go through a vetting process typically. And we'll search out electrical contractors in that region and then I'll start to vet them based on their ability to do the type of work we do. First and foremost, do you know how to work in heavy industrial environment? Because it's very different than light industrial and commercial work. I just use Google. That's all I did." [#24]
- The co-owner of a WBE-certified construction company stated, "Usually I know them in some way, I've met them somewhere through networking and then building that relationship just like you need to do with clients. It's been mostly through my networking stuff. I've gotten a couple introductions from the Urban League and even from the City, I guess I've had some people reach out and say, 'So-and-so from the City gave me your name. I own my own business.' And we'll get together, and chat, and talk about what kind of projects we might be able to do. Or if I could sub work out to them." [#27]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Given my background in journalism and news in the industry here in Cincinnati, I have a lot of relationships with people who like me are former journalists who now work in the private sector, either as freelancers or have their own companies. So, I have relied on those relationships and also recommendations from those people that I know working in the industry. Mostly it's contact with relationships, people in the industry who, if they can't do it, they can recommend someone who can." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Based on price and their reputation. Well, if it's for services, and I have done that a few times, it would be for me actually attending events and having met with them and established a relationship with the owner. That has been on the services side. … from the supply side, it more so was comparing price and the choice to go with the actual manufacturer versus a mom-and-pop shop that also sells copiers. I just decided to cut out the middleman and go direct because no one else could beat the price that the manufacturer was giving me. ... For me, it's mainly been going to events, so it could be an ADA event, a women-only event, or any kind of event. But I've personally met and had some synergy and maybe had lunch or dinner with the other business owner and we stay connected in some form and that's been it. So, I've never just blindly gone out and done the

marketing through SBA's portal that they have or anything like that, because it has to be more personal for me." [#33]

- A representative of a majority-owned construction firm stated, "Our industry is fairly straightforward most of the time. Now on occasion when we do need to subcontract work out because of some of the work that is required is outside of our normal scope and it's better. So, we either work with vendors we've worked with in the past … choosing those vendors necessarily generally it's availability, price to a point, what the cost is going to be, is it worthwhile for us to subcontract with you? But availability is the biggest. Like, can we schedule, are you available to do this work for us? Usually we start local and then availability and you just kind of go through the list and see and who is available and at what price and is it going to be... Are they a business who's been in business for a while, et cetera?" [#37]
- A representative of a Black American-owned construction firm stated, "Most of it is by referral." [#38]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "I reach out to peers across the country." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We typically have a list for every trade, a roofer, painter, electrician, whatever the trade might be. We have a list of subcontractors that we gradually, we have worked with them or, and we know the reputation and the quality of work. Now, if you are a new subcontractor, we will use you one time. If you perform then you go on our list and every job that we bid, we will invite you. If you do a bad job, we cross your name out and we will not take your number." [#41]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors [#23, #24, #27, #28, #41]. For example:

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The bottom line is just, they want the best price for the buck and the best installations for the buck. Everybody's like that so, there's no difference." [#23]
- A representative of a majority-owned professional services firm stated, "Most of private doesn't care one way or the other [about certified businesses]. They want diversity and inclusion. Okay. But they haven't pushed that down into the ranks. Now there are a few exceptions [that] some of my clients want to start seeing some of that, but … we're heavy into steel and here's the thing. The steel industry makes money by not having a lot of people. … they got to compete on the price of steel and they got to keep their labor down low, and it takes time and money to manage those things. And if you're going to bring in new suppliers for stuff, okay, you got to vet them. … it just depends on the type, see the B2C businesses, I'm seeing those guys pay attention to this. Okay. Just like they did environmentally first, years ago. And then it will trickle down because what I'm even seeing now on my B2B business guys that environmental concerns are becoming part of them as well. But the diversity push hasn't quite hit that yet, but it probably will because it all trickle down. Because the B2Cs do it in order to show their consumers that they're doing this. …

when it becomes kind of built into the cost and the economy of doing business. And if everyone can raise their prices a little in order to achieve this, then let's do it." [#24]

- The co-owner of a WBE-certified construction company stated, "I guess it's a little different. I know that the City has a list of companies that you can't use. So, if you are going to use a sub, you need to make sure you do your homework and make sure they're not on that list. And I'm not sure I ran into anything like that in the private sector. I think the public sector has even, I've bid on jobs that said you can't have subs, but I'm not sure I've seen that in the private." [#27]
- The owner of an SBE-certified construction company stated, "I don't generally use them [certified subs] only for the government contract and then black ball them or not use them for something else. I generally use them for... It's more or less, who's available and the cost. And with demolition, it has a lot to do with the location. It's expensive to move a 20-, 30-, 40-ton piece of equipment across town. So, if there's a truck driver, for example, that is in Hillsborough and your job's in Hillsborough, you would use him, because the MBE or SBE that's down off of river road somewhere in Cincinnati at Addison or Sailor Park, he's going to have an hour drive each way… He's not going to want the job, because it's not uncommon to give a truck an hour of travel time, generally not two. So, you can't expect them to drive two hours a day to make eight hours pay." [#28]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "It's that in the public sector, we may be more under pressure to use contractors that have to be WBE or MBE versus in as private sector. Typically, you do not have that restriction." [#41]

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 [#7, #16, #23, #41]. For example:

- A representative of a Black American-owned, MBE-certified professional services firm stated, "[We select them] by the added value they bring to the team. If I'm doing work on a university campus, I have a go-to selection of people I like to use for MEP [mechanical, electric, and plumbing engineer]. If it's K12 or housing, I got another MEP consultant that I like to use. I know what they bring, why they bring, the skill sets that they have in order for me to give are very best to our client. It's performance based first." [#7]
- The owner of a majority-owned goods and services company stated, "After I've worked with someone for a while, generally, if they're giving me what I consider fair are prices, and I'm able to mark them up and get the jobs, then I can count on them. In business you stay with what you know, generally, and I continue to work with a few people that I know and trust and can work with." [#16]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "When I buy materials, I'm buying from the lowest and most responsible supplier there is." [#23]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We wanted a subcontractor [for] about the $750,000 portion of a project. And this

guy came in and God as my witness, this guy gave me his business card And I looked at the two phone numbers and I said, 'Which number do I call you?' He said, 'Call me on this number.' I said, 'What number is that?' He said, 'I sell barbecue at the zoo.' As God is my witness. 'Do you think I'm going to give you a three quarter of a million-dollar project while you're selling barbecue at the zoo?' You pay your dues, you build up your reputation, you build it up and … you don't build 100 of story high rise straight on the top, you start on the bottom." [#41]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. 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 mentioned the helpful role the County's or MSDGC's programs play in finding work [#26, #27, #AV]. For example:

- The Black American male owner of a construction company stated, "The Ohio DAS database … A lot of my work come through them or recommendations … a lot of times because people look for inclusion. So people looking for inclusion somehow find their way to me a lot of times. … Somebody will tell them about, 'Hey, this is MBE or an EDGE contractor. They can help you with that.'"[#26]
- The co-owner of a WBE-certified construction company stated, "We get invited … I would say they reach out because they'll say, 'You're on the City's list.' Or 'I understand you're a WBE and we need a certain amount of participation.' But then those are the ones that say, 'But can you give me the bid by Friday?'" [#27]
- A representative from a majority-owned professional services company stated, "Loved support in finding small minority businesses to work with." [#AV13]

Four subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because they are known in the industry [#14, #19, #24, #43]. For example:

- A representative of a WBE-certified construction firm stated, "A lot of times, if that work is being performed at a piece of property that I'm already familiar with, a lot of times they will say 'We use [my company], we want them on a job.' You know what I mean? So that gives me an opportunity to bid to that general. Or a lot of times, the prime, the general would come in and go, 'Who do you guys already use? That's who we want to use.'" [#14]
- The owner of a majority-owned goods and services company stated, "[A local City], they used an outside company to do their big expansion. So, they were not only doing the buildout, and controlling that, they were controlling the flooring, and carpeting, and then they were controlling us. But the City [said] we want to use these guys, meaning us, for the furniture. … City had already picked us out and said, 'We want to use them.'" [#19]
- A representative of a majority-owned professional services firm stated, "The other thing that you get is referrals … a lot of times they'll have an engineering firm doing work on their

controls and stuff like that. … and it needs an arc flash study. And so, they'll call that sub, that guy will call me up and subcontract the arc flash work to me." [#24]

- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "So I've been through many different agencies from going from … one command to another command, so … my name was out there basically, that this many years of experience, and I worked with all the commands in the past. Everybody knows me. So, I ended up to this particular command, and so [if] somebody wants you, just say, 'Hey, I want you on working for us.' Then the plan contractor will brings [us] under there as a subcontract." [#43]

Thirteen 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 [#1, #3, #8, #10, #15, #23, #24, #25, #27, #37, #38, #39, #41]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "We have to sub out our engineering because we provide [different services]. So, we work with a host of different engineering disciplines from structural, civil, mechanical, electrical, plumbing so we have relationships with them. Some of those firms also have relationships with the County and because we've had good working relationships successful projects, they know that they can depend up on us [if they need a sub]. kind of reciprocal. That's on private and public projects, but more so on private." [#1]
- A representative of a Black American-owned professional services company stated, "Every contract that I've had, every relationship that I've expanded to, has been by performance, personal relationship, and referral." [#3]
- A representative of a majority-owned professional services company stated, "When I started this company in 1996, I quit from [the prime]. I was one of their project engineers. When we did that project, I still knew the owner of the company and many of the upper management people. And so, they approached me because they knew our size would be such that we could get the small business enterprise designation. And they said, 'Hey, if you're willing to do this, we'll put you on our team and you'll get 10% of this fee. And we'll figure out how we break the project down in order to make that all work.' So that was how we made that connection." [#8]
- The owner of a majority-owned construction company stated, "I have in the past, a couple of times, only because I knew the people and they were in a jam. I only worked for three electrical contractors before I started my own business, and all three of them have gotten in a jam more than once and I've gone to help them out, and they've also done the same for me. And then, there are a couple of other general contractors that, again, get in a jam. The electrical contractors they're using fall behind, and they'll call me and say, 'Hey, man, can you send a couple of guys to help these guys out?' I've done that a handful of times … we help each other out, and it's beneficial for all of us. I can't to tell you how many times I've been on a big job and I'm like, crap, I need a couple extra hands and you can't find them. So I'll call up one of my old bosses and say, 'Hey, you think you could spare a couple of your guys for a couple days and help me out on this job?' They'll send them over and we get the job done. And then, a couple months go by and it'll be him calling me and saying, 'Hey, you

got a couple guys you can spare for a couple of days?' You know? We repay each other." [#15]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The first thing I have found out, it's not what you know is who you know, and the ones you know, you have not let them down. So, they had no problem with inviting you to bid on their contracts. The hardest thing is bidding to a person, individual, or a company that totally don't know you, but they know you're a minority." [#23]
- A representative of a majority-owned professional services firm stated, "I mean, it's like anything else, you establish relationship stuffs with people and if they're getting the work done and it's, to your satisfaction and it makes your client happy, and then that relationship stays and you, and they're not going to abuse it by raising their prices, inordinately. I mean, it gets to the point where you have certain relationships with people, you just like, look, this is the pricing on this. It may be more than you want, but here's the reason why I did it this way. If you want to change my scope, I'm all happy to do it. But I, and I, and a lot of times I'll just slide right in front of the client. So this is my estimate." [#24]
- A representative of a WBE-certified construction company stated, "It's word of mouth... You know this person and they kind of say, 'Hey, we really like this company'." [#25]
- The co-owner of a WBE-certified construction company stated, "A lot of our work, like I said, is word of mouth and repeat. So sometimes we'll get that where, 'I heard you were on this project. Will you bid on my project?' Kind of thing. So sometimes it's like that." [#27]
- A representative of a majority-owned construction firm stated, "We've worked with a couple prime contractors in the past, and that's just either through business relationships we've been recommended. And that's the way we've gotten contact. The most recent one I can think of, that's how that came about was, another one of their vendors had worked with us in the past on a different project and we were recommended." [#37]
- A representative of a Black American-owned construction firm stated, "Some of them are in my ACI or associated contractors that I belong to, and I just know them. They're everywhere." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I do receive some calls or emails that somebody will, a GC or something, or a friend of a friend might ask me to bid on, they think it's in my wheelhouse. I am on some plan bid sites that they send out, anything that we do, they'll send me an email." [#39]

Eight 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 [#10, #17, #23, #24, #25, #27, #38, #41]. For example:

- The woman owner of a construction firm stated, "We get all kinds of emails every day for bid this project or bid that project or go do this. Home Depot or Dollar General stores right now are a big thing. They're growing like crazy. We've got on these email lists for these contractors. There's probably four or five generals that send out [solicitations]." [#10]

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "City of Cincinnati holds meet and confers, I go to those, or I used to go to those a lot. I still get the emails of who's soliciting stuff. Also, you go, and you sign up for their vendor list. A lot of those construction companies, you just sign up for their vendor list, and anytime they have a project coming up, or a solicitation coming up, you sign up for it." [#17]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I know who they are. I've been around the block a few times. I know what they're looking for. I know what to stay away from. It's a sixth sense. You look at a project, you see who the prime is, you say, 'Okay, they know me, I'll give it a shot and talk to them about it.' Some projects are so specialized that I wouldn't even attempt to talk to some people about them." [#23]
- A representative of a majority-owned professional services firm stated, "A lot of times I'm aware of it as a prime, and I decide, I don't want to prime this and then I'll find out who else is bidding it and talk to them about subbing it out to me. So, this electrical contractor and I, as classic example, as he went to the same bid walk as I did, and he needs an engineer if he's going to bid it and I need a contractor if I'm going to bid it. And I have to know the guy there, introduced myself to him and I said, 'Hey, why don't we just partner with this? And do you want the lead? Or do I want the lead?' And we're doing one, right The first one we did, I'm the lead, the second one, he's going to be the lead." [#24]
- The co-owner of a WBE-certified construction company stated, "Just mainly from finding out what their websites are, and you have to go and do the prequalification thing, meeting them somewhere at a networking event. And then the standard answer is always fill out the prequalification form on the website." [#27]
- A representative of a Black American-owned construction firm stated, "By getting on their actual bid list or with some different associations that send out bids for new construction jobs, the bid connect, those type of projects. So, they'll send out projects and then once you're on their bid list and you'll always keep contract and you'll get the RFQs for different bids." [#38]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We subscribe to several sites that provide which projects are coming up. We make a decision which ones we would want a bid. And then of course, on a daily basis, we get invitations from larger general contractors one we get to submit a bid to them, which we do." [#41]

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.

Many business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly [#10, #14, #23, #24, #27, #29, #38, #41]. Examples of their comments included:

- The woman owner of a construction firm stated, "It's like everything else, you just got to play that game until you find the guys you like working with, and then just don't work with the rest of them."[#10]
- A representative of a WBE-certified construction firm stated, "There is primes we refuse to work with. Several, to be honest with you. And it's just because they really just don't want a good job. And it costs us a lot of extra money and that's purely the reason. There's just really good contractors out there and there's really bad contractors. And we try not to work for the bad contractors because also, even if you're a sub and you're associated with that prime, if that job goes bad, you're just, your name's mud too. And we just try to stay away from that. You know, it's all about reputation. I mean, it takes a lifetime to build a good one and it takes five minutes to throw it all way, you know, a lot of that has to do with the work, the atmosphere that we're working in. Right now we're all fat and there's plenty of work and everybody's working and it's good. So we cherry-pick. If there's a questionable prime bidder out there or a questionable contractor, I don't have to work for him. Five years from now, maybe because times aren't so good and we just need to get a job, I'll work with this guy, even though he is kind of shady, just because I need to work. A lot of it has to do with the times that we live in." [#14]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The same reason why the majorities like to work with people they already know. They have experience. They have a history with these people, and their services have been proven throughout the years or throughout the projects they've been involved with me on. … Some primes are dishonest and don't pay you in time, or the cultures just don't mesh, and so you kind of stay away from those. I mean, it doesn't make sense to work with somebody you won't get along with, or don't work with somebody won't pay you on a timely basis. It just doesn't make sense, good business sense." [#23]
- A representative of a majority-owned professional services firm stated, "We have established relationships with primes. I can't say it's a preferred situation, but we do work for them. We treat them like any other to us. It's a client. And whether that's the end client or not, he's still my client at that point." [#24]
- The co-owner of a WBE-certified construction company stated, "They're better about listening to your expertise, taking your ... I don't want to use the word opinions but listening to what you think is best and taking your ideals, or suggestions, or whatever. Some work better with you with payment terms. It seems like most of the time, none of them will negotiate payment terms, but once in a while you get lucky and they'll even pay you certain amounts, percentages as the project goes on. So definitely, there are some [good primes]. Then, of course, you hear bad things about some other ones, that they don't pay on time, and you have to fight to get your money. I don't know if I would say that [I wouldn't work with them], but maybe be very cautious. I don't have any one company that would be like, 'Oh, no, I'm not bidding on their job.' But maybe be cautious about bidding on their job. Just from things that you hear from other contractors about how they run their job sites, or like I said, how they pay, kind of thing." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "There are certain primes that, and we know they're bidding of project, we will make sure we bid too because we feel that we're getting a fair

shake. We've done work with them in the past. They're good to work with. They're easy to work with. And so yes, there are some primes, generals, and CMS that we definitely prefer to work with. And then just in general, we don't work with a lot of out-of-state companies coming into state just because of the risk factor there. But we do work with them once we vetted and know, and we'll set up different payment terms and pretty much say, 'Hey, you either accept what we're saying, and we won't bid, and we don't care.' But yes, there are certain contractors we prefer to work with just because of the relationship we've had with them in the past and know that we're going to get treated fairly and things should run smoothly." [#29]

- A representative of a Black American-owned construction firm stated, "We've established a relationship, and I know they're a good paying customer. [I wouldn't work with some primes] because of their treatment to us, or type of work they do, or things they require. Pretty much different reasons, but pretty much pay. They don't pay well. That's the number one reason." [#38]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "If there is a project that we are biding as a sub-contractor, [and] if you short us one time, that would be the last time we would get to you. I assure you that people ask anybody, they know that they don't play that game. I don't deal with dishonest people. Again, I always tell people, 'Sweetheart, will you marry me if I told you I'm going to cheat on you?' So why would I want to go in bed with somebody, a contractor, which at the beginning he was trying to short me or lie to me and play some games?" [#41]

Subcontractors discussed the effect working in the public or private sector has on their decision or ability to work with certain primes [#24, #27, #38]. For example:

- A representative of a majority-owned professional services firm stated, "No, not really. A bid as a bid. It would operate the same [in either sector]." [#24]
- The co-owner of a WBE-certified construction company stated, "I've I can't think of any jobs that we've for GCs in the private sector that we've also in some way done in the public, not that I can recall." [#27]
- A representative of a Black American-owned construction firm stated, "[I get on projects] by getting on their actual bid list or with some different associations that send out bids for new construction jobs, the bid connect, those type of projects. So, they'll send out projects and then once you're on their bid list and you'll always keep contract and you'll get the RFQs for different bids. That's only available in the public sector, unless it's a special... They do have private jobs, but most of them are all [public]." [#38]

F. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

1. General experiences working with public agencies in Ohio;
2. Barriers and challenges to working with public agencies in Ohio; and
3. The County's and MSDGC's bidding and contracting processes.

1. General experiences working with public agencies in Ohio. Interviewees spoke about their experiences with public agencies in Ohio and the Hamilton County area.

Fifteen business owners had experience working with or attempting to get work with public agencies in the Hamilton County area and in other places [#7, #8, #9, #10, #11, #14, #15, #20, #21, #26, #29, #35, #37, #41, #AV]. Their comments included:

- A representative of a Black American-owned, MBE-certified professional services firm stated, "We got the RFP. They said they want a historical style garage that fits in the warehouse district of downtown that can be converted to housing in future. … we won the bid. Won the job. Excited. Right? … We had meetings for four months and we developed an SD package and a DD package and [construction company] bid it, priced it, and then the new elections happened. And the new mayor said, 'I don't want just a garage. I want condos on top of the garage.' I said, 'Okay, I get that. New administration, new vision. We legally won the bid. But no one at the City called me or [construction] and said, we're going to change the program. We're going to change the budget. And we're going to add 150 condos on top of the garage.' Instead of allowing us to change our design, to follow the new administration, they went off and hired another team named [company]. And they built what you see there today. … you never gave us a chance to recoup because you wanted a traditional historical look back of a garage and you changed the script to say, you want contemporary and you want to build the housing now, not later. And so [company] is sitting out here in the cold and we were never given the opportunity to respond. And I think that is on a criminal side of this fence… So you can be the City of Cincinnati's on their vendor list. And I think it's a vendor list for small projects under the threshold of a million dollars, for example. And I typically been on that list every year, except for what happened two years ago. I was threatened that I couldn't be on the list four years ago because I had [an outside] address. So I fixed that. So right now we are registered as a minority vendor for the City of Cincinnati, man. We get that updated every two years. However, they have created this other preferred vendor [list] and I don't know what happened. And I think it might have been a deadline thing that we didn't get asked to submit or email or 'Hey, by the way...' It was like, 'Oh, that you found out about this too late.' And my thought is, what kind of relationship is this? We're all people, but to allow one of your oldest vendors that's been in your system for over a decade, and say that you're not valued, we don't need you... Because that's kind of the message, when people don't say anything and then they don't even try to help once you do have." [#7]
- The woman owner of a construction firm stated, "We had kind of a relationship with some people at the Park District; so I think that was why they called us. They probably called a

few other people, because I'm sure they had a minimum like three bids for a job or whatever. And just called people and said, 'Hey, give us a price to do this work.' So that's probably how we got to bid on those jobs. … it all comes down to the people you're dealing with. And every entity, whether it's public, private, or otherwise, it depends on the amount of people, how the people are that are running it. You can make all the rules you want, but if the people on the top of the heap aren't following rules, it doesn't matter." [#10]

- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I have, I'm trying to think that there's a website. I guess it's not a website, it's like a service called construction journal that lists jobs that are upcoming or out for bid and stuff like that. So, that service is like seven or $800 a year. So I know what jobs are coming that are within my counties that we work in and dollar range that we would do work in. But I don't know the only City or jurisdiction I know of that has, and I hate to say it because everything else they do is ridiculous. But Middletown has a really great system because I'm on an email list. So everything that comes out from the City of Middletown, as far as, whether it's landscaping or, I mean, you name it, anything, the City is getting bids on. It just comes to my email automatically. So, that's super nice. I don't have to stay on top of what electrical jobs may or may not be coming out of Middletown, because I know that jurisdiction will just upload everything that's going out for bid. And I see that notified, but I don't know of any other City or jurisdiction that's doing that. You know, when that comes out, all I got to do is click on the link, I'm already in the system, my email is, and the whole bidding documents are right there. What the job is, what the requirements are. So that, that is extremely smooth. But I don't know of anyone else doing that, but that's the City of Middletown. County wise, I would say the model out of the counties that we deal with, who is a pleasure to deal with is Warren County, their staff is wonderful." [#11]
- The owner of a majority-owned construction company stated, "I used to do a lot of work up at Miami University for Oxford. I kept getting the jobs because I was competing against the unions, and obviously I was half the price, sometimes a lot less than that. The prevailing wage jobs were kind of a nightmare, a lot of paperwork. It just wasn't worth it, so I backed out of that." [#15]
- The co-owner of a majority-owned goods and services company stated, "The sheriff's office… we met with them several times and they were on board to use us as a vendor for specific uniform items, and it just never blossomed. I would follow up and follow up and follow up, and they wouldn't do anything. They just kept saying, 'Oh, yeah, I'm going to get to that. I'm going to get to that. Yeah, I got to do that.' I never got an order from them. … And I've reached out and I still haven't had an answer and no order. So, it's very frustrating. It's one particular person That they'd get the orders together and send them through, and I haven't heard anything." [#20]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Yes. We have actually done some things with Cincinnati Metropolitan Housing Authority and SORTA [Southwest Ohio Regional Transit Authority]. Working with SORTA right now, that would have to say was kind of refreshing. Again, just the way that they went about doing things and actually broke up to the bid. And so, I had an opportunity to pick and choose which things I wanted to bid on. So, that was very helpful. And I would have to say refreshing to be able to pick and choose the things that I knew that we could be

competitive at, and that we had a better chance on getting than the other portions of it. Everything has been pretty good. I know what items, products that we need to provide for them. And as I said earlier, once we get notification as to what needs to be delivered, and we turn that around ASAP … I work with Metropolitan Housing would say, there were pretty transparent when you're late on something, for example, our insurance, of course, you have an expiration date. And so anytime that you would get close to that, if you hadn't submitted it already, they'll let you know you're three weeks before your insurance is expired, please get this to them. And so not necessarily a process is easy, but just the lines of communications were very clear and very relaxing. And it was pretty much non-threatening, or they did it in a non-threatening way. So, I would just say that the overall working relationship has been pretty easy and pretty relaxing." [#21]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "When I'm thinking about CMHA, they'll send out an email and say, we got these projects coming out. Now the City will do it once every blue moon. But again, so no. CMHA is easy. City's not easy." [#29]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "The University of Cincinnati has been the easiest." [#35]
- A representative from a woman-owned professional services company stated, "I have signed up for the City of Cincinnati where they send the jobs out, but it seems like there isn't a whole lot of environmental consulting jobs going out. I know that some of our competitors have gone out of business. There are a lot of nationwide consultants without experience in the area who will hire a person to do the onsite work. I feel like I'm competing with nationwide firms that just hire someone." [#AV7]

Thirty business owners described their experiences learning about or getting work with the County specifically [#1, #3, #4, #7, #8, #11, #12, #14, #16, #17, #22, #23, #28, #32, #36, #37, #39, #43, #44, #AV, #FG1, #FG2, #PT2]. For example:

- A representative of a Black American-owned professional services company stated, "Communication channels. I'm not sure that all of Hamilton County, in terms of its ... They're not universally linked. So different departments will use different communication channels to convey the opportunity. I had been aware because of relationships I have at the County. And because I sit on the [a connected board], I was aware that there was a potential contract or service that was going to be coming forward."[#3]
- The Black American woman owner of a professional services company stated, "I guess I'm looking at the County. County, what exactly does the Metropolitan Sewer... Yeah. What do they need help with? What is it that they...? What work would they contract out? And how would I find that out? I understand that I've been to the procurement websites. And then some of the websites... For the County contracts, why do we have to pay a fee to be able to see the contracts?" [#4]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "Where is that bucket of information that forecasts [capital] improvements, which is where I live. If I don't know the capital improvements that need to happen for the County, then I can't participate in a public race. The City's challenge is they have a public race in a

pool and then they have a bunch of private departments that pick up the phone and call their friends. And then on top of that, they have this other selective list of minorities that make it on the list that they change every two years. And now the 16 years, this was the first year I didn't make the list." [#7]

- A representative of a majority-owned professional services company stated, "It's just not worth the effort. Because since we aren't typically in a prime position, we weren't really getting opportunities to bid on projects. And when we did get opportunities, they weren't right projects for us. Like we would get Hamilton County, or the Metropolitan Sewer District, sending us a thing for a road replacement, which has nothing to do with our qualifications. And that's not what we had indicated on our paperwork that we bid, is almost like they just saw engineer and said, 'Okay, we'll send them this bid.' And so, we got a lot of requests for bids that didn't have anything to do with what we do and practically no bids for what we do. And even when we did, it was something where we needed to be prime and have other sub-consultants. Well, usually we're the other way around, so we don't have a lot of architects typically that work for us and that kind of thing." [#8]
- The owner of a majority-owned construction company stated, "I try to stay out of Hamilton County. It costs too much to have the licensing for the little bit of work I have." [#12]
- A representative of a WBE-certified construction firm stated, "To be honest with you, the way that works is we do not know that unless we're invited. So, I have really no idea what Hamilton County Sewage District is doing, unless they send me an email saying, 'Hey, we're the Sewer District. We have this project coming up, we'd like for you to bid on this project.' So until we get, you know what I mean, I won't know that until they would have to reach out to me for an invite to do that. You know, when that would go, when Hamilton County put something out the bid, depending on who would be the engineering firm on that, would send invites out to who they're familiar with, I guess. Or I don't know how they get their invite list, but that would also be into paper. So, I mean, you know you can go into paper and see all these public announcements and these public biddings, because if that's got public money in it, it's open bidding. They can't keep me from bidding it. But you would have to go search that information out yourself." [#14]
- The owner of a majority-owned goods and services company stated, "What happens from that is once in a while we'll get an inquiry, 'Can you price this?' And they say that they're going for competitive bidding and we may or may not get it on that particular item. It doesn't happen very often. There's not a huge amount of business that comes from that, but once in a while, there is. So again, I think by creating the web ordering portal for them made their lives a lot easier. And it also helped lock in that business for us, because again, we made it easier for them to do business with us. And as I said earlier, I haven't been bidding on any work that comes to me mainly because I physically don't have the time to do it. And I don't have someone... I'd love to. I mean, there'd be times probably that I'd like to be able to bid on something, but I just don't have the resources within my organization to be able to take that on and do that. So, I possibly miss out on some opportunities because of that … [we] just do not have, as you call it, the bandwidth to be able to put the bid package together and get it submitted in time." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "City of Cincinnati, Hamilton County, you have to go find their

solicitations, you have to look online. I sit around here, and I'll go through all their solicitations probably once a week. I take one day and go through all their stuff that they have coming up, marking on my calendar, and see if it fits for us." [#17]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I don't know how to know where the RFPs are. I am versed in the City of Cincinnati, where we can go out and get them. But Hamilton County or the Metropolitan Sewer District, so it's more if they happen to knock on my door rather than me being able to go out and seek them out." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "You know, you don't know what you don't know. I see advertisements and RFPs and all that. RFQs from the County. I see a few of them, but I'm sure there's more going on than that. So, I don't think I get a full regimen of RFPs or RFQs or invites from the County. The point is that you look around these facilities, County facilities, and you know it's much more going on, you just don't hear about." [#23]
- The owner of an SBE-certified construction company stated, "It's pretty much almost impossible to work for Hamilton County in the present system. You found me, they found me. Once upon a time they sent me all the... I didn't need a license to work for Hamilton County for 30 years, okay. They sent out the bid opportunity, I bid on it, if I was the low bidder, I went down and bought a permit and provided the correct insurance and proof of workers' compensation, tore the house down. And now you spend 40 hours trying to get the opportunity. You never get a... they don't send out notifications to the contractors." [#28]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "There are many, many departments in Hamilton County, and some of them, many of them do their own videos. But when those departments go out to seek vendors for video, they don't consult the Hamilton County BOLD list. [The SBE representative] does not ever facilitate our companies who are on that list coming before these vendors. There's no opportunity. They just do what they've always done. And I think if you look at public records, you'll see that. I've said, 'I'm on the list, how does this help me as a business owner? What do I get?' He goes, 'Well, we always talk to everyone in the County, and we tell them to consult our list.' That's all I've ever gotten from him. Him saying they tell people in the other departments [that] they should look at the County's BOLD vendor list. That's it there is no way to know when all of these departments in Hamilton County might be going out for public relations or video services. There's no one to connect you to them. I find that the most challenging." [#32]
- A representative of a majority-owned professional services firm stated, "I think the opportunities are there, and I'm pretty sure all that stuff is published on a website somewhere. I know I've been to it before, where it's publicly available, all the stuff that is out for bid." [#36]
- A representative of a majority-owned construction firm stated, "I would say, mostly because it was through once again, word of mouth that we were recommended. Somebody was talking and they're like, 'Well, we actually know somebody.' And then they've reached out to us for the most part. Mostly because opportunities in the public sector on the whole, I think they're harder to find. And so it's kind of needle on the haystack type looking on

because there's not like one place where you can really go necessarily, unless you're going for larger public entities, such as at the County or state size, so to speak. So, each individual City has their own place where they put out RPs. If you're looking and there's not really a place where that is convenient or easy to come about." [#37]

- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "I don't even know where to look." [#43]
- The woman owner of a goods and services company stated, "I think you guys do a Periscope S2G subscription. I don't know if you're part of the Ohio Business Gateway or the SBA, or if you do things differently. I did a little research as far as your County bids and how you do it. I'm not even registered with you all." [#44]
- A representative from a Black American woman-owned professional services company stated, "Barrier is I have no idea what contracts are available or offered. Hamilton County is not advertising or making it available what is offered. The fact I was only privy to government contracts not aware of any that Hamilton County has." [#AV2]
- A representative from a Black American-owned professional services company stated, "It is difficult to get professional projects in Hamilton County especially a minority company." [#AV31]
- A representative from a majority-owned professional services company stated, "How do we find out about contracts with Hamilton County? Who do we contact, or do you contact us?" [#AV72]
- A representative from a majority-owned professional services company stated, "I never get any information offers to provide services." [#AV73]
- A representative from a Black American-owned construction company stated, "The difficulty I would run into is not being placed on the correct bidder list." [#AV328]
- A representative from a Hispanic American woman-owned goods and services company stated, "Hamilton County has the hardest time submitting a bid." [#AV299]
- A representative from a Black American woman-owned goods and services company stated, "Well it has not been easy to obtain work, not easy to get. We have been a vendor for them, and they do not send us a lot of business, over the last several years." [#AV303]
- A representative from a woman-owned goods and services company stated, "Have not received any contact from them but yet I have sent advertisements, flyers etc. But no one has contacted me to even let me give a bid; there has been nothing, no contact. It would be nice to bid on or have an opportunity to bid on jobs with the Hamilton County Government or at least to have the option or availability to do that." [#AV309]
- A respondent from a focus group stated, "I have public records requests and documents up to six years ago, trying to find out who, how I can bid the fire alarm and security monitoring only at the Hamilton buildings. I have letters, emails that because they don't bid it every year, they don't publish it. When I finally get ahold of the people, and I'm not going to say their names, but I have the emails. They say, 'Oh. Well, that's a contract that we do with the credit card.' I go, 'So let me get this right. For the last 40 years, you've been spending this $22,000 a year with the same company and you've been buying it with a credit card every

quarter because that's under the $9,999 spend that you have to give. But you will give me a record of when you're going to spend that and when you're going to do it so that I can give you a price. So that if my price is lower, I can have the opportunity to win that work.'" [#FG1]

- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "It's been really more difficult to tap into the business in Hamilton County." [#FG2]
- The woman owner of a professional services firm stated, "Does the City primarily do business with people located in Hamilton County, or I realize they do it with businesses not necessarily located in Hamilton County, but is there a priority given? How's that work? We have an office in Hamilton County and then new one, we just moved into like three weeks ago and I'm trying to get my arms around if I need that Hamilton County anymore, other than, it is a good place for our person who works down there. It's like, Hey, if you're not going to have an office in Hamilton County, go away. I just didn't know if that's what I was going to hear from you. Whenever I try to do business with Hamilton County, sometimes I just hit a roadblock. It's almost like I present ideas. I do all the work, blah, blah, blah. And I'm not sure I'm getting to the right people or I'm following the right path. So, I think a roadblock on that would be, how to make sure, that we're getting to the right people that can really objectively look at what we're presenting." [#FG2]
- A representative from a public meeting stated, "The Periscope site is the site that Hamilton County uses to post ITB's. It's free to register but they charge $149 per month to view any solicitation posted by a prime." [#PT2]

Six business owners described their experiences learning about or getting work with MSDGC specifically [#18, #22, #27, #32, #39, #AV]. For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I don't know how to know where the RFPs are. I am versed in the City of Cincinnati, where we can go out and get them. But Hamilton County or the Metropolitan Sewer District, so it's more if they happen to knock on my door rather than me being able to go out and seek them out. I think they're all a challenge, because … They all have their little portals that you have to go into, and I think it's a challenge to find where those are." [#22]
- The co-owner of a WBE-certified construction company stated, "I know MSD I learned of because, well, actually I did a small project for someone at MSD and that fortunately turned into more. I guess it does seem a little difficult to learn about some of these projects if you're not already ... And I don't know if you're on a list, but since I do work at several City properties, I feel like maybe I get emails because I'm on the City's list or something. " [#27]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I haven't really tried to get anything with MSD, and I never hear about any opportunities with MSD either. I would like to do something with MSD." [#32]
- A representative from a Black American-owned professional services company stated, "I attempted to work with the sewer district but has been less and less each year." [#AV41]

Thirty-five business owners described their experiences working with the County specifically [#1, #2, #3, #5, #6, #7, #9, #11, #12, #16, #17, #21, #22, #28, #29, #32, #33, #34, #37, #40, #41, #AV, #FG1, #FG2, #PT2]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "In the past, so we've been in business for over 30 years and we can only say we've worked on … I believe it was two projects. They were good sized projects. One was a prime and that was our very first project with Hamilton County … the project that I'm thinking on that we were the primes on, and we did that, we did basically a tour with other companies in the same space. Did you know they did not believe we did that project by ourselves? Literally the facility managers questioned whether we did the project. They're walking through the project. It was totally done." [#1]
- The co-owner of a majority-owned construction company stated, "They're probably about the easiest, as far as getting the work out, their engineering department are very responsive as far as answering technical questions. The account engineer is very hands on, although they do spend a lot of money, but they don't let nearly as many contracts as other folks. Other folks maybe safe would say, so they don't have quite as much on their plate there, I guess. But as far as once you're low bid, they review the technical stuff they need to review, looking for errors and just problematic things. They're very fair. If they think you're too low or too high, they'll bring us in and ask why our numbers are where they are. Conversely, as soon as they got a comfort level, they turn the contracts around very quickly, and they're easy to work for." [#2]
- A representative of a Black American-owned professional services company stated, "The crazy part is, and it's not just Hamilton County, because I have seen it in other forms, even if it doesn't apply, you're required to complete the form and check N/A. Why not omit the form if you've done the due diligence to understand this doesn't apply to this buyer?" [#3]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "[The Director of Economic Inclusion] has been great in, I think, opening some of the eyes to different departments about why they should be doing this. The County, because of its structure, they can't really mandate certain things. They're in a bit of a complex scenario, how they're approaching some of this. In the process, we have had meetings with various people in the organization. I think they took the meeting because [the Director] said, 'Hey, you should talk to these folks,' but we've had zero traction here in your own backyard. We've shown value … we were selling insurance product, 'Hey, we're self-insured,' what they would say. That's the typical response in this space to not have to talk with someone who sells insurance product. If you're large enough, you could believe it, 'Hey we're self-insured. We don't buy.' That's not true. You do buy it. You don't buy at your lower-levels, but you buy access and you're buying that from the big names on the block, and you've been doing so for a long time because I can go look it up and see what you've spending with them over the years. I've yet to see any communication, RFP, or anything that says, 'Hey, we want to talk to some others, or diversify what we're doing in this space.' I know the County's not centralized in everything that they do, but still, when we walk through that and say, 'Here's where we can add value,' and we've demonstrated we've done very similar things with other counties that are larger than Hamilton County that will raise about what we do and the value that we add, but it just doesn't even get you a real sniff at an opportunity. … When

you do so much in the community, it's like you can get a fair shake, at least have a genuine conversation about, 'Hey, yes, we need this,' but then you don't pursue the opportunity to engage with something that's clearly known that you need, but then you find out that that solution has been delivered by another firm…" [#5]

- A representative of a majority-owned professional services company stated, "Sometimes we are included on an email or some sort of broadcast email that lets us know about projects, but I think it's probably a small fraction of the number of projects [out there]." [#6]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "Years ago, our office was in [City] and we couldn't bid on the Hamilton County work because I did not have a Hamilton County address ... I was able to at least have a nice sit down with the director of facilities … he's in the lower level of Hamilton County offices and he said, '[Participant], anytime you need anything, give me a call. I'll let you know.' He's able to share his budget and budget goals over the next five years, how he wants to spend $20 million or $50 million. There was a bit of transparency there that I appreciated. And also, I felt like he would be honest and given us a fair share. … Once you get the RFP, it's clear path of what is expected of you. So, my challenge is not really after we say go, if we learn the information and say go, my challenge is getting the information to make the decision to go or no go. I think Hamilton County is trying to figure it out, I don't know. I just don't know if... I don't know if there is a real system in place. And I know there's a website. But notifications when things get posted, I just feel like I try to read the paper every day. I get on it. You're just not living on their website five days a week, every week for 52 weeks." [#7]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "For us and every other trades person I know customers that we talk to, it's not really the County, it's the inspection firm … that they give the inspection work to. And that place is utter insanity to try to work with. I mean, we work with, different cities and jurisdictions. We work in five counties and IBI, which does most of the work for Hamilton County, is by far the worst, their attitudes are horrible." [#11]
- The owner of a majority-owned construction company stated, "It's not really worth it. … I got the distinct impression that it was a good old boy network that, you know, I just, I didn't know who I needed to know in order to do this." [#12]
- The owner of a majority-owned goods and services company stated, "I've been registered for quite a while. I don't recall the process being particularly onerous. I think, again, maybe because of my background, I wasn't intimidated by the process, … I get updates from the City and the County on bid jobs. Generally, I look at those, but I don't generally bid on those sorts of things. How the business has come to us is perhaps an individual in one of the departments or whatever happens to be reaching out for some reason. Or we inherited the business from another, I've done several small acquisitions throughout my years and some of this business came with those acquisitions, and we've tried to solidify that business, but generally it'll come from an inquiry rather than from a bid, an official bid. ... Going back to that whole bidding process, if Hamilton County had something that they'd like to get my input on and say, 'Hey, we'd like you to do this bid.' Just to bring it to my attention, so it's really top of mind to me, they say, 'Hey, because of your participation in this, would you

please bid on this and give us your input or consider this bid?' I'd be happy to do that. I'd find the bandwidth to do that for sure." [#16]

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Hamilton County is probably one of the worst people I've ever tried to get a contract from, because you never know what's going on, you never know what's going up. Even though they have an account about the contracts coming up sometimes, you can never seriously get somebody on the phone all the time to know what's coming up." [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I bid on a couple of things with the County … but it just wasn't as clear as working with us some other agencies. It's just their process is a little confusing. And some of the ways, the one about submitting your bid pricing was challenging and confusing. I would probably say, I probably plugged in some numbers in a place that I probably shouldn't have. And not sure if... Well, I would say, I know I didn't get any feedback as to what might have happened, or why I didn't win besides my pricing was not low enough. So, the experience that was a bit frustrating in terms of how do you go about doing things and ensuring that you've done it the right way."[#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We do work within Hamilton County, but none of that's on a big contract level like you would do with construction or marketing. It's very project-based instead of contract-based. That's the best way to put it. … I went to my salesperson because I knew that I had this today, and I said, 'I need feedback on anything about Hamilton County, anything that's bad about Hamilton County.' And he said, 'I can't name anything that's bad about Hamilton County. I really can't.'" [#22]
- The owner of an SBE-certified construction company stated, "She [an employee of the County] failed to put the asbestos out of two buildings, which I had a contract with them for. Therefore, I couldn't start work, even though I had equipment there, she failed to hire a [contractor] to do the asbestos, which wasn't part of my contract, and then she went after my bonding company for liquidated damages, which messed me up with Hamilton County. ... I've had that those two contracts that I did have, which I got through HGC from Hamilton County. … So, they had Hamilton County do it … But we got the houses all hauled away and there was sanders underneath them. Then they demanded that we haul the sanders away free as if they were part of the house. After we got done doing that and finished the thing up, she [an employee of the County] came out and didn't even know where the properties were. So she wrote me up for a pile of rocks, bricks, and similar material that HGC was going to use for facing in the parking lot … So, she wrote me up for that stuff, that material, which wasn't even on their site. Their site was a completely finished, seated and strawed. No problem. Everything was lovely. And so she wrote me up for those 90 loads, because she couldn't even find her own jobs. And that basically messed me up with the County. Their attorney at the time pretty much agreed with me when he had all the paperwork in front of him and he got me paid. He said that they were going to, at the time, they were going to do something in house and that I would be back on their bidders list in six months or a year, a year and a half when she was gone. I think she's been replaced since then, or she got a different job, but she messed me up there Hamilton County … The file on those two

wrecking jobs is at least three inches tall .., I had to work with a lawyer. Because of her going after my liquidated damages on the bonding, because I couldn't get the project done in time because she didn't get the asbestos out of it. If I went in and directed with the asbestos in it, and got done timely in everything, then that would... Fines for asbestos are $25,000 per day, per violation. That far exceeds the liquidated damages for not completing in 30 to 45 days, starting with. They were putting in the projects, you were supposed to start within five days and now it's 15. It's not unrealistic for the permit application to not be... It's not unusual at all for it to take 10 days just to get logged in." [#28]

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I had a contract with Hamilton County that was competitively bid. I won it. And that contract that I had … led to me doing work for other departments in Hamilton County. … Then the pandemic hit, and the County started using a different company, male owned out of Kentucky for some of the services that I was providing, giving me no chance to bid, no chance to quote. And they said, basically, well, we didn't have to because we're in an emergency. And basically, they are way, way, way overpaying this company … I've been doing good work for the County for five years, and suddenly they just illegally picked somebody else who was not an SBE. And I don't know what the reason was, but it has to be some sort of personal connection with somebody or whatever. And they didn't get three quotes as required by their own policies, even though they were in a pandemic, and it was an emergency, three quotes are still required. And I did a public records request to see, well, who else did they ask to make a quote, no one. Also, after this happened, I tried to talk to people at the County about what happened and nobody would speak to me, including commissioners that I tried to contact." [#32]
- A representative of a majority-owned construction firm stated, "Hamilton County. We have looked into a couple projects that they've put out there. But once again, I said we spoke before about challenges. It was the scope and the limited timeframe to get things done. That was one of the projects that we looked into. And it just was unfeasible for us as a company to even come close to getting that and so we backed out of submitting a bid." [#37]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "I haven't attempted to do business with Hamilton County in years because of the understanding that Hamilton County really isn't interested in doing business with organizations or people that look like me. They historically haven't and I do not go places where I know that door will not open. I go places where the door has opened and will open, but one that's still shut, no, I don't waste time there." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "They have been wonderful to work with. I mean, they have to follow public rules or higher revised code or their guidelines for getting public, but we do so much work with them and they have been so wonderful clients to deal with. They have been very honorable. They pay on time. They're very fair in their treatment of the subcontractors. So, we love working with them. Hamilton County again, they have a wonderful team. Their staff are highly qualified. They know what they want. They have a very good engineering support. So, in that respect, really as far as Hamilton County, I really cannot make a lot of comments on it. … when a Hamilton County project comes about, if our plate is full, as far as what

projects we're bidding, we may drop something in order to bid the Hamilton County because we enjoy them that much." [#41]

- A representative from a woman-owned professional services company stated, "Not all of the Hamilton County Departments have inclusion on their contracts, so that is a barrier." [#AV9]
- A representative from a majority-owned professional services company stated, "Understaffed, also the timeline for project and approvals is very slow." [#AV56]
- A representative from a majority-owned construction company stated, "Their bidding is a mess not the easiest when it comes to documentation and all of the necessary paperwork." [#AV217]
- A representative from a majority-owned construction company stated, "Anytime I worked for the County it's been convenient. Organized well." [#AV248]
- A representative from a majority-owned construction company stated, "The inspection bureau is awful. You can't reach anybody and when you leave messages you get no answers." [#AV296]
- A representative from a majority-owned construction company stated, "As far as working with Hamilton County government, is a very difficult place to work." [#AV324]
- A representative from a woman-owned goods and services company stated, "Difficult to do bids with the County. They seem to be one-sided." [#AV214]
- A representative from a Subcontinent Asian American-owned professional services company stated, "Yes difficult. We never get called back. Wait is way too long and there is a lot of red tape to go through. I think Hamilton County should look at how Columbus is handling their County. Hamilton County is way backwards and too much politics." [#AV237]
- A representative from a Black American-owned goods and services company stated, "We work with the Hamilton County probation department and administration for Hamilton County and have no problems." [#AV319]
- A representative from a Black American-owned construction company stated, "I don't think Hamilton County is open like for businesses like mine in entertainment or local concerts or anything like that of that nature. Nothing is readily available; they have a lot of loop holes and buddy systems going on [and] nepotism." [#AV306]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "What happens with Hamilton County with me is anything that's bid, they put a bond requirement on it no matter how low the cost. Well, because my bonding rate is higher than the people that I'm competing against, that makes my price higher. And because I have to go to five diversity meetings to get invited to the table and I have to send my estimator and my sales manager who make money, who I have to pay to go to these meetings so that I can get the opportunity to bid [to] a low bidder when my cost is higher. That cost our business more money to go for that work. [If it was] even or fair, I would beat them. But because our cost of doing business is higher, we can't win when the margin is already low, and I got to

pay 20% more because we are a real business and it's not me all the time [that's] going to these places." [#FG1]

- The Black American owner of an MBE- and SBE-certified professional services firm stated, "One of the challenges with doing business in Hamilton County is again, maybe twofold. One, across the region, Hamilton County in particular, in the professional services space, organizations are not forward thinking. In other words, small, minority, women owned businesses can consistently share their capacity statement, their services, their scope of services, et cetera, and that the agency or the organization does not believe that that's a concern or an issue in their organization that day [and] it's tabled. It is not addressed until there is a ground swell of concern then an RFQ/RFP is put together and it's socialized. Part two is the challenge when it is socialized, then there is a mad rush of applicants, submittals, and it sometimes lands on the lowest bid. Sometimes it lands on the relationship that the selection committee may have of that committee. We too have done years of public records requests. We have seen the proposals, we've seen the contracts and the contracts in our space of HR diversity workforce development, they are consistently landing with the same organization so much so that there have been times when the awarded bidder had actually submitted the bid after the deadline, but because of the selection committee being very familiar with their service, extended the bid to get them in. And I think that's a challenge when you have 20 or 30 bidders that meet the deadline, there's not a response, and then all of a sudden there's the awarded contract and rightfully so, but it was after the fact. So, was it we were not qualified or et cetera, or was it that there was a relationship and kind of a decision made before the decision?" [#FG1]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "Once you get there and once you are awarded the contract, then my experience has been a very positive one. They look at me as being a minority firm, the fact that I need to get paid. They want to pay me in 30 days, I insist that you pay me in 20 days because I need to pay my suppliers in a certain amount of time so that I can keep the product line flowing. So those types of negotiations that we have to do on behalf of our companies... because the way they write those bits and everything, they're writing them for what's in their best interest. And so, you have to then go through that and say, 'This works well for me, but can we here because this doesn't work well for me. I need these terms versus these terms.' And most times, if they're really serious about doing business with the minority firm, they will negotiate that and allow for some concessions in those areas. But I think once you get the contract, as far as I'm concerned payment, they pay me on time. They're a good customer. So, my experience is positive."[#FG2]
- The woman owner of an MBE-, SBE-, and EDGE-certified construction company stated, "I understand the world is short staffed … but it seems like the tone of the town conversation is more about trying to find ways where [COVID] funds were not allocated properly as opposed to finding ways to assist a professional services business … By trying to assist us in making sure that paperwork and everything is acceptable. So my overall feelings is that there often tend to be more barriers to success. It seems like there's more energy towards trying to keep us from access rather than to assist us to do the things that we are trying to do as a small firm. We just don't have a lot of capacity to go through tons of paperwork and having to keep coming back. … my overall sentiment is that we cannot put new wine and old wine-skins. I would like to echo [other statements] in saying that there has to be

systemic change. There has to be changes that are not barriers for our success but assisting us with success … but it just seems like a lot of effort was put more so into keeping us from it than assisting us." [#PT2]

Twenty-one business owners described their experiences working with MSDGC specifically [#2, #5, #7, #9, #22, #23, #27, #28, #33, #35, #AV, #FG1]. For example:

- The co-owner of a majority-owned construction company stated, "MSD, that's a whole 'nother world over there. It is like their own little empire … I don't know that their contract administrators really understand some of the requirements that are asked of the contractors that, I don't know that I believe those folks understand the impact and/or, I'm not trying to beat them up, but- They're just not as expert in that specific construction industry to understand the implications of how they've structured a procurement." [#2]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "MSD has been difficult to zero [in on]. I may have had one meeting with them … we had a meet and greet … I could not get a defined, this is our process for hiring architects and engineers. There was not a streamlined understanding that I was given to how they do business with vendors, let alone minority vendors. And it's my understanding that they actually have money. They've probably got more money than any other department in our County … I was kind of walking away from that experience, pretty disappointed and just didn't know how to maneuver less facilitate future work, any work." [#7]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We've attempted to do work with the Sewer District, but I don't think we've ever been successful in doing it with them. My only experience with the MSD was they could not find that I was certified, and so they just went somewhere else." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "[The gentleman who was running MSD] met with us, and he talked to us, and I think he was sincere, but nothing ever happened. I don't know that he had roadblocks or whatever, but I can't blame him. At least he sat down, talk to us on several occasions." [#23]
- The co-owner of a WBE-certified construction company stated, "That's been a good experience with MSD. Like I said, we do stripping and waxing. And so I did some floors at MSD and started building a relationship with the guy there, the facility guy, I guess, and then bid on job, and then would get a smaller job and then get an opportunity to bid on another job, and get that job. And got to the point where they would reach out if they needed something special or whatever. So, the whole MSD thing has been a really good experience. I guess I would say of the City contracts I have, probably MSD's, I would say probably is the easiest. They're not as stringent, I guess, or they're a little bit more laid back, maybe, is the way to say that, on some of the things. And then I don't mean that they're letting you get away with something or whatever, but just easier to deal with, to get answers to, you know, that kind of thing." [#27]
- The owner of an SBE-certified construction company stated, "I don't think in the last 20 years we've done a job for MSD because they basically stopped me or blocked me one way or the other. Their permitting, and their licensing and stuff." [#28]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "MSD, I just found out that our process going through the City of Cincinnati. I just learned in the last year that they're not connected. So, I just thought because it was MSD and it was the City of Cincinnati that if they had a bid for what I do, it would come through the City." [#35]
- A representative from a woman-owned construction company stated, "Hamilton County government and MSD required company workers to having an apprentice program to do work for MSD and we stopped working with MSD because of that." [#AV8]
- A representative from a woman-owned professional services company stated, "I had another business before, and I was pursuing bids. This was more than 13 years ago. I had access to opportunities with the MSD that they would publish work online that they needed to contract out. When I reached out to them no one contacted me." [#AV11]
- A representative from a majority-owned construction company stated, "MSD had criminal issues along with the Port Authority - giving their buddies jobs and etc. - as far as I know it has been cleaned up." [#AV21]
- A representative from a majority-owned professional services company stated, "We were told that we were unable to do work for the division [MSD] because we hadn't had prior work with the division." [#AV30]
- A representative from a Black American-owned professional services company stated, "I've experienced more barriers with MSD versus Hamilton, and I think the barriers are accessibility and transparency. The process of winning work is not evident, consistent, or clear. I'm not the most tech I'm looking for vertical work as an architect, but that doesn't seem to be their forte. If they partnered with Hamilton County, it seems there would be more they could do." [#AV32]
- A representative from a majority-owned professional services company stated, "I can't work with Hamilton County or the City of Cincinnati because I work for the Metropolitan Sewer District." [#AV35]
- A representative from a majority-owned construction company stated, "We've had a fair number of difficulties with the procurement department with the City for jobs we bid on with the MSD. They have a fairly outdated system for online bidding that cost us an $11M job." [#AV48]
- A representative from a Subcontinent Asian American-owned construction company stated, "MSD has been very tough to work with because they have a union requirement. Otherwise, projects are just so large that minority and smaller businesses don't get a chance to bid because of bonding restrictions and size limitations for prime contracting." [#AV50]
- A representative from a Subcontinent Asian American-owned professional services company stated, "Can't get any reliable responses from the MSD." [#AV323]
- The owner of a WBE- and SBE-certified professional services firm stated, "I'll say like in terms of doing the same work and making money, it used to be better. MSD has now required... it's called a far federal audited rate, or something like that. For example, I used to build projects at a 2.97 multiplier and now I'm at a 2.4 because I'm small and I don't want to pay 20, 30 whatever, a thousand dollars to have this audit. So now your choice is you keep

your multiplier, but you get this audit done. I don't even know if it's annual because it's far too much money for me to even consider doing. So, it's cheaper for me just to go at a 2.4 multiplier and just suck up the loss than to try to do that audit. And the reason that exists is because I'm being held to the same standard as a gigantic national firm because their contract rolls down to me. So that's not pleasant. And then in terms of invoicing, I have next to me an invoice that I have to submit to an engineer for MSD and it's probably 15 pages because I have to submit not just the invoice, I have to do a report, the invoice, a line item for every day, every work that somebody does, and then I also have to do certified payroll report at the end. So, for example, I do work in Louisville and I send them an invoice and they pay me. But MSD, I do a report, an invoice, every detail of every day and then the certified payroll also … It's kind of weird but I want to do the work and I like the work. I mean, I want the work, but it's a whole lot more time for me just to get paid to do work at MSD." [#FG1]

- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "We're doing work with MSD. And I think they've gotten a lot better in the last few years about making it easier for me to compete. They were kind of like the County for a long time where I just couldn't seem to get a shot, but I'd say in the last three to five years, they've done a lot better job at letting me provide pricing and opening some of that up. The County is at the place where I can't even give them a price. That's where MSD was at, I'd say eight years ago, maybe. But they've done a good job at least. We submitted some prices; we do constant work for them. And like I said, the pay's a little slow…" [#FG1]

Eighteen business owners described the best practices they have experienced with public agencies in the marketplace [#2, #11, #14, #17, #22, #23, #24, #27, #29, #32, #35, #38, #40, #43, #44, #AV, #FG1, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "I think both ACI [Allied Construction Industries] and definitely OCA [Ohio Contractor's Association], they have an early in the season meeting for whoever wants to attend, where the owners, all municipalities, they'll come and present the program to the contractors. Here's what we're going to do. Here's the jobs we're going to do this year. Here's our plan. We're going to build these six jobs, they're worth X amount of dollars, et cetera. And they should bid and this April or May, or kind of the timing when it is. So, we make our master list off of that... That's how we would initially find out. It's much easier to work for the small municipalities because it's really just the low bid. … for preference, for easy entry, it's small municipalities then would go to Hamilton County, for all the counties actually. Then I'd say State of Ohio would be probably next and City of Cincinnati the most difficult to work with, as for the bit of bureaucracy hoops you got to jump through and forms you got to fill out and the summary, unreasonable requirements that we need to try and work through. Building the jobs, we'd rather build for the City, but of course we know all the, that's just our own comfort level, we know the inspectors and engineers and personalities even, and don't say this, we're going to make them mad. So once we get them, our preference, well, they're as easy as anybody, just getting through the contractual process is most difficult with the City." [#2]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "Their inspectors are wonderful, I mean, another big part of [the organization that handles permits

for the County]'s problems is their fees are outrageous, outrageous. You know, for example, if I'm doing a solar install in Warren County, rarely would I ever pay more than a hundred dollars. In [Hamilton County], I'm looking at a minimum, probably like 390 to $400. So, I mean, those disparities, there's no justification for them, you know?" [#11]

- A representative of a WBE-certified construction firm stated, "You know, Newport, the City of Newport has one guy. So me and one guy communicates and if he's got a problem, he calls me and I go fix that problem, when that problem's fixed, I communicate back then him. Other municipalities, that list can be long. So, I may have to check within and check in to three or four different people to keep everybody on the same page. And that's a giant inconvenience for me. That makes that customer different than any other customer that I have. … having to do a project and have to deal with so many different people in one municipality is daunting for us. You know, I mean, it's just crazy that I have to deal with so many people when one guy should be the spearhead of that and that's who I need to deal with, he's got all the information or should have. And Newport's got that down, that's worked well for them. And at the end of the day, it saves them a lot of money." [#14]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "City of Cincinnati has gotten great about putting up all their future contracts and their past contracts. Hamilton County, it's even hard to look up their past contracts and seeing what those people won and how they bid those contracts, so that you can have an example for the future. Hamilton County, to me, doesn't run it through any technology. They just want you to submit the bond. They want you to print out the papers, upload the papers, and that's it. And then they read over. That's their whole process. Whereas other places, like Building Connect, which is a... Building Connect, you can go in, look at the blueprints on their site, you can submit your numbers through their site, you can even do your takeoff, like the measurements and everything, on their site. It's really helpful. If you needed technical support, you could call them. Hamilton County does not have that at all. You can actually have a calendar, too, that you can look at and determine what projects are a month out or two months out. Building Connect. Yeah. A lot of the major general contractors use it, like Messer, Turner Construction, they use it." [#17]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "The City of Cincinnati's [bid processes] are very easy. They tend to be very well-laid out with the information organized. They've done the research, so it's not vague. It's pretty specific information. Hamilton County is the same way in terms of the ones that we work with. They're all very knowledgeable. And so that helps, because they come and they know what they want, and they know what they need. And you don't end up doing an RFP that has a bunch of misinformation, and you can't figure out what to quote and what to be. They're knowledgeable, and they come out, and they're well-written. I would say JFS [Jobs and Families Services] is super easy. They don't demand. They know what they want to accomplish, and they allow us to give input into how we can make it better or more cost effective for them. So they're easy to work with, because they put out the information, but then they allow you to make it better. If there's a potential to make it better, they allow you to make it better." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Best process I've seen is making sure that a blanket email goes out for every

project, whether it has goals in terms of WBE, MBE, SBE, what have you, disabled vets. That's great to have, but also even those RFPs or request for quotes, whatever, don't have any goals in them, you still should get them out to all minorities involved. I mean all minorities, period. Let them make a decision whether to bid or not." [#23]

- A representative of a majority-owned professional services firm stated, "We do a lot of small cities and stuff in the state of Kentucky, especially, because you know, we're a Kentucky company, so we'll do distribution line engineering for them and they're always really nice and easy to work with. They're typically smaller municipalities that own their own power grid. So, they don't have any engineering at all. they're like 'Do it for us' and they just hand it to you. … we have a great working relationship because we their on-call engineer and we usually win every bid that goes in there just because we understand their systems. It's a lot easier to bid, you understand risk better when you understand an electrical system. So, it gives you an inside line being the engineer for it." [#24]
- The co-owner of a WBE-certified construction company stated, "We work for the City of Cincinnati, so we have living wage jobs, which is fine and great. I love being able to pay people more money, but at the same time I have to charge more because I'm paying them more. And then again, it comes into that somebody comes in and cuts the price in half. And it's like, 'Well, how are you even meeting the living wage with that price?' The work I do for the City, they have a living wage that they stipulate you have to pay a person depending on whether they're part-time or full-time." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "The people that's working, they're very nice and try to be helpful. That's just specific. Like to the City of Cincinnati, which I love the City of Cincinnati, I love the personnel. I love the people that are down there. They're easy to work with." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Now that I'm on the list, I get a lot of notifications from the City of Cincinnati and also from sort of whenever there's an opportunity in my vendor codes, whatever. … I'd say the City of Cincinnati was the easiest to work with just because they really were hands off." [#32]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Let me make the City of Cincinnati the easiest, because of their bid process, because of the qualification or the questions they ask within their information and the process that you go through to put the bid in has been the easiest." [#35]
- A representative of a Black American-owned construction firm stated, "Like State of Ohio, Ohio Buys, so they got some MBE set asides. And those are, I would say the easiest because I've bid them online and they send me a bid for some products, and I sent them back a quote. And then if I'm accepted, they just [send] back a purchase order. That's a very easy process." [#38]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "I wish the local government would operate more like the federal government where the federal government provides you with who's the contract officer, all their contact information, who has been the incumbent, what the award was and the terms

of the contract. And they also forecast what's the opportunities in the next six months. And who's the contract officer for that, the description of it, and the opportunity that's forthcoming. They do not have the RFP, but they give you enough information to be ready when that RFP comes. What will be very helpful is the municipalities and counties would do the same. That would help the playing field get level.... It will move toward being level. Because you are aware of what's coming just as others who have insider information." [#40]

- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "A good portal. From any agency, I find a good portal where you have that comprehensive list of the projects coming up, and then everybody get a fair chance based on their experience, year of experience. And if they can get opportunity that way, I would love to see that way, because many times opportunities are all over places. Some people put somewhere, some people put different places, just things goes by word of mouth that, 'Hey, this is coming up.' I would never get to see that basically. It just passed through directly from one agency to the contractor. Like a keyword search is kind of important. Or the [NAICs] code. The [NAICs] code is people working in the state or federal for them. [NAICs] code is pretty important, too. So, if you can do those basic search criteria, on a [sam.gov], you have now the combine fbo.gov and all [are] now combining everything into the one portal now. So, something similar if the County had not that's sophisticated, but everything they coming up, or maybe their five year plan. Many times, [there's an] SBA requirement to put out some sort of a five year plan for every agency to say, 'These other contracts are expiring,' and different things. So, if something comes out that way, so people can look ahead and say, 'oh, I think this might kind of on my realm. And I would love to see if I can bid on it.' Because all agencies would have that. They know when their contracts are ending when they will be up for the bid. So, if not today, if something coming up two years and if something interests me, I can build that with the agency or try to get some more information and when time comes, I can bid for it." [#43]
- The woman owner of a goods and services company stated, "I see you guys have the same thing as far as the three bids and that's... I like the fact that I saw that it's not necessarily based on price, it's the best for the County and the people." [#44]
- The owner of a WBE- and SBE-certified professional services firm stated, "Part of what we do is assist with inclusion programs. And I think the City of Louisville is doing a fantastic job right now with their supplier diversity program. Based on a disparity study, they've proven what the needs are in the City of Louisville to justly employ people. And there's a 15% goal that's strictly enforced on construction projects and engineering with MSD for African American owned businesses. They enforce it. It's not even a goal. It absolutely has to happen. And then one of the things they do... As you can see, I'm a Caucasian woman. There's also a disparity for Caucasian women doing work with MSD. So, I'm in Cincinnati and they hire me and every month we do a call. I have every list I can find of registered minority businesses, and we reach out if you're in the construction realm and try to increase participation and get you registered because they're not a certifying agency, but they do take registration in Louisville. And so, it's just exactly what you guys are saying. It's upfront. It's before the project even starts and then we'll do matchmakers to connect the contractors with the minority businesses before the project is even on the street. And not only do they require that you're having that conversation, but then they have to commit to

you in that bid. And it's written and it's in writing and it's absolutely enforced. And if they're not doing it, there's the problem. They're not going to get the work."[#FG1]

- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "Another thing that helped us a great deal, and I know this is a County study, but it was the City of Cincinnati that decided that it needed to support its small businesses. So, they started coming to us for all of the PPE supplies, the COVID supplies, and once we were able to tap into that market and pull some of that from the majority companies that were supplying those products, then it was really good for us as a small business to, at that point, not only thrive, but survive at that point because it was the product that was being sold at the moment. So, it just depends on, the mindset of, I would say your decision makers in your state and your City entities and how they want to support small businesses. And if they're serious about supporting small businesses, there's plenty enough that to go around, to be able to support them and to sustain them… the City of Cincinnati does well with me. They're all always looking for opportunities of which they can facilitate minorities on their procurement opportunities. So, I really give a lot of kudos to the City of Cincinnati and that their purchasing department and what they have been doing to assist minority businesses, at least mine." [#FG2]
- The Hispanic American owner of a goods and services firm stated, "I've never done business with the state, but they certainly are more helpful in disseminating the information that we need to provide our clients, the small minority on companies easier. And they actually come out to date and give a class on access to capital, filling out the information that you need." [#FG2]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "The Metropolitan Sewer District at Louisville, their [program] works incredibly. It starts with leadership." [#FG2]

Thirteen business owners described the worst practices they have experienced with public agencies in the marketplace [#3, #10, #12, #14, #22, #23, #24, #27, #28, #32, #AV, #FG2]. For example:

- A representative of a Black American-owned professional services company stated, "This is for the City of Cincinnati. I was approached to provide a service, to potentially provide a service. This was going to be an RFQ, so it was not going to be a full bid process. It was going to be a sole source, because of the value of the contract. When I started discussing budget, again, unrealistic for what the buyer wanted and expected, versus what they had allocated for budget, I'll tell you what I told them. And I was not being demeaning, and I was not being insulting, but I was hopefully, being informative. 'I would rather you asked me if I could donate my time than to ask me to submit based upon this budget.' And I'll tell you why. In personal services, we work off of rates, or half-day rates, full-day rates, or hourly rates. You're asking me, and I'll just make it as for example, you're asking me to take my $100 an hour rate, which is not, but for the example, you're asking me to take my $100 an hour rate, to $20 an hour. I'd rather you ask me, 'Can you do us a solid and just donate the time, and we'll serve as a great reference? I would have considered that than put my time into responding to your RFQ.'" [#3]

- The woman owner of a construction firm stated, "Well, one of the districts we worked at, there was a change in maintenance supervision. And actually, they went through several different entities there, that everybody was wanting to bring their favorites in. Because a lot of these guys that come into those positions used to work for X Y Z contractor; so those are the guys they are going to try and drag in there to get the work that's going on. And those of us that have been there, that know the business, and know the district and everything, we're just kind of shoved out. And that's just business. That's just the way it is." [#10]
- A representative of a WBE-certified construction firm stated, "I'll just give you one example and it has to do with CMHA, which is Cincinnati Metropolitan Housing, which would be more on the federal level than it would be on the Hamilton County level because public housing is always said it's federal level. So, … we fill out this information packet, right? And part of this packet is the diversity training. And if we hire minorities and... or if we would hire minorities for this project. Because obviously in Cincinnati Metropolitan Housing, and this being it's federal money, they would like for that to go to minority contractors. But here's the case that my experience, this information packet to be approved as a CMHA contractor, is drooling at best. And you know it works for me because I've got really two good girls as secretaries that will stay on it and search the information and double check and double check and double check. But I can see where a small guy, a one, two, three-man shop who's just trying to get off the ground, say a woman owned or minority owned business, would not have that resource that I have. So, when they get this packet, it's daunting because they take it off for misspelled words, for sentences not being punctuated right. And you know, then we get a grade and depending on my grade if I can move forward or not. Which like I said, it works for me because I got an office staff, but I could see a small shop not having that office staff and not being able just to fill out the paperwork. Do you know what I mean? But they would be very capable of performing the job in the field. So, I think that that... I mean, and I've addressed that with CMHA management prior to me and you talking, just out of conversation like, 'Man, the reason you don't have any contractors is it takes,' and I'm not exaggerating, this packet when we're done, it's as thick as a phone book. I mean, it's in a spiral notebook binder as thick as a phone book. That's how many pages, how many documents are in this one packet to get approved. Which is daunting, it takes off a month to get it together. This is the packet to be approved to go ahead and bid." [#14]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Put a balance between taxpayers and others... I think they end up with the people that they do all the time, just like we do so much work with the City. And I know the City does bid out projects, but I think they just bid them out to the same ones. And the same ones get them all the time because they know who is in that bailiwick that can do it. So, it's hard to break in as somebody new because they don't really include people." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The City's not too bad. The City's not too bad [to find out about their work], but let's put this way... CMHA is kind of wishy-washy sometimes, but the County is the worst, I think. They [the County] don't have an MBE program for one. And, within the MBE program, there should be goals and other work set aside." [#23]

- A representative of a majority-owned professional services firm stated, "SD1 is probably a harder bid process than MSD when I've done that. But MSD's bid was not a firm fixed price for a piece of work bid and they never are. And that's the problem. They're spending probably twice as much money as they need to on capital projects. You get an RFP in for a review of a capability. … They tell you what the work is going to be and concept. And then you respond to it telling them your qualifications and they call it a qualification bid. And so, then you respond to that whole thing and you submit your qualifications and they determine who's going to get the award off of a qualification, not a single price. Yet the project is easy enough that I could bid it in my sleep. I don't need the qualifications. And anyone who can't bid it, they said, it needs to be engineered before you bid it. And I'm like, then send out an engineering order. Okay. And then send out the rest later. But no. They're horrible. We have never been qualified to do work there. And do you want to know the reason why... Their reason quote, from the purchasing person, 'Because you've never done work with MSD before'… So take a guess, if you have two or three people that are only qualified, those two or three people know that, what do you think they're doing to you? You're paying that County. If you put me in charge of MSD tomorrow, I'd cut that capital budget in half and probably fix the damn sewers with all the money they're wasting. MSD change your bidding process and go fixed bid and save a lot of money." [#24]
- The co-owner of a WBE-certified construction company stated, "I guess my very first bid that I did for the City, I turned everything in that was back when you still did paper and took it downtown before the online thing. But what was funny about it was, and maybe this has nothing to do with your question, but I found out I was awarded the contract because I received the living wage poster in the mail. And I was like, 'Well, this is interesting.' And then I got the contract a day or two later. So, I don't know if somebody was just really good at their job or what, but it was just funny. … I would say the police department probably has been more challenging than the other ones. One, because of the fingerprints, and two, because of their scope of work is one size fits all. They have one scope of work for every building, but not everything in the scope of work applies to that building. Maybe that explains it a little better." [#27]
- The owner of an SBE-certified construction company stated, "They're short staffed, if they have any staff. A lot of the departments in the City of Cincinnati, they sent all the workers home. And the only person working was either one secretary or a supervisor. Another thing they pull is, for example, Cincinnati Gardens. They shortened up the bid time so that he [a large competitor] didn't have any competition, little if any, or whatever. He doesn't have a whole lot of competition because it's such a big project. So, most of the people in Cincinnati couldn't bid on it. I mean, generally speaking, on a big project, you needed a minimum of 10 days to do a walkthrough, so that people can go look at the building and see what they're wrecking And then you've got another 10, 20, 30, 45 days to put in a bid. What they can do, they shorten the bid time down, put in there that you've got to call for a walkthrough... Hamilton County can control the bid by cutting down the time to five, 10, 15 days where nobody else can really get into and do all the research and bid it. [The incumbent]'s got all the research done because he has been here working. He knows where all the dumps are and everything." [#28]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I'd say Hamilton County's was the hardest. Just required the most

paperwork. you have to fill out a cost sheet for a lot of things, which you never use in the job, actors, studios, union rates, when everybody knows what you're going to be doing is producing stories about foster kids or something. You don't need actors. We don't go to studios, but they still have all of that material in their bid, which is silly. The hardest was Hamilton County just because sometimes like where my contract began a lot of it relied on the public relations people for Hamilton County getting [us the required information]. So it was just like pulling teeth just to do those stories. Cincinnati Public Schools is another big entity that doesn't really reach out to SBE firms or give them any kind of advantage or try to be inclusive with SBE." [#32]

- A representative from a woman-owned construction company stated, "Working with Hamilton County is atrocious. Working with their 3rd party inspectors is horrible. Awful experience for anyone dealing with them. They should all be fired immediately. The County should resume control over their own inspections instead." [#AV259]
- A representative from a woman-owned goods and services company stated, "Cincinnati, can be very political on how they select bids." [#AV288]
- The Black American woman owner of a SBE-certified professional services firm stated, "We had three of them. And every time I try to check and see if we can do some work, there was never anything. So that right there can make a small business or break a small business. You did all of that work and you're expecting something and nothing ever comes of it. An agency will call you and say, oh, we have this urgent work to do. We need you to do X, X, and X, give us a quote. And then you give them a quote and then they take it to procurement. And procurement says, 'oh, now we got to send this out to bid.' so your quote becomes the RFP? And then somebody else gets it because they now have all your ideas and recommendations? That happened to me before and I promised I would never make that mistake again." [#FG2]

Eight business owners described their experiences getting paid by public agencies in the marketplace [#10, #14, #32, #AV, #FG1, #FG2]. For example:

- The woman owner of a construction firm stated, "We never had any problem with Park Districts paying us. … within 30 days we always got a check from them." [#10]
- A representative of a WBE-certified construction firm stated, "Well, in the CMHA portion of it, I've not had a bunch of problems. They seem to be that, if I have my paperwork in order, it's a non-issue. If my paperwork is a little out of order, it could hold it up and the paperwork will have to be redone and I'll have to resubmit. But at this point, we're pretty well trained. So, I try not to make any mistakes they've got me pretty educated at this point how they want things." [#14]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I will just say that Cincinnati Metropolitan Housing Authority that I'm working for now uses a system called VendorCafe and that is kind of hard to get paid. It takes a long time it seems to get paid." [#32]
- A representative from a majority-owned goods and services company stated, "When I had a previous business, they expected us to work for practically nothing and Hamilton County

was particularly responsible for that. Even being a minority (Veteran) business didn't make a difference." [AV285]

- A representative from a majority-owned goods and services company stated, "The VA takes forever to pay." [AV290]
- The owner of a WBE- and SBE-certified professional services firm stated, "Usually I'm not paid when it's a public project where it depends on them [the prime] getting paid." [#FG1]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "My average days to pay for City of Cincinnati is about four to six months. Even though they signed the contract for 30 days, it's between four to six months before I get paid. Some of it has went on to over a year." [#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "If I work with a County, I tend to get paid every 30 days consistently and [if I] work as a sub it's 65, 70, 80 days. It's because it's always dependent upon the approval of the prime's bill and they can have problems in their bill, but their bill gets paid. We don't get paid. And so that's always an issue." [#FG2]

Two business owners described their experiences getting paid by Hamilton County in particular [#22, #26]. For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "We have done some that are larger, and those require a little bit more hand holding to make sure that you have all your I's dotted and your T's crossed to make sure you get paid. The jobs are not difficult, but the payment process is more difficult because they want to make sure that they have it all correct in the land." [#22]
- The Black American male owner of a construction company stated, "I love working for Hamilton County. When I get done with a job, I get paid. They say 30 days, but I always get paid before 30 days. So, I have to give that to Hamilton County on that. I did a [project] some years back, paid me fast." [#26]

One business owner described their experiences getting paid by MSDGC in particular [#FG1]. For example:

- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "I mean we get paid on quite a bit of our projects in 30 days, but the government work, it's up to six months sometimes. And sometimes it's because somebody's on vacation or... MSD is one that's been tough too because when I submit a payment to MSD, it goes to this email called MSD accountspayable.com. And if your payment is right and everything's good, you get paid. But if it's not right, you have to wait 30 days to make sure that it's right. ... I guess they do it by alphabet based on your company name, but person you give the price to, and you give the bid to, and the people that you get the payment from are kind of detached. ... I understand they're a big, big organization, but that's a barrier. In a lot of government organizations, there's not a person … For example, MSD [has] accountspayable.com instead of a person that can reply and say, 'We got it. You're good.'"[#FG1]

2. Barriers and challenges to working with public agencies in Ohio. Interviewees spoke about the challenges they face when working with public agencies in Ohio and the Hamilton County area.

Ten business owners highlighted the length and large size of projects, communication with decision makers, finding potential primes and plan holders, and lead time before projects are announced as challenges, especially for small, disadvantaged firms [#2, #8, #9, #13, #21, #23, #25, #28, #29, #AV]. For example:

- A representative of a woman-owned, DBE-certified construction company stated, "Because there's so many variables that go into getting a job, doing a job, covering the liability, but if you have get bonded or not, and especially on a federal level, because they haven't dealt with Hamilton County thus far. The people who're putting these procurements together and putting them on the internet, for something to go out for bid, they have no idea what they're putting a procurement out for. They haven't been in that facility. They don't know what they're contracting, so if you do get somebody on the phone, it's of no help." [#13]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "It boils down to you, as the business owner, do you have enough time to sit in on all that to help you? So, it's skews the language but damned if you do, damned if you don't. It's just a lot of time that, as you know, we have to go through to be prepped on things. And they just don't have that much time when you're washing dishes over here, picking up paper over there. And you're trying to sign documents here. And so how do you streamline things? And I don't have a magic bullet or answer for that. Or these are the types of things you need to go through. But when you're a one-man shop that many people are, and it's just a lot of time that you don't have. That would basically fall when you have to bid on the entire package of things have seen. One organization, I think there might have been 90 items to bid on. And if you weren't bidding on all 90, then you were rejected. So even though we do carry a lot of items, some things you just don't have a relationship with the manufacturer or someone to get those items. So it made it to be extremely challenging and kind of upsetting, especially when you know that you could bid on 50 or 70% of it. But if you weren't bidding on everything, then just forget it. So that was depressing." [#21]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "There's a hint of racism here and there. Like I told you earlier, if a minority makes a... If I make a mistake, a legitimate mistake, it's not the same if a majority company made that same mistake, or if somebody dropped the ball along the chain that I'm dealing with to supply the services to the County, they look at it as your fault, even if you have proof that you did everything possible to do it the right way, but you can't control everything. But they make it seem like... three strikes you're out; white boys, ten strikes, you may be out." [#23]
- The owner of an SBE-certified construction company stated, "One of the biggest challenges is the politics. I'm not particularly into politics and there are a lot of people that are trying to line their pockets with money down there in Cincinnati." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Like I said, the most challenging is just what I said. Being able to find out what's out there, how do I access, who's bidding on this? How do I

know if I really want to go after this? Who picked up drawings? Who's on the bidders list because they're not inviting me, kind of deal? But this would be a good fit for my company and how am I able to find out who can I submit a bid to when it's not directly to them. " [#29]

3. The County and MSDGC's bidding and contracting processes. Interviewees shared a number of comments about the County's and MSDGC's contracting and bidding processes.

Twenty-three business owners shared recommendations as to how the County, MSDGC, or other public agencies could improve their contract notification or bid process [#1, #3, #5, #9, #10, #12, #16, #18, #19, #21, #28, #32, #34, #35, #40, #43, #AV, #FG2]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "I guess I would say a little bit more flexibility. … I would say a little bit more flexibility in evaluating minority and minority firms, I'm not going to even say smaller because that gets them to a whole 'nother thing, but to recognize that … we may not have X number of project examples, but we might have some of directly what you're looking for and others that are allied. So those should be I think they can be projects that are accepted. So maybe I did five libraries and three [school] centers, but they're both open to the public or have similar code … let's suppose for the County and the City to just talk more like on an annual basis about some of their forecasting, what do they see coming down the pine? How can small businesses start preparing themselves to go after that work? I haven't [seen any public agency that does it well]. That's been an issue in our industry being able to get that type of information. Just having some type of like annual forecasting. I mean, I think that the County could start off each year or in the year looking towards the next year of, 'Hey, here's some things that we know are coming down the pike. We know when we're going to need help with this, we know we're going to need help with that.' I think those would be good door openers and help to build relationship between Hamilton County and the small businesses." [#1]
- A representative of a Black American-owned professional services company stated, "We partnered on a bid that Hamilton County had put in for some work. We were not awarded the work. I don't know what the regulations are with regard to feedback. I think when the work is awarded, when it is finally awarded, and one of the bidders comes back and says, 'Can you provide us feedback,' I think there ought to be a feedback mechanism. I think there ought to be a way of sharing with bidders, where there were other opportunities for consideration. Meaning that it was in your pricing structure, or it was in your credentials, or whatever that case might be. I always ask for feedback from my corporate clients if I don't win something. Because of the work I do, and because I'm in the HR space, I get why people don't always want to document certain things. Because there's always the opportunity to come back with some sort of litigious response. But I think there're and should be ways that you get feedback in understanding how you as a bidder did, not necessarily in comparison to how it was awarded, or other bidders. But here are some areas by which we thought you could have been stronger, or your pricing was out of line. We don't know. So, you have this lowest. Were we in the middle of the pack? You see the rubric in terms of, here's how we are going to score everybody. What we don't get is the feedback of, here are your scores. And I'm not even concerned honestly, about ... I am, because I'm competitive like that, about

where my competitors scored. But it's more helpful for me to know where I scored. Because that helps me, if I'm going to bid for this particular entity again, how they look at certain things, and where they put emphasis. And how I responded to that or not. The other thing, before I lose my thought that I think is very different in personal services, there ought to be a procurement process for professional services. Professional services is not the same formatting for a manufacturing, [or a] contractor, and is not the same for construction. And it appears to me that because the vast amount of dollar spends are with suppliers and vendors who are construction or manufacturing, procurement is written in that deferred language and that deferred forms. We have a lot of forms that we are given and shared that don't apply to me." [#3]

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "In consulting, in this space as well, I think the education factor of why it's important beyond ... A mandate creates pushback in certain regards. I think the business case, even though it's a non-profit, there's still business to be done and money to be made to pay the bills, if you will. I think, to have folks understand the business case that's already been proven and that when you diversify your supply chain that it adds to innovation, it adds to the bottom line. All those things are there, but I think when it comes out, oftentimes, it's, 'Hey, we're doing this. I need you to take a meeting,' but there's no real follow up or accountability that comes from that, again, because the County's in a situation where they really can't put percentages on stuff, but they can make procedural changes that everything that's being bought by the County would have to go through a lens check to ask that question, 'Have we sought out to make sure that there's no other vendors in this space that could be a part of this?' Or 'Are we communicating with our current vendors that we love and trust? They're the right partner.' Can they help us out with diversifying who's working on accounts by saying, 'Hey we want to see ...' I just left a meeting today on a board that I'm on, significant-sized board, and the conversation was, 'We love this partner. We don't want to get rid of them. We're going to challenge them to have them be more inclusive in who they bring to us,' and we're paying this money out that they're not getting all the pie. When this pie is getting divvied up into other organizations who can add unique value to what they're already doing, but also looking for ways that they can create additional value for our organization by looking for vendors that could be a part of their team to deliver at a higher level. I don't think anything else stands out as a best practice, but no, again, besides leadership saying, 'Here's what we're going to do and it's a part of policy for every ...' Again, Hamilton County is different. They can't do it the same way that other ones are, but I think procedurally, if a group like [the Department of Economic Inclusion] is looking at all the spend across the organization and pulling out where there's opportunity, and having those direct conversations with those departments that, 'We need to see this. I think this is going to be helpful.'" [#5]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "It's a continual process. When you put a bid and you're not successful, if I was doing it, when I was running projects globally, I even tell the suppliers, I request from them to get feedback on how they can improve. I tried to make it an open book as possible so that they can see where their strengths are and their weaknesses and be able to next time do a better job. It's tough to say because it's comparing apples and oranges." [#9]

- The woman owner of a construction firm stated, "I think if the public sector people like Hamilton County had some system, where they would sign off on the work that we do as an electrical contractor on a job, 'Yes, it's completed. We're satisfied with this 20% of the job.' At that point, if there would be some way to force the generals to pay us what they owe us at that point in time. It would be a huge help if the public sector people would put a program like that in place that would force these generals to pay their subs in a timely manner. And I don't know, I've really never been on the general side of things. Do they get the same pushback from the public entities as what we're seeing from the generals?" [#10]
- The owner of a majority-owned construction company stated, "I'm certain that there was a website and I'm certain there are websites I can go to, to try and find whether it's federal or state or any municipality work. But I think a lot of those websites I have to join in some way, so I just I've kind of dismissed it. … Due to the digital age right now, there's really no reason to have a plan room or someplace where you have all these outside contractors coming in to look at stuff. You can email things. Or I could be on an email list where they send me opportunities. And if that exists, I'd be happy to know of about it." [#12]
- The owner of a majority-owned goods and services company stated, "When you're putting bid packages together, the people that are putting these, they don't know who might have those capabilities, but since the County's spending this extra time doing this exercise now, certainly, again, it might be a time to maybe reach out in a more targeted way. And then I guess I'd be willing to help you in that process or help the County. if the County wanted to assess its procurement process and platforms with a real test, again, if they wanted to, as we talked earlier, tell me, 'We really want you to bid on this because we want your input on how the process works.' If something comes up where it's, again, within my scope of work, which could be everything from small format printing, targeted mailing services, promotional products, apparel, all the way through vehicle graphics, interior, exterior building signage, all that sort of stuff. Again, if they got it to my attention in a way that they wanted to test and learn more, I'd be happy to make sure that I got it done." [#16]
- A representative of a majority-owned construction firm stated, "If the MSD is interested, I mean, there's ways that they can access the business community and make people aware of maybe projects that are coming down the pike. So, as they develop a set of requirements, they might come to a group and say, 'Hey, we have a set of requirements. Does this fit up? And who would like to bid? And does it make sense to put together invitations for bids.' In other words, just be more open for this type of work, this sort of heavy lifting. I mean, again, we're in our own niche … they know when they're budgeting. That they want to do whatever. We're going to replace 250 miles of pipe underground. They know that they're going to receive it in certain months. So already they've defined it as to say, 'Okay, it's this many tons per hundred feet,' so they can spec it." [#18]
- The owner of a majority-owned goods and services company stated, "All I can say for government agencies is, if they act more like commercial companies that need to acquire their products, meaning that instead of sending out a bid packet, to a faceless... We never even get to meet anybody; tell our story and we always get to meet our commercial customers. And I can guess what I'm saying is if government would treat the procurement process more like commercial businesses do, I think government agencies would be in a much better position. And they can make a better decision in their procurement process of,

be it office furniture or carpeting, or whatever whatever's needed in their process of running the agency. What I think they should look for is the best value. And that means interviewing perspective suppliers, maybe visiting their showrooms, if they have one, talking to past customers of their perspective supplier, and maybe I don't know, looking at Google reviews, whatever it takes to get the whole picture of who they're going to work with in the future. In my opinion, how they should do it versus just sending out the eight by or nine by 12 envelope with the packet of 45 pages." [#19]

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "How can the County play a role in working with our financial institutions might be something to really look at. But then again, that might not be something that's within their preview to really do, because that might just be outside of their lanes. … I would have to say doing a better job of working with Southwestern Ohio Regional Workforce Board might be helpful… I would say, probably 90% of people don't know that organization really exist and might even say 98% might not even know it exist, or what it's there for. So how do you train people, or at least educate people of these opportunities that might be out there, then also to the County's connection here. In this region, of course you see, you got Cincinnati State. So, it's easy to call and develop relationships with those education institutions, because all of them have some type of internship program, or co-op program that they could tap into, and take advantage of those opportunities that might be out there to help people with the workforce and training issues. … Just reducing the length of the RFP. I think if someone won the contract, then that's where you need to put all that language together, in order to help people move forward. But having it done on the front end, that might be a little bit too much. … Just breaking up the bids. Well, let me take them back in regard to the notification process. I think if I'm not mistaken, you have to go on to their site just to see if things pop up. I know they have the system but I'm not sure if it works extremely well due to the fact of, I think the bid comes to you if your keyword matches with their [NAICs code] or something like that. And I don't think you get enough room. Well, from my standpoint, I can't put down all the items that we have access to in order to participate in the bid. So therefore, I'm probably overlooked over some because I didn't put in the right keyword to meet their search requirements." [#21]
- The owner of an SBE-certified construction company stated, "You don't know when you bid stuff, they don't publish the bid tabulation timely. Used to be when you bid something at 12:00, at 1:00 you knew what the bid was, 2:00 whenever it was over. You might not get a bid tabulation... My wife is saying, 'A week or more is not uncommon now.' They bid 20 houses and you don't know if you've got one or you got 20. I don't know if you could hear her, but what she's pointing out that when you go out there, and you bid, say they have bid opening start four, five days in a row, or maybe we'll have one Wednesday, one Friday, and one the following Tuesday, that's not unusual. Well, if you don't get the bid tabulation for 10 days, two weeks, you don't know what you got on the first one. The next thing you know, you got too much work. You can't get bonding for all of it. Or if you can, there's no way you can start all the 10, 20 projects within 15 days and have them all completed in 30 to 45 days. It's just the way the system's set up, it's just ridiculous. The bid tabulation should be immediate." [#28]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Just ensuring that County officials follow protocol and when they don't,

they should have to rebid and make the correction. For example, if they don't get three quotes for something and they just awarded to a friend, when they're called on that, they should have to do that over instead of just sweeping it under the rug, which is what they did in this case. I think a lot of times the work I'm talking about, which is really professional services is not considered on the front end with contracts, whether they be, let's say it's a big construction contract, they don't really think about how could we get a small business involved in the marketing and promotion of, let's just say it's a new apartment complex. Once it's done the PR of this, somebody to help perhaps with City council, that usually is not taken into consideration and small businesses given an opportunity on that end of many of the bigger contracts. I think that each department of the County, there could be something arranged for County officials, the department heads and decision makers and professional services. Because I think professional services is left off the table quite often. And there could be some match makings sessions or at least some introductions made so that our companies will at least have a chance to bid on work next time that it comes up. And like I said, I don't know anybody at MSD who does that work or who is helping or interested in using small businesses. So that'd be great too because I know literally have no idea." [#32]

- A representative of a majority-owned professional services firm stated, "One benefit or one thing that had helped be, was the opportunity to discuss those issues with other people who are going through the same thing to help me sort out what was part of the environment and what was actually discrimination. … having other people to talk to and compare notes, that was kind of invaluable to help me be able to determine what was an actual issue and not an issue. I would think knowing where you could turn, when you see fraud going on and knowing how to report it would be, I had no idea how to go about doing that or to be heard. … if I'd made a public complaint, I would be dealing with the backlash of it more than they do, probably. So, there being some kind of reporting mechanism would be really useful." [#34]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Let people know that it's [bidding and notification process] out there. It is not. I went to the County. I can't tell you how many years ago and laid out to the commissioners, et cetera. And I was told that they didn't make any exceptions for people like me, and they weren't interested in doing that. So in that case, I never went back … So not being aware of what's out there, as long as I've been in business, there are not enough notifications." [#35]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "If you are looking to maximize tax dollars, you then think about how do we do that? And one way to do that is to develop procurement plans that says, 'How do we attract the best in this area to compete?' And how do we create an environment for them to compete that is truly, and I hate to use the word fair, but it is done without bias. By doing so what will occur is that you'll end up with a more diverse environment that probably looks more like the percentages of the greater Cincinnati area in terms of businesses." [#40]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "Not only Hamilton County, a few counties together can have a common portal and they all publish, so the cost brings down or a cost share model helps each other. And then it's good for the other contractors like me, we can get the more comprehensive set of information for all the surrounding counties." [#43]

- A representative from a Black American-owned professional services company stated, "What would help for the County to open up and be more amenable to small businesses and in opening up relationships." [#AV41]
- A representative from a majority-owned construction company stated, "As far as I would like to see Hamilton County do more prime contracts. I like when my bid goes right to the owner. When all the others send to general contracts to others. It is not as far when the County does not control that. What I run into is if there." [#AV249]
- The Black American woman owner of an SBE-certified professional services firm stated, "I think that African-Americans and black people of color, mainly African-Americans have really been left out as a whole conversation when it comes to really getting contracts. And it depends upon the brown and black people to say something, but when people say minorities and they give you these stats of all these folks who've worked and none of them, you know look like you ever, it is about the leadership, the person specifically who are making the decisions and the politics at the moment… The professional arena has a lot of lobbying if you will. They're all bigger firms. They can get millions of dollars. And if you check right now about professional services, not even on the radar, but they're paid a lot of money to do what they do, but they don't use us. They don't hire us there as individual staff people, they don't partner with professional services. We're always left out." [#FG2]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "Probably relationships. That's probably one of the biggest things that I see when working with Hamilton County, the lack of opportunity to be in relationships with the decision makers there and that influences that organization. So, you have an opportunity to show your wares and show how you can compete. It's very difficult. Hamilton County has buyers, and you can really only talk to those buyers and those buyers don't have a clue, really what you do. They just know how to purchase. So getting beyond that is very, very difficult. And without those relationships you can't build trust without trust, it's hard to get a selection. It's hard to win. … They put up RFPs and quotes all the time and they have a score sheet, and they publish a score sheet. And they'll say, if your business has, if you have more than one contract with us, if you have more than say three contracts with us, you get zero points. If you have no contract, then you get 10 points. And what that says is, is that they want new blood, right? Or they may say, if you located close to us within 30 miles, you get two points. If you located within 100 miles, you get no points that says they want a local company, new blood, right? They set their score sheet up so that if I'm a minority firm or a large firm, I can decide whether I want to go after that deal. Because I can see based on how the scoring is, what they're really looking for. [The] County does nothing like that. I've suggested it 1000 times, DNR, ODNR does it all the time. So, it's within state law because they all got to follow state law, got the County follow. They follow the state, and they don't embrace it. I feel like sometimes that could be intentional cause it is a great way for the County to be able to obtain more diversity or whatever it is they want." [#FG2]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "If they just really looked at our NAICs codes, they require that we list all of these NAICs codes and everything on our credentials. If they would just go to those and at least look at them and look for the different offerings that... I think it would help a lot of us a

whole lot, if they would simply do that because we're sitting there and our capabilities are sitting there, but it's not being utilized." [#FG2]

- The Hispanic American owner of a goods and services firm stated, "I think the County and the government agencies have to be a little bit more proactive. They got to come to us and say, 'Hey, look, we've got this opportunity coming up.' We need to know. There's a lot of people that don't know that there's a website that you can go to look up these procurement opportunities. But I think, pardon me, the County has to be proactive and come out and say, 'Hey, look, let's have a public hearing on this proposed opportunity and make sure that everybody is included and has an opportunity to bid on that project.' And they got to be a little bit more proactive. Like I said, I went to the website this morning and it looked a little cumbersome and not very user friendly as far as looking up an opportunity to bid on something. So, I'd behoove them to be a little bit more proactive." [#FG2]
- The woman owner of a professional services firm stated, "If we were invited to the table during contract negotiations, or just putting a bid together and to get our perspective from a small business perspective, because there's so much that small businesses can do and we're more nimble than larger corporations can do. We can add so much value if we were given the opportunity at the onset of the negotiation." [#FG2]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of Hamilton County's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Relief programs for businesses affected by COVID-19;
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.

Nine 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 [#21, #27, #28, #32, #33, #35, #36, #AV]. For example:

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We've been on a steady incline. Besides, well, things were going up until COVID really hit. And things are pretty much falling off, I would have to say, the growth plan as slow tremendously based on what we're dealing with now, especially now with the supply chain issues. And the lack of things, for example, right now, if you have access to some five-ounce foam bowls, then please send those to me. Because I can't find them anywhere." [#21]
- The co-owner of a WBE-certified construction company stated, "I guess with COVID it's gone down just slightly." [#27]

- The owner of an SBE-certified construction company stated, "[Because of] COVID the City of Cincinnati canceled. They didn't actually cancel. They stopped about five different wrecking jobs last year for over $100,000 worth of work. But they've actually... it's either stopped or on hold or canceled. I don't actually have a cancellation letter on any of it. We had a massive decrease this year because of the cancellation. The City of Cincinnati's got probably to my best guess thousands of houses that need [to be] torn down or cleaned up or stuck in probate." [#28]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "People who had planned videos canceled them a lot. So yeah, it did shrink." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "And COVID really has changed. I used to travel to do marketing and now that's not happening." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "It took away a lot of my seasoned employees who have and will not return. My clients, all of my clients, every last one of them cut their staff, which meant since I have a temporary placement that has cut my staff. So I do less business with my clients now where an employer might have had 99 employees working there, they might have 10 now. So they are still in recovery. One of my other divisions, such as, just take apartment turnovers, no one's turning over too much these days." [#35]
- A representative of a majority-owned professional services firm stated, "I hate to blame external factors, but I was on a pretty good upward trend until COVID hit. And then I've kind of been starting over since then. I didn't close down, but clients did, projects [were] pushed back, and 2020 was a complete and total slaughterhouse for me." [#36]
- A representative from a majority-owned professional services company stated, "Right now in commercial office space it is very slow because of COVID." [#AV28]
- A representative from a majority-owned goods and services company stated, "Things are difficult because not everyone has come back to the office. A lot of people are still working from home. Requests for business cards have greatly declined, so that is a business we have lost." [#AV320]

Eight interviewees shared that COVID-19 negatively affected their firm, but things have started to improve [#16, #22, #24, #37, #38, #41, #44, #AV]. For example:

- The owner of a majority-owned goods and services company stated, "Well, 2020 was of course for everyone, well for most everyone, a very tough year, luckily we were able to get the grants and the EIDL, a large loan, which is good, but we've bounced back very well. I think, it seems like economies come back very strongly, I think at least in our sector. I continue to be awed by the entrepreneurial spirit of the American people, despite everything, people are still starting restaurants and whatever. So, again, 2020 was not a great year. We were able to get through because of all the interventions that took place. Some of the things that I did, myself to cut costs. But we were able to stay open because we were supplying critical industries and businesses. We were able to stay open. We worked remotely. A lot of us, we worked remotely. I obviously didn't, but we were able to adjust

and keep moving on. And then 2021 came back well. And then 2022 is starting off strong. So I'm beginning to wonder if there was some wash out of competition maybe during that time. And we're like a last man standing type of a scenario too. I wonder about that sometimes, but so right now I feel cautiously optimistic about the rest of... It's better than cautiously optimistic. I remain optimistic, certainly about my company's future in the short term." [#16]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Our revenues dipped in 2020 because of COVID. We got both PPPs, which means that we dropped a little over 25%. But we've bounced back this year." [#22]

- A representative of a majority-owned professional services firm stated, "Increased other than a little downturn at COVID. So, take out the COVID years, it's increasing year over year. Well first was we require onsite access to our clients? Most of the time, probably about 70% of our orders and our clients just because nobody knew anything for sure. They all just shut down. So our first month after the COVID shutdown was about 8% of normal revenue. Oh. And then it went up to about 17%. Then it hung down in the low thirties for a long while before finally starting to recover about the summer but no full recovery happened until the January of this year." [#24]

- A representative of a majority-owned construction firm stated, "It was very much affected by it. A lot of our business style, so to speak, was a little more old fashioned, it's a little more face to face and hands on when it comes to meeting our prospective clients and such. And with the pandemic that highly affected the way we do business, mostly because people were unwilling really to meet with you or want to meet with a stranger, so to speak. So that definitely cut into our business model there and definitely affected our overall sales. I have seen as the pandemic wears on that people are coming around a little bit more. They're a little more open again, and also they're a little more fiscally available to spend money on upgrades that they may not have been willing to spend at beginning of the pandemic because of the uncertainty of everything. we've altered our business model a little bit. And so we have kind of stuck foot a little bit more into the digital side of things and are contacting people at fine distance, so to speak." [#37]

- A representative of a Black American-owned construction firm stated, "it was affected quite a bit primarily because some of our main customers could not allow anyone to come into their facility for certain periods of time. So we got some jobs canceled, we got some jobs, we lost some business because they no longer needed office space done anymore, everyone was working at home. So there wasn't a need to replace. Two particular jobs I lost because they didn't need it, with people working at home. So it affected me like that. I probably went, it was probably the first quarter, second quarter of 2020. It was pretty hard, but we had just moved into our new location, so I didn't complain too much because they gave me an opportunity to put our location together and had a lot of work to do and improvement work. But it did affect us quite a bit initially. And eventually it didn't because we, I said, most of our stuff is commercial. As long as they allowed us to come into the buildings, we didn't have a problem." [#38]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "[I] took a lot of major losses because I've always believed I'm a human being first and businessman second. So I didn't lay off the single person or give anybody pay cut. So this cost us a lot of money in that respect. It also cost us money because if some of the people working on a large budget and say electrician got sick, all of the people around that electrician had to go home per OSHA. We had to pay him for two weeks. They could have that [anytime] that they use the excuse. 'Well, I got a headache. I'm got the fever.' Say have send them home for two weeks so they don't have to be exposed. So some people took advantage of it. As far as pandemic it is over to most extent" [#41]

- The woman owner of a goods and services company stated, "The trade shows, obviously, they were weren't happening, so that affected my business, but I just feel like it was a shock at first for everybody and no one wanted to order promotional products. But everything works its way out. People just get used to the situation that they're in. And now, it's back to normal. We're doing trade shows again." [#44]

- A representative from a majority-owned professional services company stated, "I feel like, at least for us, it feels like things are starting to get back to normal from COVID." [#AV64]

One interviewee noted that COVID-19 has had little to no effect on their business [#28]. For example:

- The owner of an SBE-certified construction company stated, "When you're wrecking a house, the asbestos, the mold, the lead base paint and stuff like that, the dumps being open because of freezing rain or whatever. That has more influence on my building than COVID … the demolition on a house, you don't have to necessarily be around any other employees. You're out in the open. So, he's not going to give COVID to a building and he can stay away from the other employees." [#28]

Eleven interviewees noted that COVID-19 benefited their business through new ventures, increased work, or the ability to learn new skills [#2, #3, #5, #15, #18, #19, #34, #39, #AV]. For example:

- The co-owner of a majority-owned construction company stated, "Yeah. I think definitely we're one of the lucky ones. I think our industry immediately, we were given like the green light. I think our crews were off for a week, but we were deemed as necessary, I guess, or I think that was the terminology. So our jobs never really stopped, actually since we're in the highway world, and a lot of our work we're out on roads with a substantial reduction in traffic, inner City especially, jobs that would've been problematic because of working around whatever businesses and traffic issues, that was all alleviated. So it made the job much easier to complete. The PPP program, that was, I think all of us, we gained from that." [#2]

- A representative of a Black American-owned professional services company stated, "Tremendous, actually. If you can take the best out of a bad situation, I'd say this was ideally it. Prior to COVID, and this will give a little bit of a ramp up, prior to COVID. I had thought about and had wanted to move the business in a bifurcated way. All of my training and development work with clients had been in person. And I had wanted to leverage more of

the virtual and online platforms. Because 95%, almost 100% of my business is outside of Cincinnati, and outside of Hamilton County, I travel extensively. So all of my services and contracts were outside of the City and outside of the County. Managing that dynamic of travel and changing that bifurcated process to a virtual, was a great idea. It was a vision for the company, but mechanically and physically, did not have the bandwidth and capacity to make that happen. I had this anxiety of what that looked like. Fast forward, the floodgates opened in June. So I literally ambled along March, April, May. And then in June, the calls started coming. 'Can you do those same sessions virtually? Can you pivot and recreate as much is possible, what you do in person, in a virtual environment?'" [#3]

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "The reason why we didn't do much out of our North Carolina or Ohio footprint is it didn't make sense to hop on a plane and spend 800 bucks to fly somewhere for an hour or hour and a half meeting, if you got that long. They were on time and showed up and gave you your full set of time, and the hotel ... The ROI just wasn't there with how long our sales cycles are to spend that kind of money. Through COVID and the use of Zoom, Teams, GoToMeeting, whatever, you can do a meeting like this and there's no expense to meeting someone, and the time that you go to meet them isn't the same. 'I hope to do business with you.' We are doing business again, so my visit there is one to further the relationship and the partnership versus trying to win you over, and hope that you would sign something. The sweetening. Remote working wasn't a new concept for us and that didn't phase us. Like, 'Everybody else is doing it now. This is cool.' The first of the month, it was that unknown of what was going to happen to our clients, our government clients where federal funds and other things are being shifted around and they're laying people off, so you're kind of, 'Well, are our contracts going to go away?' and paying for the private sector. But once the PPP money came out and folks had at least some cushion or some reserve, or flexibility that they had... If their business had downturn a little bit, they had money coming in to fill those gaps. It's been exponential for us, again, with other folks going to this remote work environment and being okay having virtual meetings, because you couldn't meet in an office because they weren't going in the office, and meeting from their living room, or from the bedroom, wherever the call, wherever their working conditions allowed them to meet from opened up those doors for us. While people say that some of the things, it's not a bad situation, we've been fortunate with that. The other part was, in our industry, we've been preaching risk management, and business continuity, disaster recovery, all those types of things." [#5]
- The owner of a majority-owned construction company stated, "We got really, really busy and had probably one of the best years we ever had. We were able to utilize that as far as raising pay rates and getting health insurance for workers, stuff like that. On top of that, even though inflation's so high, we've raised everybody's pay to where it kind of offset that inflation. For them that's great, but for me now it's killing me because I'm losing money every day. Nobody ever expected things to get this bad." [#15]
- A representative of a majority-owned construction firm stated, "For the most part, we were able to continue working just because the nature of the work we're doing. So we were on the critical list in the beginning. So we were asked to come in from the federal level. So we were never compelled to close." [#18]

- The owner of a majority-owned goods and services company stated, "Believe it or not had our best year, last year of 2021, which you wouldn't think so because of the pandemic. But people continued to buy office furniture. And people would ask me 'Why was our year so good?' And all I could say to them was a lot of folks got that PPP money from the government. And I always figured they spent it on upgrading their furniture as well as other things in their office maybe, as well as pay their employees." [#19]
- A representative of a majority-owned professional services firm stated, "Initially. At the beginning of things in 2020, we were slowed down for a bit, but after that, not negatively. In a positive sense lots of people sat at home and got to thinking about what they wanted to do with their property and with their homes, ended up generating a large amount of folks looking for our services." [#34]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "It's kind of been about the same. I mean, we generally keep anywhere from four to seven employees. We have been on the rise of generating more projects in the last several years, probably due to the fact of COVID. People are staying at home, not able to travel as much, so they've got more money to spend on their home. We've kind of thrived a little bit during the COVID, but for some of our suppliers, it's kind of been an issue. We had to broaden our horizon on vendors that we tend to rely on." [#39]
- A representative from a Subcontinent Asian American-owned construction company stated, "Busy time for anyone in construction" [#AV66]
- A representative from a majority-owned goods and services company stated, "Our best year ever was last year. Our market is really good. We sell to a lot of govt agencies across the River. Our products are middle market office furniture. We are not the most expensive but we are the best value for what you get. We have [experience]." [#AV293]
- A representative from a majority-owned professional services company stated, "No barriers that I am aware of. I have not tried or attempted to work with MSD of Hamilton County Government. It's been gang busters for a long time now, but now I sense it coming to a slow." [#AV232]

2. Relief programs for businesses affected by COVID-19. 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.

Three interviewees mentioned their experiences applying for and/or obtaining COVID relief programs [#15, #16, #FG1]. For example:

- The owner of a majority-owned construction company stated, "I don't like to take, really, anything from the government. It seems like it just comes back to bite me in the tail. I did take the PPP loan from the COVID in 2020, which helped majorly keep guys at work and not having to get rid of anybody that you didn't want to lose because things did get a little a wild there for a few months." [#15]

- The owner of a majority-owned goods and services company stated, "We were able to get the grants and the EIDL, a large loan." [#16]
- The Black American woman owner of a professional services firm stated, "It was a good thing. COVID was a great thing. That saved my life, honestly. Because I was given a cash injection that I didn't have to pay back. And it wasn't even that much money, but at that point, my business was in huge trouble. And it was to a point where I was probably going to have to close. And I tried to get funding, could not get it. So, I mean, I was just so close. I didn't need that much, but needed a little bit in order to make a huge difference for me. And so for that reason, it was great. And I was able to keep my employees. There were a lot of things I usually worry about or [was] definitely worried about that time that I didn't have to. So, it worked out great for me." [#FG1]

Fifteen interviewees discussed the effects of COVID-19 on their business [#5, #6, #7, #9, #11, #12, #21, #22, #23, #24, #26, #27, #29, #33, #35]. For example:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "If you had 60% of the plan done, the core pieces done, and then that other 40% was just being unique to that particular situation, 'Well, if I'm 60% along the way, I'm ahead of the curve of those who are starting at ground zero.' Those companies who had a plan in place, they really didn't miss a beat. To give you an example in our closing here, is that there was some businesses whose employees still had a desktop. How the heck are you going to work at home on a desktop? That's still at the office, and you couldn't come back. Things like where they were having their employees drive into the parking lot, and handing them laptops in the parking lot to go work from home. What that business did, on the cyber side of that, those machines were not configured for network security. Then you got all these other issues, so that part of our business exploded as well because people were figuring out, 'Why am I dealing with all this ransomware and these other things, and remote working. Now we're outside of confined structure and security on-prem.' Now you have 25,000 networks you're dealing with because everybody at home has a ... Most people have an unsecured network at home, and you have a secure pharmaceutical business or a lot of PII or PHI. It was impacting them, so we got lots of phone calls, so that really helped us excel. We didn't have to educate people. They had a problem, we had a solution." [#5]
- A representative of a majority-owned professional services company stated, "It has picked up." [#6]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "It has for us [as] the largest African American owned firm in the country, you can imagine. We've received quite a bit of attention in 2020 because of the social pandemic with George Floyd and how we manage that as a firm. I think it really turned the corner for people's perceptions are of us. So those challenges last year, A, COVID. B, George Floyd. And the whole social stress allowed us to dig deeper in ourselves and practice what we preach, if you will, of being diverse by design. So we got a good mix over the 12 offices. And I say that because we had to learn how to love each other again, how to work with each other again. Even in our COVID isolation, we had to reach deeper into ourselves to say that we are a team, no matter what we look like. And we want to respect our brother and our sister, no

matter what their background is in culture. Because culturally we've got about 13 different cultures here." [#7]

- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "It brought us to our knees. We were completely shut down. Because most of our work, we have to be present. And so most of our key customers, we are shut down. As a result, we were shut as well." [#9]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I mean, everything has gone up in price due to inflation and COVID the main constraints have been equipment supply. So like I said, I mean, what industry is not facing that kind of shortage right now with stuff?" [#11]
- The owner of a majority-owned construction company stated, "My business dropped off to nothing. Some of the restaurants I was working for actually went out of business. I'm still inching my way up." [#12]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We've been on a steady incline. Besides, well, things were going up until COVID really hit. And things are pretty much falling off, I would have to say, the growth plan as slow tremendously based on what we're dealing with now, especially now with the supply chain issues. And the lack of things, for example, right now, if you have access to some five ounce foam bowls, then please send those to me. Because I can't find them anywhere. Initially, yes, but we like most people's pivoted and started to look at different things to really focus on. But as I said, I have access to close to 80,000 different products. So for us, we just really started to talk to a couple of our customers to see what they really needed to focus on and just start to really hone in on those items. For example, we have always provided sanitizer disinfectant to our customers. Now, all of a sudden going from, we need four cases of that a month to 15 cases of that a month. Some of our customers needed full containers gone from providing them with two cases a month to, we need 30 cases of that per month. So certain things just really magnified a lot. But initially, I didn't know what I was going to do. Because a lot of people were basically closed down, we had nursing homes that we provided products too, and with them being on lockdown, especially nursing homes, I didn't know what we were going to do. But they stuck with us because we had a variety of different products that we could offer them. Again, we have spoon, knives, forks, disposable. Again, going from we need one case to we need 10 cases. So, that helped us out tremendously. Now, I'm starting to see the things are loosening up some. But part of the challenge that I see for my business is that a lot of people went to bigger companies because manufacturers were allocating products to certain companies, especially if your volume has not been great with them before, they went from, again, just one example, we provided some of our clients with sanitizer disinfectant wipes. Again, some of them previously only needed one case per month, all of a sudden that goes up to 20 cases a month. But my manufacturers say well, previously, you never ordered that much. So we're not going to give you as much, we might give you two now and you'll have to wait on the rest of them. And at that point, a lot of our customers, well, we can't wait. We need this now. And they would find a bigger firm to offer. So hopefully people will come back but if they're getting things that they need consistently from a larger company, then that's the thing that I'm a little bit worried about, but we're currently maintaining and we'll see how things

continue to develop. So obtaining supplies is a huge challenge for us sometimes I would have to say, and not been able to get everything that we need. I would have to say this is magnified, especially last year during COVID." [#21]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Long term, we've done nothing. I guess I should go back. So we do hospital work, we do printing for hospitals. So to say the least, it affected us because we had to get the hospitals everything they needed. So during the height of it, we divided our employees staff into thirds so that they didn't see each other, so that if one part of people became positive, we didn't lose our whole entire staff. But we only have 21 people working in 14,000 square feet. So we actually have them all working, and they're all vaccinated except for one. So we have them all working full time now." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I guess supply chain is the main issue. I'm sitting here waiting on some cabinets and case work that was supposed to have been here two months ago, but it's the supply chain." [#23]
- A representative of a majority-owned professional services firm stated, "Very much so. Then everything came back and they let us back on site and everything started to flow normal again." [#24]
- The Black American male owner of a construction company stated, "Oh yeah, residential has [declined]. I'm going to just do it. I'll say it as a percentage. At one point, residential was half of our gross income for our business. If I did a million dollars, which I've been doing a million dollars for the last few years of work, half of it came from residential. Well, now I would say 85 to 90% of my work is commercial industrial. So 10 to 15% is residential at this point because they still don't trust people coming in their houses. The pandemic did a lot of damage because, like I said, for one, 99.9% of my business is from ... I mean I have offered all type of discounts and coupons, and none of that stuff seems to ... It's not bringing back the business. The business is not coming back like it was. Now we're doing a lot of work for contractors. So we're getting with builders and trying to go after that work. Obviously, the City of Cincinnati has, we receive those emails. So I'm really trying to tap back into that because we were generating a lot of our residential work through Angie's List and HomeAdvisor, our website." [#26]
- The co-owner of a WBE-certified construction company stated, "I would say probably 90% janitorial right now and 10% painting. Before COVID it was closer to 50-50. We've just been riding it out at the moment. Our painting work has gone down significantly and some of our janitorial clients have wanted additional cleaning people. So most of our painters have become cleaners. So we've talked about some things, but just, we don't know. All I know how to do is get through each day recently, for some reason. And I feel so fortunate because I know so many people have it so much harder than we do. We didn't have to shut down, luckily, and all that stuff. But to some degree, I just feel paralyzed as to where do we go from here and what do we do?" [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Yes, we were affected, but the help from the federal government helped us. But how it affected us basically, we had to come up to speed with technology. We were not ready to immerse into the Zoom and virtual world, so we had a lot

of cost impact with bringing our technology up to speed. We had a lot of cost impact with providing PPE, as far as COVID PPE, for our employees, both in the office and in the field. We had to constantly adjust to make sure that we were still able ... We were fortunate to pretty much stay working with the projects we had so we did not have to go remote. But we did have to be able to accommodate those that weren't comfortable and let them remotely. So, yes. And then because of COVID, steel prices have escalated out the roof and they're still very volatile, so it affected our pricing." [#29]

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Yes. I would say the mentor protégé, the teaming, the opportunity to subcontract, to learn from someone who's been successful at submitting proposals. Because we submit. We're all in for the submitting, but it seems like marketing is an issue, is a barrier. And COVID has just added another dimension to that, to figure that part out. Like I can't attend a conference in person and know that that company or agency is going to be there and I decide to fly in because they're there and that's going to give me my face-to-face time." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "We have increased the staff's income to keep up with everyone else hiring employees. We have tripled our advertising dollars. We've beefed up our employee perks. We give out, oh my God, we give out employee loans that sometimes we wouldn't have done before. We overdo now for employees." [#35]

Seventeen interviewees discussed the effects of COVID-19 on their industry [#2, #5, #6, #9, #11, #16, #22, #24, #27, #29, #32, #34, #35, #37, #39, #41, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "I think everyone, the folks that I speak with that we're on a friendly competitor basis or whatever, and association peers, et cetera. I think … they would all say that they've come out better because of the pandemic, bizarre as that is." [#2]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "The reason why we didn't do much out of our North Carolina or Ohio footprint is it didn't make sense to hop on a plane and spend 800 bucks to fly somewhere for an hour or hour and a half meeting, if you got that long ... The ROI just wasn't there with how long sales cycles are to spend that kind of money. Through COVID and the use of Zoom, Teams, GoToMeeting, whatever, you can do a meeting like this and there's no expense to meeting someone, and the time that you go to meet them isn't the same. 'I hope to do business with you. We are doing business again,' so my visit there is one to further the relationship and the partnership versus trying to win you over, and hope that you would sign something. The answer to your question was there's no geographic boundaries for us now. We're doing stuff pretty much anywhere that ... South Dakota's the newest one. We're now doing, we work in South Dakota, but that came up just because the internet is there and the ability to do a virtual call versus trying to take three flights to get to the middle of South Dakota. Just a perfect storm, to play on the words. In that middle-market sector, really opened people's eyes to being focused on looking at risk and not just buying insurance. Because they found out, through COVID, it wasn't covered. You're left holding the bag because you had no plan in place. You never thought that something like this, really even close to this could happen

to you, so the first five months, you're trying to figure out, 'What do I do with this scenario? My suppliers are down. My employees aren't at work. We're getting sick.' Not that you had COVID specifically identified, but you had some framework around something that where people couldn't come to work or you couldn't do what you were normally doing, and you could easily play off of that." [#5]

- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "In terms of work volume, is the same. Because when your key customers are shut down, you're shut down. In terms of the whatchamacallit, the reliefs and stuff, we were at very disadvantage. My bank was horrible. So, we got the first round, second round they screwed it up. And there's nothing we could do." [#9]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I mean, everything has gone up in price due to inflation and COVID the main constraints have been equipment supply. So what industry is not facing that kind of shortage right now with stuff?" [#11]
- The owner of a majority-owned goods and services company stated, "I made an acquisition last year of a small printer, who'd been in it for many, many years, but he was very, very small and it got to be the time and for him to say, 'Well, enough is enough.' I don't know how much of that was related to COVID. I think maybe the COVID thing pushed him sooner. I think I've got another acquisition of a small mom and pop sign company now that I gave them an offer, but he's near 80 years old. So, did COVID do that? I don't think so, but again, if it hadn't been for COVID, they would've said, 'Well, we can keep going this for a little bit longer.' … We're getting a lot of inquiries in, on both sides on small format and large format, which makes me feel like people are looking around for new vendors that I hadn't seen in quite a while. So, I don't know if that's because they're just taking the time now or the people that they had been using have become unreliable or somehow gone away. Again, I'm just seeing these inquiries coming in a fashion makes me feel like there's been some washout." [#16]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think our industry as a whole … was affected much worse than me." [#22]
- A representative of a majority-owned professional services firm stated, "There's too much volatility right now in general in the market and there's too many determinants beyond just COVID that are causing our client base to give more orders out. So, I have half of my clients projecting a possible downfall and half of them projecting a boom, then they're in the same industries. So, I'm seeing a lot of unknowns, in my opinion, about what's going to happen exactly ... Most of our business is in the heavy industry, steel mills and things like that are a big part of it. So, I track those heavy industries and I talk to those clients about what they're projecting and I probably have 65, 70 that are fairly optimistic for this next year and not optimistic then starting in 2023. And their reasons are all different from inflation to tariff potentials to incentive packages. They're all over the map. It's too hard to... Unless I was a statistical economist, I doubt I could come up with it and I don't have the time to do that." [#24]
- The co-owner of a WBE-certified construction company stated, "I'm thinking more towards the side of permanent than temporary, because I feel like things are changing. In fact, I'm a bit concerned about where commercial cleaning is going to land. With people working from

home, if that's going to continue, these companies don't need these big buildings, so I'm not sure what the landscape is going to look like in the near future for that. I won't need to clean or paint your building. In fact, that's what I think saved us during the pandemic. We were very fortunate that we were working for the City and there was a time where it looked like they may close down some of the sites we were at. And they said, 'If we close our site down, you're not allowed on site.' So, we really got worried because they brought in trailers for the people to stay on site 24-7. But luckily it didn't come to that. So, during the pandemic, we only lost one client and it was a private client, just a small one, and they probably quit, or we didn't clean there for about three months. And then when they did reopen, unfortunately they didn't last very long, and they ended up having to close." [#27]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "The residual effects, of the pricing that was a result of COVID … because of COVID and other things shutting down, so of course we're a construction company, so brick and mortar, a lot of people weren't bidding, were not building and expanding like they used to. And then which meant that there was less projects available, which we found that there was more competition coming in. Whereas before it was certain competition because people weren't going after the same projects. But we noticed that instead of three or four competitors, we may have 15 going after one project. So it was that squeeze of trying to build a pipeline and trying to make sure that the competition and getting our numbers where they need to be and still be successful." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I think it affected the entire industry as a whole. A lot of people that I spoke with had clients who canceled videos during the pandemic. They just said, 'No, we're not going to do that at this time.'" [#32]
- A representative of a majority-owned professional services firm stated, "At the beginning of things in 2020, we were slowed down for a bit, but after that, not negatively. In a positive sense, lots of people sat at home and got to thinking about what they wanted to do with their property and with their homes, ended up generating a large amount of folks looking for our services." [#34]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "[COVID] was [bad, declining] for the industry as a whole. I think larger companies who, I mean, I'm just giving an example, like Amazon, for example. Companies coming in building new places to work, that's affected my business because they're taking up a lot of the workforce. The other way, where we used to have scheduled interviews, people don't show up like they used to because there are so many options, or they don't care. The attitudes of people have changed tremendously." [#35]
- A representative of a majority-owned construction firm stated, "I think it's not just our industry, but most industries I think saw a lot of issues when the pandemic started, just because people weren't willing to spend that extra money because they didn't know how their business would be affected by the pandemic. So, any extra funds that they may have had, they kept pretty close to the chest." [#37]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "We've kind of thrived a little bit during the COVID, but for some of our suppliers, it's

kind of been an issue. We had to broaden our horizon on vendors that we tend to rely on." [#39]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "There's a tremendous shortage of labor. Before the pandemic, we were beginning to face it. We gave talks at the start of high school and then we went to junior high, tried to recruit people to come into for their life, for future to come into construction industry. So, we had anticipated a shortage of manpower, but because of the pandemic a lot of people quitting their jobs. And of course, we lost a lot of people to COVID. There is a tremendous shortage, so that is what is the lingering effect of the COVID is." [#41]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "So our challenge during the pandemic was the fact that we on a daily basis support the corporate offices, the manufacturing floors, and when our state was shut down and everybody was sent to work from home, it proposed a challenge for us because we weren't selling those consumable goods to our customers. It was only when we decided to, let's see if we can be creative to see if we can get our corporate customers like the state and our universities to say, 'You have those employees and staff working from home, they still need those consumable goods. They're still working. They still need printer cartridges. They still need paper. How about we ship those products based upon your approval to their homes, and you can decide how you want that to look, and you can decide how you want us to charge your different entities for those products.'" [#FG2]

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 Ohio marketplace that they have observed over time.

Six interviewees described the pre-pandemic marketplace as increasingly competitive [#20, #26, #AV]. For example:

- The Black American male owner of a construction company stated, "So, for instance, commercial industrial, it's a cutthroat game. That's what I have learned in construction. It's very cutthroat-ish. I'm a real open and honest person. I like to have loyalty and humility. I like people that's real loyal and shows humility because that's the type of person I am. I have learned the hard way that you can't trust people, not everybody anyway. Even those you think you can trust, a lot of times they will back stab you and steal your good people. I have had employees that was actually stolen from a contractor of mine that I had a relationship with before I started my business before they became a contractor. I actually started my business first. So it was one of my teachers in a ... I'm going to just give you an example of what happened to me. One of my teachers that was in the union had a good relationship in the union, liked the guy. I started my business. He ended up leaving the union, started his own business, called me all the time. Actually, he called this morning while we was on the phone. It's actually the contractor that does a lot of work for [company]. I was slowing down. Things were slowing down because this was last year. Things was kind of slowing up for me, the pandemic. But I had enough work to keep a couple of my best guys working. But he ended up calling me, begging me for some help. 'Hey, can you send some guys over to help me out because we got a lot going on? If you

slowing up, it'll keep your guys busy.' So I ended up sending one of my guys over there and I kept his brother. That very next day, they quit to go work for that contractor that I'm describing. So that affected me a lot because at that point I felt like, dang, it's no loyalty out here. It's no trust." [#26]

- A representative from a majority-owned construction company stated, "I think everything's pretty much the same as it's been. It's always a competitive market." [#AV36]
- A representative from a Black American-owned goods and services company stated, "From my experience when I have tried to work with the government and being a small business it is difficult to place these bids when most contracts are locked in with larger and more well known companies and it creates a barrier when you are not a larger [business]. The cleaning industry is not too saturated but there is a lot of competition and that can make it a little difficult and the goal would be lock in a long term contract with the government to create a consistent stream of revenue." [#AV225]
- A representative from a majority-owned construction company stated, "Red tape obstacles, needless paperwork really doesn't seem to change the outcome of the project. It only delays the project. Very competitive market." [#AV283]
- A representative from a majority-owned professional services company stated, "None that I am aware of. It's a pretty competitive landscape, which I think means business is pretty good around here." [#AV325]

Eleven interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses [#22, #40, #AV]. For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I guess there's been a shift because there's more digital marketing, so there's less print. But that has been shifted over to mailings because people do much more mailings. Even before COVID, they did much more mailings than they did in the past. So kind of the mix of the product, but our offer is different." [#22]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "It has during the pandemic increased. And we primarily prior to that few years had leveled out, but as a result of the need to go remote and do that rapidly, we've had an increase in growth. And we also expect our business to grow even more so because of the supplier management platform we've developed." [#40]
- A representative from a majority-owned construction company stated, "All conditions are favorable to start or continue a business." [#AV23]
- A representative from a majority-owned professional services company stated, "We haven't experienced any barriers, but we have not directly pursued and opportunities either. We are expanding at this time, and the business climate for our business is satisfactory, not excellent, but pretty good. Our services are in high demand." [#AV55]
- A representative from a majority-owned construction company stated, "It's generally a good business environment in Cincinnati." [#AV265]
- A representative from a majority-owned goods and services company stated, "Great place to have a business." [#AV274]

- A representative from a majority-owned professional services company stated, "Starting a business has been slow, and we are growing more rapidly this year. We are looking forward to significant growth, not in just in products and supply, but also growth in employment." [#AV200]
- A representative from a majority-owned professional services company stated, "I think Hamilton County is great for growing a business, and I think business in Hamilton County is very healthy." [#AV291]
- A representative from a majority-owned goods and services company stated, "Great opportunity booming business here. Last few years due to COVID been difficult though." [#AV313]

Two interviewees observed that pre-pandemic marketplace conditions were in decline [#15, #AV]. For example:

- The owner of a majority-owned construction company stated, "I think things are pretty bad right now even though the market doesn't show it. It's near. We're ready for a crash. It's coming, I think. We haven't seen one for quite a while, and I fear it's real near." [#15]
- A representative from a woman-owned goods and services company stated, "Hamilton County tends to be more difficult to expand a company and to do business in Hamilton County." [#AV216]

4. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Hamilton County marketplace, in their respective industries, and in general [#18, #19, #22, #24, #25, #27, #32, #33, #35, #36, #37, #38, #39, #44, #FG1, #FG2]. For example:

- A representative of a majority-owned construction firm stated, "So if you're good and you're efficient, you still have to be price competitive. So if you're all of that and you have quality pricing performance, then you'll get more work is basically how it shapes out." [#18]
- The owner of a majority-owned goods and services company stated, "It's not always about price. We try to service our customers really, really well. And we'll sell a chair if that's all they want. I mean, cause we treat every customer like this could be a customer that could buy stuff for the next 10 years from us. And that adds up even if it's just starting off very small type momentum." [#19]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Mix of product, flexibility, and constantly keeping up with the changes that are going on. Because it's just always a mix of what kind of print people want." [#22]
- A representative of a majority-owned professional services firm stated, "So one of the things that we do is we're engaging further and deeper in with our clients, having these discussions before we just used to kind of say, 'Oh, steel industry is up. Yay.' Everything's good. But, but now we're actually talking to the people in there and saying, 'What is your company projecting?' What are they telling your employee? I'm talking to the employee there that hires me and I say, 'What's your management saying is going to happen to you

guys? Are you going to keep expanding or you going to contract or how you do it?' And you follow the investment trends as well in some of the different trade manuals. Who's building what? Because these heavy industries, they're not small projects. I'm going to go build a new plant. That's a four year multi... Hundreds of millions of dollars investments. Okay. So that stuff is well published and documented. So you can follow those very well. And then that gives you a good feel for what's happening. Plus, you can track layoffs and other labor changes that they have. Smart people. It takes... Yeah, it's a very people driven business because power is very dangerous and also when the lights go out, the big bosses and your company aren't very happy with you. So when I meet with my counterpart at a client, who's an engineer there. His main goal in life is not to be the one called out for having the plant go dark, okay. Because you shut down a steel plant that can burn a million dollars an hour in profit. So it's not, it's not something you want to be known for. You shut down a utility and the federal government comes knocking on your door, wanting to know why you shut down a utility, okay. And NERC doesn't like that at all. I mean, being their commission is electrical reliability. That's what the E and R stand for in NERC. So yeah, you don't want to be known for that so. The assurances that you can give your client are key to doing business with them. They want to know and trust you have their back and you're not going to let anything bad happen on their watch and that's probably the single biggest thing. I mean less so on the smaller businesses and stuff, but it's still the same thing. They're usually even more ignorant. So they don't want to hear any of it. We warn a client it's like, 'Okay, this panel's rated dangerous and that panel's rated dangerous and you haven't done your maintenance and they're overdue and you're going to have an accident and you need to get these things fixed.' And it's like, oh, it's $2,000,000 to fix all that stuff. And they're like, 'Oh, we can't spend that money.' And next thing they have an arc flash explosion and luckily nobody's hurt but all of a sudden they go, 'Oh, what panel is that? Oh, that's the one they told us was going to blow up. Okay.' Again, I think it's the quality of what you can produce that is in power and heavy power like we do that is the most important thing. I mean, it's rare, you hear all about statistical quality control and in our business, there is no such thing. It's still 100% inspection. It's not... You inspect every wire, you make sure every connection's been done right. That's just the way it is and that's how you commission things in this business because everything has to be perfect. And so if you don't have that, that's all as like a baseline, you've got to have that to even compete and then after that, it's really just the relationships with the clients and how much they trust you. And a big part of it is that we're very specialized So our clients usually don't know what we know. Okay. There's a few that know pieces of what we know, but they normally don't know what we know. So we work to educate them about this part of the engineering, because their job is to keep everything running on the plant, but they don't have time to dive down and do a detailed harmonic analysis they know nothing about it but when they purchase one from me and we present the report to them, it's the same time you educate them and have them understand where you're coming from, how you derived, what you did. And that also gains the trust. So we work a lot that way." [#24]

- A representative of a WBE-certified construction company stated, "Realistically to be competitive, you got to have a good safety record and then you have to make sure that everybody's doing the right thing." [#25]

- The co-owner of a WBE-certified construction company stated, "I would say quality, doing what you say you're going to do. And a satisfied customer, knowing what the customer wants and delivering that." [#27]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I think I'm very competitive because I don't have a bunch of employees and a bunch of overhead. I feel confident when I have the opportunity to bid that I'm going to be very competitive. I'm not a huge firm." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I would say it takes qualified, because we do offer services with onsite personnel most of the time. So the quality of our employees is essential. But also, just having a chance to prove that we can do the work, being aware of the opportunity and meeting whatever certification that is needed for it." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Quality people and competitive pricing." [#35]
- A representative of a majority-owned professional services firm stated, "If I could answer that, I would probably have the golden ticket. But I think there's a few factors. If I had to pinpoint one thing They don't give a lot of thought to quality of service. I think they assume everybody does the same thing, so instead of shopping around like they would if they were buying a car or buying a house, they just find somebody that's in their neighborhood. Maybe in the building with them, or two minutes up the road from them, instead of looking around. I think that's maybe just a perception thing at the consumer level." [#36]
- A representative of a majority-owned construction firm stated, "It takes a lot of things. Price is number one, but also value, what you're offering and the services you offer. It takes a lot of things. It's a very competitive market right now because of the explosion of the availability, so to speak, of the product." [#37]
- A representative of a Black American-owned construction firm stated, "Well, it's probably dominant, but it's also on your work that you've done. And so if to be competitive, you can consider yourself to be competitive, you wouldn't just get a job, you have to do a job, complete a job and have to satisfy customers. Then you can become competitive because until anyone knows who you are or what you can do, even if you win jobs, it doesn't make you competitive. So it is important to build the track record of completed jobs for satisfying customers and that allows you to be competitive." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "You got to be able to do multiple things. Again, with us, we do asphalt and concrete. I think if we generally just focused on one, we would kind of fall short of some of our sales goals." [#39]
- The woman owner of a goods and services company stated, "Other promotional products, companies, how they would be competitive is if they get end quantity pricing on certain product that I don't, because I have the access to get the same items that any distributor could get, but it depends what the supplier's going to make deals with me for." [#44]
- The owner of a WBE- and SBE-certified professional services firm stated, "Reputation. " [#FG1]

- The Black American owner of a DBE-certified professional services firm stated, “I'd say bonding capacities…I would say all financial. Both access to credit along with bonding. " [#FG1]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, “Connections. The context to know when things are happening and being involved in the planning and design stages instead of waiting until the documents are all written. We'd like to be... A lot of companies don't know something is happening until it's already happened." [#FG1]
- The Black American woman owner of a professional services firm stated, “I would say funding. Getting loans or getting grants. Those types of things would be a big one." [#FG1]
- The woman owner of a professional services firm stated, "The biggest ad agency in Cincinnati, I mean for years folded up, went out of business. Not saying this totally by COVID, but they had, 100 people or something. You got to be able to weather that storm. So I think really when you're smaller, you almost have more, you can be more fluid and you can withstand it a little bit more." [#FG2]

H. Potential barriers to business success

Business owners and managers discussed a variety of barriers to business development. Section H presents their comments and highlights the most frequently mentioned barriers and challenges first:

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Factors public agencies consider to award contracts;
5. Personnel and labor;
6. Working with unions and being a union or non-union employer;
7. Obtaining inventory, equipment, or other materials and supplies;
8. Prequalification requirements;
9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by primes or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;

18. Size of contracts;
19. Bookkeeping, estimating, and other technical skills;
20. Networking;
21. Electronic bidding and online registration with public agencies;
22. Barriers experienced through the life of a contract;
23. Size of firm; and
24. Other comments about marketplace barriers and discrimination.

1. Obtaining financing. Thirty-eight 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 [#1, #2, #4, #5, #9, #10, #12, #13, #16, #17, #21, #22, #23, #24, #25, #26, #27, #28, #29, #33, #34, #35, #36, #38, #39, #41, #43, #AV, #FG1, #FG2, #PT1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "If we could get more business, we wouldn't have to go to the bank." [#1]
- The co-owner of a majority-owned construction company stated, "The reality is, currently, we don't want to grow any faster than we're growing. We could probably double the size of our business and handle those requirements, the financing. Of course, that's working capital, and I guess the number one challenge is working capital. There were never issues with our lending partners. It would be just to get that working capital up to where we're comfortable and that it would be enough to handle our growth needs." [#2]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "We've been fortunate enough not to really have to seek out the traditional types of financing to do our growth. We've been able to generate enough cash flow to invest in the business. As we see the future landscape, we do understand that there's a challenge. We've had conversation with folks about, 'What if we wanted to do this?' We don't produce a product. We are a service-oriented business so that makes it, again, it's an additional barrier when there's not an inventory, something tangible that they can go after. We don't have a building, so the collateral side for the business isn't there because we don't have to own a lot of stuff to do what we do, so then they come back to the personal side, which is fine but, yeah, it is much more of a challenge as we scratch the surface of those conversations. Because we're looking, hey, how can we exponentially grow and invest? Instead of having so many contractors, how do we build out some of these service lines or acquire other organizations that are doing things similar to us that we can go and buy revenue, and buy talent, and buy clients, right? Those conversations are happening and through those, where you were going is we're already seeing some additional hurdles in the traditional sectors for getting financing for business acquisition." [#5]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "I've never gotten finance before. I've been doing it since 2007 out of my own money. I've never... outside the COVID, we were doing well, until the COVID. We had projects lined up. So we were on a very tight ship. So in terms of physical cash management, we know how to do that, but we've not really had access to finance." [#9]

- The woman owner of a construction firm stated, "We have a Capital Access Loan on our house, and we try and stay liquid as much as we can; but when those times come that we need some cash, we just basically remortgage the house, and then pay that off as the jobs get finished. We've really never had to go to the bank asking for money, to make it work. Well, it's not a matter of the banks being unfriendly. It's just, if we can handle it ourselves, that's what we've always tried to do. That's part of the... Probably the reason that we're not bigger than what we are. I didn't want to go into debt for a great big pile of money, and not... No, I've seen friends of mine in this industry that went out and bought a whole fleet of trucks and sold contracts doing parking lot maintenance and stuff. And two years later, it was gone. So, we just kept it small and close to the chest. And for us, it's worked just fine." [#10]
- The owner of a majority-owned construction company stated, "Financing, money. Well, and along with that, I'm leery to just get loans until I have a good financial plan on how to utilize those funds." [#12]
- A representative of an woman-owned, DBE-certified construction company stated, "Capital for big projects, being able to pay people until we get paid is one. we do have a line of credit set up with a bank. I'm not sure what that line of credit amount is. All right. So, we do have that, but, before the company got that, it was a challenge, robbing Peter to pay Paul, or what do you pay and what do you let go until a big check comes in because there's times that we'll go and do a job in a paper mill, and we'll be gone, be in that mill for a week with 30 or 40 guys. And that's a lot of money to get the guys there in hotel rooms and per diem, and then you got to pay them when they get back, and sometimes these mills don't pay for 60, 90 days." [#13]
- The owner of a majority-owned goods and services company stated, "Not for me, again, any small businessperson looking for bank loans has a certain amount of barriers… I've been able to get bank financing, I've been able to build relationships with banks throughout the 17 years that I've been in business. SBA helps quite a bit." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "I think one has been the access to capital, which is changing these days. Because I know there's a big loan package out with the State of Ohio right now, that's significant." [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "In terms of access to capital. Yes, basically, [we] kind of live that every day. But we have not had any direct issues in terms of getting access to dollars." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "When I took ownership, there were two challenges. One of them was financials, because the owners had all kinds of money. And so, our bank actually pulled our line of credit because we didn't have as much money as the old owners." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I come across a lot of brothers and sisters who, A, can't get financing, B, they don't know how to go about getting financing, and C, the banks and the loan institutions doesn't make it easy anyway. So you... Like, I try to reach back to a lot of smaller... Not smaller, I would say we're small, but I try to reach out to younger people who are trying to

get into the business, and they don't know what a financial statement is, or... And I'm not a CPA, so I can explain to them best I can, but they act like they don't want to go out and get help. And my CPA, who was a good friend of mine, he'll take on new clients here and there when he has time. But knowing what you're up against is very key, and financing is something that you can't play with, and you know that yourself by just dealing with banks and financial institutions, on a personal level." [#23]

- A representative of a majority-owned professional services firm stated, "We were with a smaller bank and they had a couple of defaults I think, in their portfolio and then started to put the screws on people but that was only for a little while. And then it all backed off again. So we've been fine so far because we do go up and down in cycles." [#24]
- A representative of a WBE-certified construction company stated, "The hardest challenge was getting a business loan. It's what they consider a high risk [industry], so that's the biggest thing is such high risk that a lot of people wouldn't look at you. Even being WBE, they wouldn't talk to us. Took out personal loans to make it work, until we could get enough established to go on." [#25]
- The Black American male owner of a construction company stated, "Retaining finances? Well, not really retaining finances. I mean because I go to family a lot if I need any help. My suppliers, they really good people. So they really help me out a whole lot. The contractors that I work with, I always put terms in my contracts and my quotes where I can get help from the people that I work from. I always put them in a situation, 'Hey, if you want me to do this, then I need this upfront. Or I might need you to give me a net 20 instead of a net 30 or a 40 or a 50.' So, learning through people beating me, getting over on me in the beginning because I have had situations where I didn't know that you can do a notice of furnishing where you could put a lien on a project." [#26]
- The owner of an SBE-certified construction company stated, "There really hasn't been any single barrier other than money. It's almost impossible to start a business and be able... a demolition wrecking business, you have to have a whole lot of money, and when you start with little or no money, it's almost impossible. For example, to do work for the City of Cincinnati, you need a bond just to buy a permit, to get a contractor's license. I mean, you can get a business loan if you've got enough money already, but it took 30 or 40 years to get enough money to be able to get a business loan. Basically, you have to work off of your own money until you've got a real... Your credit rating has to be spectacular before you can get a loan. You can't have a good credit rating when you start a business." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Access to capital. And basically, that's a blanket statement. But without having capital and cashflow, we're not able to attract and retain talent that we need. Which that's another barrier as far as being competitive, to be able to offer health benefits and retirement plans and just the different things that experience workers and even not experience workers, but what someone's looking forward to come to a company. Because we don't have capital to be able to put things in place in the back office, it's hard for us to attract the right talent to come to work for us. And so, it's a domino effect." [#29]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "The only time I've applied and been denied has been, I wanted an

increase in my line of credit. I have a very small line of credit, just what I had from the beginning, $30,000. I've been with the bank for years and years. No problems with them at all. All I wanted was $50,000 and I went to two different banks, the one I was a member of and the one, I still had an account there, but I had left them because they just didn't understand federal contracting, so I left. And I was denied because I have too much student loan debt. It was for the business, though. I've always had them check. They always are concerned about the business side, about my personal side, even when I first got with them. Even when I first got with them, their focus has been on the personal side. I do the projection, that three-year Excel spreadsheet you have to give them. Everything looks well on the business side. There's money in the account and so forth. I did start searching for another bank and I just didn't make the change because it's a hassle to change banks. And I never had the energy to go through that again. But yeah, I was able to just figure it out based on, I got another contract and that was able to provide the working capital." [#33]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "It has not been a barrier because I don't go borrow money anymore. I don't try anymore. So that barrier is gone because I just will not try. I don't do it because I was turned down too many times in the past with top credit collateral, the whole nine yards. I just don't try anymore." [#35]
- A representative of a majority-owned professional services firm stated, "I've never taken loans or anything like that. But I have them offered to me constantly. I think access to finance is probably pretty good in this area. Or at least that's been my experience." [#36]
- A representative of a Black American-owned construction firm stated, "When you say a barrier, I would say yes, but then that's not all, some of it's on me because I spent my time trying to increase my credit rating I had in my personal business. Years ago, it wasn't as important to have personal credit with your business credit. You could have them separate. Well, time has changed, those days are over. So, while I kept a great business credit, my personal credit wasn't always the best. So I can't blame the systems for that. So now that my credit scores are very high now, I'm sure I will open up a lot more doors for me. But so it is important to have good personal credit in order to really go far in any kind of business, period. That's really the main barrier." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "Obtaining loans for a new location or new equipment. We've kind of outgrown our current location where we can't purchase any more new equipment because we have no place to store it. So, it's kind hindered us in that aspect." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "in our industry, as you may know, people hold retainage. So on our $40 million project, at 10% are holding $4 million worth every 10. So those kind of things affect your cash flow." [#41]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "Yeah, it's financing is one. If you want to get a line of credit with 50 grand is very easy. Every bank probably will give it to you, but anything beyond that, it's a so tedious process. It's very hard to get through, and they ask some really, really stupid questions and documents, if I'm honest. And then when it gets frustrated, and then you just say, 'You know what, it's not worth for me to spending all this time.' And then they come back and say, 'Oh,

we cannot give you that much.' And all that stuff, even though you have longest history of being a client with them and no negative activity. Still, it's very hard to get beyond certain amount of line of credit. I don't know whether it's just for very small businesses like mine, because all these big business, they all get this money. They all get Chapter 11, and they still get again the credit again. I don't know how they all they do. It's a little bit disadvantage to minority business maybe." [#43]

- A representative from a Black American-owned construction company stated, "Anyone starting a construction company need to have their head examined it just a lot involved in getting started. Doing the work is the easy part. Capital out lay is high & certifications are needed." [#AV294]
- A representative from a majority-owned construction company stated, "Last year we were refused by the government to get a loan - no one wants to give a loan for equipment to companies." [#AV287]
- A representative from a majority-owned construction company stated, "Relative to other areas, for small technologies there are not many incentives or help from the County. We had to raise all our funding out of state." [#AV327]
- A representative from a Black American woman-owned professional services company stated, "I could do this full time if I had the capital and the resources." [#AV317]
- A representative from a majority-owned professional services company stated, "I'd like to get loans and grants from Hamilton County to expand my small business and employ more people." [#AV307]
- The Black American owner of a DBE-certified professional services firm stated, "I would say all financial. Both access to credit along with bonding… I think it's definitely a challenge for especially a lot of startups, right? And perhaps even I guess in this COVID environment, where for many of us our sales have not been consistent. Whether there have been substantial increases because of COVID or there have been substantial decreases. I think we all know from a financing standpoint that the lack of consistency within a certain margin can be a problem from a financing perspective. But I would think it would even be more increasingly difficult for startups… literally I just got off a telephone call with a lender here in town that I've had a 25-year relationship with. And I asked for some funds on a multifamily renovation project that we currently own. It's vacant. There's substantial equity in it even in its current condition as being vacant. And that 25-year relationship with good credit. I own multiple properties in the City. We were told that they couldn't do the deal and that it would be better for me to apply for a personal loan against my personal residence. I mean, kind of a slap in the face when you hear that with a group that you've been doing business with for over 25 plus years. So, the challenges of capital I think clearly are our biggest challenge. I don't necessarily see that it's getting any better to be quite honest with you all. There has to be some kind of government I guess buy-in within this City, I guess." [#FG1]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "I would agree 100% that access to capital is an issue. I just tried to buy another company in another region, and we went through everything, the valuations and talking to the bank. And it is just interesting that I can buy a Maserati, but I can't borrow that same

amount of money to buy another business. And I think that a lot of that has to do with... A representative of the bank that I was talking to, he said, 'Everything looks good. Everything looks great. But how do I know I'm going to get my money back if that deal goes bad?' And those are the questions that large companies get asked also. But I think since my company... I mean, our company started from scratch. So, we only have a 20-year relationship with a bank as opposed to a company that has 100 year relationship or a 50 year relationship, or they went to high school together, or they graduated college together. So, people that I went to college with and went to high school with and grew up with in my neighborhood are not presidents of banks. So, getting that tap on the shoulder, that, 'Yeah, I know you. You're a good guy.' … For acquisitions for us, we're trying to grow now, as opposed to one customer at a time, we're trying to grow 600 customers at a time. And I can do an acquisition that costs me five, 10, 15,000 dollars, but to really grow into other regions to support for my business is just not there." [#FG1]

- The woman owner of an MBE-, SBE- , and EDGE-certified construction company stated, "When you go for money, the problem is you can't get money because there's other people that have relationship with the bankers that the bankers are calling their clients, Hey, I have this money, and then there's no money for the small people." [#PT1]

2. Bonding. Public agencies in Ohio 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 sixteen interviewees discussed their perspectives on bonding [#2, #10, #13, #17, #23, #24, #26, #27, #28, #29, #38, #39, #41, #AV, #FG1]. For example:

- The co-owner of a majority-owned construction company stated, "Our firm? Well, through the years, the bigger barriers would've been bonding capacity, finding qualified personnel. We're a merit shop company, we're open shop. The union work tends to limit a lot of opportunities for us. Based on net worth, net volume. That's kind of a double-edged sword. The more money we leave in the business, the more at risk it is. So, you don't want too much money in, but if you don't leave much money in then you can't grow, because it limits your bonding, then no one's going to lend as much money. That's a challenge. It's a challenge for us. And it's multiplied quite good for small businesses, I would say." [#2]
- A representative of a woman-owned, DBE-certified construction company stated, "Because there's so many variables that go into getting a job, doing a job, covering the liability, but if you have get bonded or not, and especially on a federal level, because they haven't dealt with Hamilton County thus far. The people who are putting these procurements together and putting them on the internet, for something to go out for bid, they have no idea what they're putting a procurement out for. They haven't been in that facility. They don't know what they're contracting, so if you do get somebody on the phone, it's of no help." [#13]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "The bid bond opportunity. Most of the time you have to get a performance bond or a bid bond. Well, that's 10% of the overall project that you're going to do. Well, you have to provide that as collateral sometimes, or put up some kind of house or something like that. If the project is $300,000, well that's $30,000 that you got to put up just to obtain that bid bond. That's very hard. We had the lowest bid, actually. I think it was hundred $182,000 that we were going to charge to do the carpet. Well, we couldn't get the

performance bond back in time, and when it came back, it was like, I don't know, $18,000 that we had to put up, just to get that. I didn't have $18,000 liquid cash, so I couldn't do it, so we had to pass on it. [We] actually won the project but weren't able to perform because of the bid bond So they passed on us. They just said it was a non-responsive bid, so they went to the next person." [#17]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I didn't have no issues with that. We do have a bonding company, but you got to remember, I've been doing this stuff for over 30 years, with [other companies I've worked with], so people in the business knew me, and getting bonding, for me, was no problem. But I can see where it's hard for any other minority. I mean, it's really hard, especially just getting started, and not knowing where to go or who to go to, and... I don't know. I tell people, especially through the African American Chamber, we have programs that help people with that. And a lot of times I find that young people, young people who are trying to start business, or older people who are in business, just are either too embarrassed to talk about it, or don't have the intellect to talk about it. But you don't know what you know until you ask, and there's no embarrassment to asking. … Requiring a performance bond or a payment bond. Generally, the minority contractor will pay higher bond rate than the average majority contractor because of unfamiliarity and because of racism, whatever you want to call it. Those have always been a sticking point for a lot of people." [#23]
- A representative of a majority-owned professional services firm stated, "There's opportunities we just don't pursue because we don't have the credit to bond it. There's a bonding limit to everything you do. So, if our bonding limits a $1,000,000 and I've already got three or four projects that consume $800,000 of that and all of a sudden a $500,000 opportunity comes along and I got to bond it, I can't do it. That's all there is to it … that's just based on the size that we are. And we pretty much can quote anything and know how to get it done. I'm very strong on the construction side and he's very strong on the design and engineering side of things. So, between the two of us it's well covered. And the only thing is bonding will get us. That's the only thing." [#24]
- The Black American male owner of a construction company stated, "All the contractors that we work for, since we are a sub of a sub, we're usually on their bond." [#26]
- The co-owner of a WBE-certified construction company stated, "Having to have a bond, that can be very difficult if the job requires a bond, because you might have to come up with thousands of dollars to get the bond, just to bid on the job. I've seen it where, just to bid on the job, you have to show you have the bond. It's like, 'Wait a minute, I'll get the bond when I am awarded the job.' But just to bid the job and have to have it, that's crazy." [#27]
- The owner of an SBE-certified construction company stated, "To do work for the City of Cincinnati, you need a bond just to buy a permit, to get a contractor's license. You need a bond to use a fire plug, a water hydrant. You need a bond from the transportation department to be able to cross the sidewalk or curb or anything, block the street. You need a bond to bid the job at times, sometimes you don't. You need a bond to perform the work, and now the latest thing, they want an additional bond for $50,000 to be able to haul the debris away. So, by the time you buy all of those bonds, and then when you finally get a job, you get a bond for example, say the job was for $99,999, you have to have bonding to do

that. So, your bonding is eaten up by all of that, and then that job gets delayed. … so, you have to get a bond for another house and go work there. Eventually, you run out of places to go, you run out of bonding You're just automatically defeated before you ever get going. … Here's another thing, why do you really need a bond on the project if the City has all the money? Well, the contractor has none of the money. He has to do all the work to get paid. Or if it's a big project, he can get draws. They don't pay you for the work until you've done it. So, unless they're awarding a contract because the contractor bid too low of a price, they don't need a bid bond. The only time they would need a bid bond and a performance bond, or a bond for that licensing, is if they were accepting a bid from somebody that had made a mistake in their bid. The City's got a job estimate. ... The City knows what the thing should cost. For example, if somebody bids $40,000 on a job, and five other contractors bid $60,000, and the City's estimate is $60,000 and they give the guy the bid for $40, then they would need a bid bond, because the guy's probably going to fail. Then they can go back against the bonding company for the extra money. But they've got the whole $40,000. They really don't need a bond in the first place. If everything was fair and above board, why would you need a bond for a project or anything like that if everything was above board and right, and correct. But when they're building the building, the City still got of money. So it's this bonding requirement, which is costing the City a bunch of money every year, if they're paying the correct price for the building and they have all the money, then the bonding become just an extra cost that they didn't need to make. But they can use the bonding to weed out bad contractors also. The bonding company does the research to figure out if a contractor's any good instead of the City that way." [#28]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "That is also a challenge. … I'm going to have that piggyback on access to capital because bonding is looking for collateral, your bank statement, whatever. They're not going to give you the bonding capacity if your bank statement looks like ours looks like." [#29]
- A representative of a Black American-owned construction firm stated, "Once I understood the process, once again, I didn't always understand all the processes, how things work, and a bond for some reason, that was more to it than it is, but it's attainable. But it's just folks like myself didn't always understand what it took to get a bond. But it is available." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "My bonding capacity is only $100,000 right now, so that's what kind of limits us to only bidding on projects of that size, but that's kind of like comfortable again for our capacity." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Bonding is one of the biggest things how you can judge the strengths of a company. That's if you want to find a new company that they want to work with us, we ask them their bonding capacity and bonding rate. If their bonding capacity is low, or the rates are high, that tells me that they're high risk and we walk away from them." [#41]
- A representative from a Subcontinent Asian American-owned construction company stated, "MSD has been very tough to work with because they have a union requirement. Otherwise, projects are just so large that minority and smaller businesses don't get a chance to bid because of bonding restrictions and size limitations for prime contracting. I think the

marketplace is fine, I think there is plenty of work out there, I think it's just making it more affordable for opportunity." [#AV50]

- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "What happens with Hamilton County with me is anything that's bid, they put a bond requirement on it no matter how low the cost. Well, because my bonding rate is higher than the people that I'm competing against, that makes my price higher. And because I have to go to five diversity meetings to get invited to the table and I have to send my estimator and my sales manager who make money, who I have to pay to go to these meetings so that I can get the opportunity to bill a low bidder when my cost is higher. That cost our business more money to go for that work." [#FG1]

3. Insurance requirements and obtaining insurance. Eleven business owners and managers discussed their perspectives on insurance [#13, #18, #21, #24, #26, #28, #32, #42, #5, #8, #AV]. For example:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "To be frank, I love working with small business and that's a valuable part of the economy, but it takes a fair amount of work to work on a client who pays ... It's a lot of money to pay for insurance, but what our client who's paying five grand or 10 grand, it's a lot to them. We don't make a whole bunch of money on a five or $10,000 account, right?" [#5]
- A representative of a majority-owned professional services company stated, "As far as the insurance goes, there has been a little bit of an issue at times with different clients in terms of appreciating risk reward benefits on how much insurance we have and that kind of thing. There are a lot of clients, I think that use boiler plate requirements for projects. And I always push back very heavily on that. We've walked away from a number of deals simply because I felt like the other side was not being reasonable on their expectations. We had a little bit of that with Butler County when we were doing this project I mentioned recently. And I guess to put it bluntly, you want to pay me a $1,000 to look at a building. You want me to take a million dollars of liability on for that. And I mean, how is that possibly equitable? And on top of that, the building I'm looking at is worth a $100,000. So why can't we write the contract to be a limit of liability of $50,000 or $25,000? It's not reasonable that I'm writing you a report for a $1,000 and I got a million dollars of liability on a $100,000 dollar building. And so, we find that a lot of times insurance requirements I think are onerous for the sizes of projects. And I understand completely why, for example, a County would say, 'Broad brush, this is what we're going to require,' because maybe they don't want to spend the money to have an attorney review every contract. But at the same time, from a practical standpoint, it really isn't realistic to expect everything from a hundred-million-dollar downtown development project to a $5,000 sidewalk repair has to have the same insurance coverage. And in fact, I would argue the opposite. They shouldn't be accepting a million-dollar liability policy if it's a hundred-million-dollar project. I mean, that seems crazy too, and in the opposite direction. So those kinds of broad brush one size fits all things I think can get in the way sometimes." [#8]
- A representative of a majority-owned construction firm stated, "We have to take the insurance you need to participate in the marketplace. I mean, I'd love to see more offers.

The capacity of that industry is a little goofy. You'd like to see more competition. That's not the only industry where you'd like to see a little more competition sometimes." [#18]

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Honestly, I hadn't paid that any attention at all, because we have a pretty high rate of insurance for our business. And usually as fit what the minimal requirement has been. … Only thing I could say is probably, if it is a barrier, then I would have to say the amount that they're asking for might be too high. And so, it might need to be reduced some." [#21]
- A representative of a majority-owned professional services firm stated, "I would love to target more of the utilities, but a lot of them require very large professional liability policies that are beyond what's reasonable for a company, our size to pay. So, we have a $2,000,000 policy and if I want to do business with Duke, I need a $10,000,000 policy and that professional liability insurance is extremely expensive. So that's just something we can't afford to do. Could we get it? I'm sure we could, but it's just, we're too small to pay for it. So, we end up not being able to do business with those types of companies that have that high liability requirement." [#24]
- The owner of an SBE-certified construction company stated, "I don't particularly have a whole lot of trouble getting insurance. It's very difficult to get insurance for the larger trucks. It's almost impossible to get demolition insurance, and if you have a claim, they cancel you. Normal companies don't write excess lines insurance, being demolition. You can't really just start in the business and go out and buy demolition insurance. They're not going to write you if you don't have any experience record." [#28]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "They make me have additional insurance, like errors and omissions assurance, which I go ahead and buy for an extra $500 a year just because it's required. But that can be, I've still done it, but it seems odd that we have to have all that sometimes." [#32]
- The owner of a majority-owned construction company stated, "The biggest barriers in trucking and when you're new is insurance companies, not so many insurance companies will insure new trucking company. Once they insure, they'll put a limit. I remember, the first company was Progressive, they do commercial insurance, but they put a limit, you cannot grow within a year over 10 trucks apparently. So, when you go over 10 trucks, once your contract is up in one year, I remember they sent me cancellation. I said like, 'Why? Everything was fine, no accident.' 'Oh yeah, because you outgrew our limit.' So, there's a lot of things that they... I feel like overall trucking is, if my statistics is right, throughout the United States, it's $800 billion dollar industry. And then it's very outdated and very old. So, a lot of stuff is, maybe they had these rules from '60s or '70s or '80s, that people are just used to it and they just keep it like that. I mean, now, last couple years, some new guys are entering the market as far as like they're trying to disrupt to market out of California, like San Francisco, new tech companies. So, they're trying to change insurance, leasing. Slowly it's changing, but when I was doing it in 2015, '16, '17, insurances puts you a limit, that you can't do much. And then at the same time insurance says, 'Well, we prefer you to hire only from Ohio.'" [#42]

- A representative from a Hispanic American woman-owned professional services company stated, “Difficulty with the Bureau of Workman Compensation - unfair business practices.” [#AV310]

4. Factors public agencies consider to award contracts. Nineteen 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 [#2, #3, #8, #19, #23, #27, #29, #32, #33, #34, #37, #39, #40, #41, #AV, #FG1, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "From that program, we did learn a lot about marketing ourselves and resume building and putting on the dog show, so to speak. In our world currently, that's really only relevant if we're marking ourselves to general contractors. … Point is, so for probably if maybe 80% of the work we do was all just low bids still. So there is no market, just other than for ODOT, Ohio Department Of Transportation, Kentucky Transportation Cabinet and Indiana, are three states that we would deal with. They all have pre-qualifications that we have to go through every year. Again, once you're in, they're easy to check the box because we're doing that work. We can just show here's a job we did. So, we qualified for all this stuff, but for 90% of the work, 80% anyway, as long as we're ODOT, we'll keep that ODOT, KDOT and MDOT certification. We're fine. We check all the boxes, as far as showing the work, we are capable of doing the work, or qualified. Then it's just a matter of being the low bid." [#2]
- A representative of a Black American-owned professional services company stated, "With regard to local, what I've also discovered, which is another reason why I have opted not to bid, is that the pricing models for government and municipalities, I recognize are significantly different than corporate. But they're dramatically different in their expectations. So, the scope of work is, we want you to do everything that you do for the corporate sector, but we want you to do it for half the price, or two thirds of the price. And so, when you put in best and lowest, those are almost oxymoronic. Best does not necessarily mean lowest, and lowest does not always equate to best. I don't know if best and lowest is the preferred way to get that message across. I get the understanding of certainly wanting to ensure that taxpayer dollars are well spent. But I can also tell you, having seen some of the proposals and professional services that I have seen, it's unrealistic. What you scope the work to be and do, and then in your pricing index, it's unrealistic." [#3]
- A representative of a majority-owned professional services company stated, "I think the way I would express it is, if you're looking for transparency, the entity that wants transparency should be the one that puts the effort into it. So if the government wants to be transparent about what's going on, if I bid on a job, then I shouldn't have to work at finding out what happened and how things worked out. Why not send out a spreadsheet that says we had 12 bidders, here's how we scored each one, and here's the points. And then I know where I was deficient. And the reason why I say it that way is again, if you're trying to help small businesses, a business that has a full-time person who is a marketing and proposal person, will get on the phone after losing a bid and call somebody up and say, 'Hey, what happened here?' And spend a half hour on the phone asking questions about the scoring process and where they could have done better and why they lost and so forth. When you're a small business and you're trying to be lean and so forth, you don't have that person

to do that, then it just doesn't happen. And so, if it doesn't get shared automatically by the entity, then I'm not going to get that information. … if I knew that I had lost every job and I saw the black and white there, the way they scored the points, 'Oh, this is why I've lost the last three jobs, because I'm missing these three points.' And I realize I'm just not filling out the paperwork right. … I think being proactive in providing that information, rather than it being a reactive thing to me having to come and get it would help me mainly because as a small businessperson, I don't have the resources to spend on trying to obtain all that information." [#8]

- The owner of a majority-owned goods and services company stated, "I think as long as we're competitive, they just want to get it done and make it happen. The price alone is not the issue. We're all consumers and we don't always go for the best price on something. We go for the best value. Sometimes the best value is a slightly higher price. But it might mean more service throughout the whole process, or on the back end. So that's kind of what I think buyers really should concentrate on is not the lowest price, but who's got the best value. The service comes into that equation. But again, getting back to the price thing, the price isn't always... I mean, even if you got a really cheap price, the lowest price bid, but the company didn't deliver, or they didn't communicate stuff that's back ordered or didn't bring you into a thought about supply chain issues. I think the buyers of the municipalities, they need to know all that stuff so they can weigh all out. This bid process has been around for oh, 75 years or longer. I don't know why we're doing business this way anymore. It doesn't tell whole story." [#19]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I put my owner's hat on. Just like you have a house, you're going to have work done on your house, you want the best contractor to do the work for you. You want the best one, the ones who have the most experience in what you ask and have them do. That's just nature. You don't want to have a guy walking around with 'I do windows' on the side of his truck. The next day, 'I do concrete.' But in public works, what we have been doing all these years, it used to be the best and lowest. But now it's, more or less, the lowest and most responsible bidder gets the job. And that responsible means a lot. That means that person is more than capable of doing what you want to have done. And a lot of us MBEs don't fall into that because usually we're not the lowest and you have bigger companies that have been around for generations. You can't outdo them. … it's just a dog chasing the tail. That's what it is." [#23]
- The co-owner of a WBE-certified construction company stated, "Price certainly seems to be the leading factor. I like to think that value is right behind that because especially on, well, on both janitorial and painting, I've seen it where people just come in and low-ball things that it's like, 'There's no way you can do a decent job and follow the spec.' I get that spec, and I look at that spec, and say, 'Okay, this is what you want me to do. Then this is how much time I need. So, this is my price.' Well somebody comes in and puts in half of an amount and it's like, 'Well, I'm not going to take a job and lose money.' Once we get a job, our reputation is everything. Even if we are losing money, we finish the job. But it does seem to run so much on price." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Past performance, experience, all that. Everybody

wants past performance, but how do you get the past performance if you don't allow me to perform on this? So, it's prohibitive from letting us really going after things and how do we get in if we can't get in to show that we have the past performance? It's just maddening." [#29]

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I don't know what they base their decisions on. That's another thing that's not really transparent, especially with Hamilton County." [#32]
- A representative of a majority-owned construction firm stated, "When it comes down to bidding requirements, whether or not the composition of employees are of race or gendered, whether or not the person's qualified. It was just what the team was composed of, or ownership was composed of is how some of the requirements that were made. So, it opted our business out of that." [#37]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I'm sure they're always shopping to get the lowest price, but not in all cases. A lot of times they want to work with somebody that they're familiar with and they got a relationship built already." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "If there's an incumbent and you typically know in this business who's the incumbent, you are wasting your time. Even though the representative from the company will give you the line that this is full and open competition when we know that it not because early in our careers we believed that, and we submitted and they kept coming back with reasons why we didn't win, even when we knew we were better than the incumbent. I don't even put in if there's an incumbent. I don't even put in a bid if there's an incumbent. And if that incumbent is not term limited in some way, they can't bid on it anymore or something like that. And as it pertains to City, County, or government work, if they have been in there for five years or more, not an opportunity. This is being compliant to advertising all that. We know it's already sourced." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Right now we are literally in middle of discussion with City of Cincinnati. They've award us a project because they said, 'As much as they love the work my company does' they said, 'you have won all the contracts. So, we want to give it to other people.' Which is again they're shooting us for being qualified, being competitive and delivering on our promises. We do things that a lot of people cannot do as competitive, but yet we are being penalized for doing to do a good job." [#41]
- A representative from a Native American-owned construction company stated, "In environmental world we center on safety and compliance. We win the jobs on the value we deliver not lower price. My recommendation for services that require compliance is for the evaluation to be value oriented rather than low price." [#AV245]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "We have done years of public records requests. We have seen the proposals, we've seen the contracts and the contracts in our space of HR diversity workforce development, they are consistently landing with the same organization so much so that there have been times when the awarded bidder had actually submitted the bid after the deadline, but because of

the selection committee being very familiar with their service, extended the bid to get them in. And I think that's a challenge when you have 20 or 30 bidders that meet the deadline, there's not a response, and then all of a sudden there's the awarded contract and rightfully so, but it was after the fact. So, was it we were not qualified or et cetera, or was it that there was a relationship and kind of a decision made before the decision?" [#FG1]

- The Black American owner of a DBE-certified professional services firm stated, "There's a very strong veil that... at least within the County, but there's a veil to protect old generational businesses. And it's very hard to pierce that veil. You kind of tell yourself, 'Well, how many times am I going to play this game? How many times am I going to be a fool?' Right. 'I'll just go out into neighboring markets and deal with companies or public firms that will appreciate us,' right? So, I mean, maybe that makes us part of the problem because sometimes we get so frustrated, we just tap out, right? And perhaps maybe that's what they want us to do, but it's really about piercing that veil protection." [#FG1]
- The woman owner of a professional services firm stated, "It just would be nice to have it a fair playing field and not have it already decided before you go through all the work. I just think that's... So unfair. I would just wish people go, 'Oh, we want this company. And therefore, we're going [with them],' and not make others of us. Because sometimes I think when you walk in the room, they already know who they're going to go with because of the relationships, and everything and what... You have no way of knowing what the relationships are. I guess that's where humans work. I don't work that way and I don't think there's anything we can do about it." [#FG2]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "RFPs can be slanted, and you know, that's kind of the fact of the business… this project, $10 million, it's three people. So, I'm in a room. I'm like, 'Oh, we're going to pursue this? This opportunity for us to have a direct PM deal with the County.' And you know, I got these big, huge firms that, why are you pursuing this little three-person job? They made a point to say that no minority requirements on this job, which … told them they didn't need an MBE on the team sitting around the room in there. We don't have any partnership opportunities here. ... That's part of the bid process. So, and so when they said that that told me that even if I pursue it as a prime, they really are in love with global. Because these was all global firms I'm sitting around, right. They want global. Three people, but they want global. And so I just felt that they could do a far better job at communicating what they want, following state law, right. So that businesses like ours, and even large men that can decide, do I invest in this or not? And they don't think twice. I didn't feel they do. So, I agree with everyone here that they could do a far better job in their procurement processes so that we don't waste our money." [#FG2]

5. Personnel and labor. Fifty-nine business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #2, #5, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #19, #22, #23, #24, #25, #26, #27, #28, #29, #32, #33, #34, #35, #37, #38, #40, #41, #42, #43, #AV, #FG1, #PT1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "[We have] challenges getting workforce. It's a specialized industry so that

makes it harder. So, when the economy's good, we have harder time finding talent when it's challenging, there's more competition." [#1]

- The co-owner of a majority-owned construction company stated, "Our firm? Well, through the years, the bigger barriers would've been bonding capacity, finding qualified personnel. We're a merit shop company, we're open shop. The union work tends to limit a lot of opportunities for us … The most success we've had is through some of the trade associations locally, I'd say, Allied Construction Industries. … The workforce shortage is the challenge for all of us. We're the high end of that since where all of our work is, well 90% of it is [prevailing wage]. So, we're paying at the high end of the scale. We're the top of the food chain as far as what we offer our folks monetarily. It's still a challenge, not enough people in the workforce now, but everyone's facing that stuff." [#2]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "Number one, I think in the industry, insurance and risk management, there's not this vast pool of people that are available. The majority of folks who are in the industry didn't go to school to do this, maybe 10, 15%. There's more coming in the pipeline because more schools now have the programs that are in place. As we try to compete for a co-op or internship, we're often not the chosen one because we're not the high-rise building, this glossy what people envision as a typical, traditional type of co-op or internship experience, but we have lots of value to add and to show folks about the industry. In terms of talent, it's difficult because there's this gap of the current folks in careers. The majority of them are at retirement age and so they're on their way out, and to capture them on their way out, they're pretty expensive. You have to make that decision; do you want to invest all this money in someone who's very experienced but only plans to work two or three more years? The return on that's just not really there. The other side of it is the younger folks in their career don't necessarily have the experience, we can just grab them and shoot them out there to a client because what we're consulting on, our clients expect those folks with experience and the knowledge to be there. We don't have a lot of products where you can really learn and grow through. It's really you know it and you do it. There's a couple of projects, but most of it is, 'I've seen this somewhere before and here's the best practice that we can leverage. Because I've done this a hundred times already, I know how to give you the best in class, or the most efficient way to achieve what you're trying to accomplish.' It's difficult." [#5]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "I think we could do better with keeping co-ops coming through here, but yeah. I just wish there was a better program that would help facilitate staffing." [#7]
- A representative of a majority-owned professional services company stated, "Probably the biggest challenge is finding qualified people that can do the work. We have on occasion spent up to eight or nine months trying to find a person to fill a role here. That's probably the biggest challenge. We honestly do not market to try to grow our firm because it's so hard to find people that we don't really want any more work until... if we find somebody that's good, we'll hire them and then we will work to get some more work in. But that's our biggest challenge, really. We have one fellow [who is a recruiter] … we've hired two or three people through that. He actually specializes, the only people he places are structural engineers. So that's a very highly specialized firm that avoids us getting a lot of the

candidates that you don't want to talk to that just are filling out applications. And so we tend to use a more focused approach like that. We've tried a couple of times using some of the broader, like Indeed or some of those types of outreaches, but we've had extremely poor success with them. There's just for professional services, you just get way too many people that don't understand even what the qualifications means. So, part of the reason that it's hard to find people is that there's probably near full employment of engineering right now. Everybody has a job, they're content, and there's not a lot of people looking around unless they're not really worth looking at, and then they're looking around, but that's because we don't want them anymore than where they work." [#8]

- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "Our business model, it's a barrier. If I have finance, I can develop younger folks. But because of the nature of the service we offer, most of our customers want experienced engineers. Fortunately, having worked in P&G and GE globally here in Cincinnati at the high level, I have network of colleagues that retires, that I'm able to pull together for some of the work. Because they require highly skilled, some of them requires highly skilled, specialized type of service. But we can train young folks. If I had the [resources], my inclination would've been to recruit young folks and train them on those specialized skill sets that we already make them grow and be very successful." [#9]
- The woman owner of a construction firm stated, "We're a union contractor, so we can hire him and lay them off as we need it. It's like everywhere else. The labor pool has good guys and gals in it, and bad guys and gals. And you just kind of... You got to sort through them and find the ones that you like and hang on to them, and send the other ones back when the opportunity arises." [#10]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I would say it is, and has been, and continues to be access to talent. You know, it seems like that's a problem with every single skilled trades group that I know. There's as hardly anyone coming into the skilled trade nowadays. So that's been the hardest thing for us, for growth is everyone that we get, we're starting from scratch with. And a lot of these kids nowadays, man they can't even read a tape measurer. So, it's like, you're literally starting from ground zero and that's a big investment." [#11]
- The owner of a majority-owned construction company stated, "I'd like some way to be sure that I have work in case I hire somebody. I don't want to hire them for one week and then have to let them go the next. I want to keep them working. … If I got a hold of some kind of a contract or something where I needed people and I could keep them working for a year or two, then I would certainly hire them. I'd figure out how to pay them. And I'd figure out how to do the payroll, things like that." [#12]
- A representative of a woman-owned, DBE-certified construction company stated, "It's getting harder to find people who want to work." [#13]
- A representative of a WBE-certified construction firm stated, "Employees, getting help. There's not a whole lot of us that like to go to work every day. The coronavirus has definitely changed how we look at our jobs. I've heard that in all the trades, so it doesn't matter what you do, if you're a drywall or a painter, plumber, everyone, we're all looking for work. I mean, they're all trying... Everybody's hiring." [#14]

- The owner of a majority-owned construction company stated, "There's not enough kids getting into our field. That's been that the that's been the case now for 10-plus years, so the help is it's very hard to come by and it's just going to continue to get harder. … The drugs is an issue too. … I found that a lot of these young kids, they're so dependent on drugs it's insane. ... I probably went through at least a dozen 18 to 21 year old kids last summer. I mean, the longest I kept one of them was maybe five weeks, and then the majority of the time it was getting rid of them because they were stoned and being late. … I've talked to the Butler Tech Career Center multiple times, and they've sent a couple kids over, and even there I've found the same thing. They're not cut out for it. It's not always drugs. Sometimes the kids will get on the job, and they see how hard a work it is, and they think to themselves, 'You know what? I want to find something else to do for a living. I don't want to do this the rest of my life.' It's not easy work." [#15]
- The owner of a majority-owned goods and services company stated, "That's always a challenge. Thankfully though, because of the business model, I've got long term employees generally, because I'm looking for pretty much some specific skills … most of them are somewhat educated and also skilled. My challenge is making sure that I offer a safe, fun, competitively compensated workplace for them. So rare time that I have to look for someone it's a brave new world all the time, because I don't do it very often." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "I used to go to Urban Leagues, I used to go to places to hire... I used to even hire vets. One of the biggest barriers about vets these days, though, they have PTSD, they have so many substance abuse needs, that after two months of working... They were my inspiration in the beginning, because like they are project-oriented, they are like, 'Let's get the mission complete.' And I'm like, 'Yes, let's do this.' They start, they start, they start, and then they stop. Fireworks come around for Memorial Day, they're underneath the bed, drinking or smoking crack out of a pipe. I've had guys steal from me, I have guys break into my office and steal medication out my office. And then it goes against even with like ex-felons. It's both ways. And then people who don't have any record it at all. So it's kind of hit or miss, to be honest. I have to really find people that want to work, which is why I primarily self-contract out now, because I usually hire in other businesses that are already established, to have just as much to lose as I do, rather than hire individuals. Being a small business owner, people feel like you can pay out any time." [#17]
- A representative of a majority-owned construction firm stated, "We pay well above minimum wage, but the real issue is I think it's been true for a while that the people that want to work or have a job and are doing their thing, excuse me, have to kick the plug out. I think the people that want to work are working. I think that the issue we get into are twofold. One is the drugs thing is a lot... the people that we get lately, we're finding that there's some turnover. So, we're having to hire more, we're having to over hire to find good people right now. Because they are jumping, people are jumping, there's a lot of upward bumps happening around town in wages so we're competing with other warehouses." [#18]
- The owner of a majority-owned goods and services company stated, "I'm blessed not to have turnover. Which to me is very expensive. And the training process, and I figure it's better to pay your folks a little bit more than maybe the go-on rate. Because you don't want

the turnover, and everybody wears a lot of different hats. Which I think makes their jobs more interesting. No one is really pigeonholed in anything. So, they get to do a variety of things and they seem to like that." [#19]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "[It's] difficult to find salespeople, difficult to find good production people because nobody wants to go into the manufacturing anymore. It's just difficult to find people to sell it and difficult to find people to produce it." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Finding people with backgrounds in what we do, it's really hard. … And the younger people... And when I say 'Younger,' I'm talking about your millennials on down, they're looking for something that pays off real quickly. They don't want to grow and learn the processes. They want to hit it and run with it right now, not knowing what they don't know." [#23]
- A representative of a majority-owned professional services firm stated, "For our business, because it's so highly technical, those engineers have great value, but their ability to communicate well and effectively with clients is a little diminished. And so the reality is we're very high tech and yet we're not personable enough. … for us it's getting technical competency with the customer acumen and the business acumen. ... Finding experienced labor, extremely difficult. And very hard to do, very common to end up in bidding wars. I made four offers in the last two months to people they accepted them and then they reneged on me and took... Somebody else came in and offered them more money and I gave them what they asked for. I didn't even negotiate. So training is the way to go … it is the way to do it, but it is expensive on a 17 man firm. It's very hard to do so we have to be very selective about how many new people we bring in because we can't afford the drain on the inefficiency, with us being 17 people. … I got a young engineer right now. He's supposed to have done this arc flash in a 100 hours and it's taken him 300 hours to do it. And of course the second one, he did it in 200 hours. He's getting better, but he's still not quite there, and now that's been over six months of just a drain on the whole company to have bring one person in. … there's nothing you can do about it. You just have to be selective about how often you do it and with how many people. … if you want to grow this business faster, the way to do it would be say, okay, let's get a, a loan for, 3 million and go hire a whole bunch of engineers and train them. Okay. And spend the next year training these engineers and bam. Then all of a sudden we'd have a whole group of engineers and be able to go get all this work. That's not reasonable. No, bank's going to give you a loan based on, you want to spend it on training people?" [#24]
- The Black American male owner of a construction company stated, "It's just impossible to find people that want to work. They do not want to work right now. I don't understand why because I pay good. I start off at $18 an hour, and that's with no skill, no background, or anything. And then you can make as much as 50 to $60 an hour. … you get people to come to work for you and they work for a day or two or probably two weeks and they quit. Another one is they come late, leave early, take long lunches and long breaks. I have to let them go. … you just can't get anybody to apply. We actually go out and recruit now to find people and make phone calls. I mean just putting up an ad saying, 'I'm now accepting applications,' doesn't work anymore. You actually have to get out here and search for people. Sometimes

that's hard to do because I'm constantly bidding work. It's easier just to hire to have them do the work. So, most of my work is performed by subs due to that lack of interest … It's very, very hard to find people. Even with my subs, it's hard. I mean I sit with one of my subs the other day and we actually went to people's houses and sat with them and negotiated getting four and five guys from this person and three over here. I mean I have never done anything like that. It's just crazy that we have to actually go door to door to people's houses almost, so to speak, and find people. It's real hard, even with the money you offer. I mean we can offer good money. At the project we got going on right now in Columbus, we offering people anywhere from 40 to $60 an hour, depending on experience. No experience, we give you $40. You got good experience and you know how to do this work, we give you $60. That's over $3000 a week that we paying out for one person, and I mean people are turning it down. That's crazy because that's a lot of money." [#26]

- The co-owner of a WBE-certified construction company stated, "In the past year it has been just awful. We've always had trouble finding labor because we are totally a service company. So labor is practically our whole kit and caboodle, but in the past year it has just been awful. Say, we'll put an ad on Indeed and we might get 50 responses, 75 responses, or more. But when you start calling people, they don't show up for the interview. They don't show up for orientation after you hired them, they don't show up for the first day of work. It's just been a nightmare. they pretty much just totally ghost you. I will reach out because sometimes I'll text the person our address or something, so I'll reach out and say, 'Oh, it's 10 after. Are you lost?' And they just don't respond. … I haven't really tried to get additional work in the last year or two, because I'm just trying to take care of the customers that I have because it's so difficult to hire people. I'm scared to death to bid on anything for the most part because how am I going to take care of the job? … One challenge, certainly, that we've come across… when our people would go and work on a prevailing wage job, and maybe they would make $23 an hour, and then they'd go back to their $15 an hour job, they didn't care for it much. So that always caused the challenge of who do you let do that? And then how do you reel them back in that, 'Well, this job isn't like that kind of thing.' We make that clear that, 'Okay. We were awarded this job. It's a prevailing wage job. So the pay is for you $23 an hour.' Just as a number. 'But when you go back to X, Y, Z painting, you go back to your regular rate.' … we're happy if we get 3% profits sometimes on jobs. It's not like we're or trying to gouge anybody or anything." [#27]
- The owner of an SBE-certified construction company stated, "Generally, anybody that'll work for a contractor anymore expects $25 an hour plus, or more than that." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Business wise, not a challenge, not a problem at all. But healthcare, yes, for employees. Still goes with that package of being able to attract talent by having a compensation package. We have a problem being small, getting good healthcare at good rates. It's because things cost money. … We don't have the right people in the right places. Don't have the opportunity to train the people because when they're getting trained, there's nobody to do the work that they're doing. So, it just sort of all goes together. There's plenty of training things out there I'm sure, but we don't have the ability to send off anyone to get them trained because we don't have enough staffing in place to cover to make sure that we're still able to do the day to day. It's a catch 22. They need to be trained but work still has to go on." [#29]

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I do rely on local colleges in their film programs, and I get interns that way. And sometimes the interns are very talented and can help professionally on a project." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I'm starting to see it as an issue, since COVID. I mean, I post out openings, potential openings, and, I mean, I'm getting crickets sometimes. I have to be more proactive about using the services to look at the resumes of people who didn't even respond, and calling, which I always did that, too, but, where I used to get hundreds of applicants, it's now like eight, five, ten." [#33]
- A representative of a majority-owned professional services firm stated, "Anything that I've been involved with the state of Ohio or even a municipality, you make the proposal, you don't hear anything for quite a long time. And then all of a sudden you get a notice that it needs to be completed in the next 30 days. So, there you are with a big project to complete, but not the manpower left because you had other projects that you had to be able to make money. You needed to have projects in your pipeline, and then you can't invoice until the end of the project and then not expect payment for several weeks or months." [#34]
- A representative of a majority-owned construction firm stated, "Finding the right fit of employee to train or finding someone who's qualified can be difficult." [#37]
- A representative of a Black American-owned construction firm stated, "I would love to find more because in this industry it's not like you can just learn something overnight. This is a journeyman's trade. You have to work at it for a long time to really become a master at it. So, I consider doing some training programs and training from younger guys and women too, if they want to do it. But it's difficult to just get somebody off the street to do this kind of stuff. You really need to put them in a training program." [#38]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Labor can be a problem. It's a challenge. Well, one in order to be in our field, you got to be knowledgeable. That's first. Second for us, you have to demonstrate that you have been successful in the role. Third, we're going to test to see your level of knowledge, right? So, we're screening to ensure that when you come on board with us, you are immediately contributing. We're not training people to get ready. We hire people who are ready. And those who are already, we then position them to take their skills to another level. So we're looking at people coming in, being productive." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "There's a tremendous shortage of labor. Before the pandemic, we were beginning to face it. We gave talks at the start of high school and then we went to junior high, tried to recruit people to come into for their life, for future to come into construction industry. So, we had anticipated a shortage of manpower, but because of the pandemic a lot of people quitting their jobs. And of course we lost a lot of people to COVID. There is a tremendous shortage, so that is what is the lingering effect of the COVID is. ... Right now there's a world going on with people offering substantially more money with people. We lost a young kid that we were about to let him go because he keep forgetting things. And we found out that afterwards, he admitted to us that he played football and had 11 concussions. That was the reason he couldn't remember a thing. ... He was making starting us at 45,000 and somebody

offered them $80,000. Because this is ridiculous in that part. But I mean, that is one of the biggest challenges for us to get the people and managed to stay within our budget." [#41]

- The owner of a majority-owned construction company stated, "Everybody has problem with hiring drivers, not enough drivers anywhere, not so many good schools. And, well, it's not really attractive for a lot of people because people think, 'Oh, if I go...' If they picture a trucker, I don't think that's a good picture for a lot of people. When they think about a truck driver, everybody associates with something bad like, I mean, I'll be honest, like, 'Oh, some fat, older guy.' That's how they see it. But a lot of new guys are joining, so hopefully it's going to change, but finding drivers is very hard. So I always hope that states or municipalities could help out by, I'm sure each County has statistics of unemployed people, right? Well, truck companies are hiring. All they need to do is go to school, get the CDL and get a job. And it's a very good-paying job. So I'm not sure how that works, because we always thought, 'Oh, why don't you go to unemployment office and be like, 'Hey, can you give me the list?'' So many people are looking for a job, but trucking needs so many drivers. At least DOT, department of transportation came up with, it's called Clearinghouse now. I think it started mandatory from last year or the year before. … DOT said, 'Well, we're going to make it public information, and we're going to make it a central system.' That now, if guys fail the drug test, it's pretty much reported in a database that everybody can see. ... I mean, they could do the same thing for companies, that let's say, if we do something wrong to the driver, well, the driver can report. Or if driver leaves a truck somewhere, they need to... So it should be both ways. So to keep both accountable for what we do versus what they do. … for the last year, I have been using two recruiting companies, and they have been helping me out pretty much." [#42]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "It depends on every different phase. So if there are a lot of big contracts going on in the federal space in similar work on different agency, it's very hard for us to get people and retain. So, my philosophy is in any time I hire somebody, I usually try to pay them above and beyond the fair market price so I can retain those talents and so forth. And so far, our retention is about 99% or 99%. So, it is pretty good in compared to the other businesses." [#43]
- A representative from a majority-owned construction company stated, "Always find it hard to find qualified people in our market, as far as our industry is concerned." [#AV18]
- A representative from a majority-owned construction company stated, "Just like everybody, finding help is the big deal." [#AV44]
- A representative from a majority-owned construction company stated, "The lack of help. Can't get employees - any skilled enough to pay attention. I have always been able to find work, but the workplace is changing. I have to work more by myself now." [#AV227]
- A representative from a woman-owned professional services company stated, "Any potential employer I would tell it is hard to find talent. If you are not open to remote work I would not take your contract." [#AV266]
- The Black American woman owner of a professional services firm stated, "For me, I can only see a certain number of clients because it's just me as a solo practitioner across two practices. … Right now, I'm completely stifled by the fact that I need more help." [#FG1]

- The Black American owner of a DBE-certified professional services firm stated, "During the pandemic, there's been a shift in terms of just that employee employer relationship. It has really changed. And it's caused us as small businesses to kind of rethink things. Our costs have gone up. Our health insurance costs went up back two presidential administrations ago and that was a challenge. But labor is really a challenge, I think, especially in this marketplace, especially post COVID." [#FG1]
- The woman owner of an MBE-, SBE- , and EDGE-certified construction company stated, "The City wants you to have reliable employees, but you can't find reliable employees and you are made to pay that same amount of money for someone that you have to teach. Now, another contract we were on, we had some, we had some regular employees. We had regular employees you have to pay $46 an hour. Okay? So when you hire someone that does not have this experience, you still have to pay them that type of money. So what's happening is that you're losing all of your revenue because you're paying somebody who cannot keep up with the work. It's basically set you up for failure. … it also don't give no initiative to get any better, because if I stop you up at 40 something, you can be a bum as long as you work for me. … you giving these guys 1600 to 2000 a week with no experience. You tell me, you start a business. It's like starting a football team or pro football team and telling me I can't have nothing but high schools. It's setting you up. You're not gonna win. … I just could never get the manpower. And you going to either deal with older retired guys that don't want to work 50 hours a week, or you going get to deal with guys that don't have no experience." [#PT1]

6. Working with unions and being a union or non-union employer. Twenty-two business owners and managers described their challenges with unions, or with being a union or non-union employer [#2, #10, #11, #12, #13, #14, #15, #17, #26, #27, #28, #29, #34, #39, #41, #AV, #PT1]. Their comments are as follows:

- The co-owner of a majority-owned construction company stated, "We're a merit shop company, we're open shop. The union work tends to limit a lot of opportunities for us. Well, prevailing wages are fine, we're a big fan of those. But conversely, project labor agreements (PLAs), and like in Cincinnati, hasn't touched MSD because they failed to do that, but they enacted responsible bidder legislation. That's what they called it, responsible bidder legislation. The reality is that eliminated all the open shop contractors from participating in those jobs. Currently that's in Cincinnati, that's Cincinnati water works projects and stormwater projects over a certain size. Again, with MSD, but the County pulled back and wouldn't participate ... There's a constant pressure we see to make more and more of the PLAs. That limitation where they convince the owners, the owner being usually municipalities … that they will guarantee them some non-strike clauses and more, no slowdown in work. … Recently, Hamilton County did one, they did their coroner's office, well the POA, where it doesn't say you had to be union to participate, but because of all the restrictions in there, I don't know any union contractor that would do it. It's too much of a challenge. You have to get all your people out of the hall and you can't intermix people. Just for several reasons, it just would never work. but frankly, the bigger obstacle that we have is the larger general contractors in the highway world. We have a great working relationship with them. We work side by side. We've done some joint venture, seldom, but some. But because of their agreements, by being signatory to the unions, they agree not to

hire any non-union subcontractors, which is where we would lie. For a long time, they would sneak us in under the radar, not just us, but contractors. The unions [said] enough was enough and they pretty much said we have to stop their practice. I certainly understand where they come from. It's how they grow their brotherhood, et cetera. For us, it's quite a challenge. We could easily probably double our size volume if we would choose to take on that work, to go union, to allow us to take on the work. … So as things got more enforced things clearly shifted, which really forced us to be prime, that or get out of the market, … [that] really put us in the driver's seat, which was way more to our benefit. So from that perspective, the union did us a big favor. Now we're the prime and we sub to the union guys, if we need them. … as the PLA is getting more, we see that more of a popular mode of putting those on projects, but that will definitely limit growth, not just entry opportunities … It takes like half the competition out of the field." [#2]

- The woman owner of a construction firm stated, "From my experience, I started in the union 52 years ago when I was 18 years old, and for me, from my experience, has been the greatest experience in the world. I've developed a considerable pension with my association with the unions. And we've had our ups and downs, but I still have a lot of friends in the union, and we've maintained that relationship on both sides of the fence. So, it's been a great experience for me." [#10]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "Now I, myself am a union member ... My employees are not, so prevailing wage has been an issue a few times as far as trying to go after prevailing wage jobs because they are not in apprenticeship programs I recognized by the state. So, I haven't been able to bid really on those jobs just because if I have to pay those, I pay my guys well anyway, but if I have to pay them journeyman's scale, because they're not in a recognized program then I can't bid those jobs because other people that can bid using apprenticeship wages, I can't compete with that." [#11]
- The owner of a majority-owned construction company stated, "It's not really an issue for me because I know that if I have to pay union wages, then that's required by the contract and they're happy to pay for those union wages. So, it's not an issue for me, no." [#12]
- A representative of a WBE-certified construction firm stated, "We're a union contractor. So, our employees are union employees, but we are independently owned. We will work in a Tri-state. We will not go national, but we will travel as far as Columbus, as far south as Lexington. What keeps us from doing that mostly is the 212 jurisdiction… anytime I leave that 212 jurisdiction, I have to register in the other local jurisdiction. Sometimes they like that, sometimes they don't. … getting rid of prevailing wage is not good for anybody. Here's my experience. So if we bid a project that's got state money in it and let's say that I'm contractor A and I paid prevailing wage, and I pay benefits to my employees. And I bid this project at say $150,000 and a lot of that drives in my money is my employees, is my labor expense. I mean, I just can't get around it. So, contractor B who does not pay prevailing wage and does not pay benefits to his employees and he's bidding $150,000 job. Do people think that he's going to bid this job at say $50,000 because he don't have to pay prevailing wage? I'm going to say no, that he's still going to bid the job at $150,000 and he's just going to put way more money in his pocket. So there's no way that these guys, these non-prevailing, these guys who do not pay employee benefits and do not pay a livable salary for

their employees, they're not getting a project any cheaper. The employees just make less. Do you know what I mean? They're not giving this stuff away. So, you just, instead of a guy making $30 an hour, you got a guy that's making $12 an hour with no interest. So now this one guy makes all the money, instead of all the other guys that would've been on that job making that money. So you can see companies like me, a union contractor, you'll see us gravitate towards federal programs … because I can't no longer competitively bid because my labor rate is so much higher than the next guy's labor rate, because I'm paying benefits and I'm paying a salary you can live on." [#14]

- The owner of a majority-owned construction company stated, "I'm non-union. All the union jobs I've seen is 10 times what they should cost and guys just standing around. I've hired several of them from the union that have been there for 10, 15, years and they don't even know the basics. I mean, my opinion, the union is a bust. I used to do a lot of work up at Miami University for Oxford. I kept getting the jobs because I was competing against the unions, and obviously I was half the price, sometimes a lot less than that." [#15]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "I don't usually work with union shops, but I am open to it, because I used to be a part of the iron workers union. They don't particularly like me, because... I think they actually kicked me out of it because I told them that they were just using me as a body to collect fees off of, they didn't care what job I went to. My truck, I had parked in a garage downtown, near Duke Energy Center, and a Fiat 500 rolled into the back of it, blew it up, my truck. Well, I was working on a building downtown. When I told them I didn't have transportation to get to my classes at the union, which was in Kentucky, near the airport, they told me, 'Well, we're just going to get you some jobs on a bus line. How does that help out? We keep you working so we can make sure you pay your fees.' That's all they cared about. They didn't care about anything else. So, I tend to stray away from them, because I know what type of mentality it is there. I know that it's just... they're just in it for the dollars, and whoever can... They can pay themselves a lot more, too. It's [for] profit organization." [#17]
- The Black American male owner of a construction company stated, "So going to the union and getting in the union in a trade, that just really was a benefit. I made money. I went to school twice a week, and I worked 40 hours a week. I think that's really a benefit. I think it is much needed, definitely in construction for people to continue to do that in order to, I guess, to get people to want to come aboard and work. So, I'm a big advocate of that right there, on-the-job training … but I don't like the union. The only reason I'm going to say this, even though I came from the union, I got my training from there. I was a die-hard union person. But once I got into my own business and understanding how the union ... I'm just going to speak about the one I came from ... I feel like it's ran by the Mafia. I think they are robbing people of their money. They tell you that you make ... Well, when I was there, you made $43 and some change, but I was taking home $650 a week. I never really understood that until I opened my own business. They call all this money they take from you, contributions, and I never knew where this money was going and why I wasn't getting this money. Why did they take the bulk of my check? Why do we call these jobs prevailing-wage jobs, when in reality it's a way that the union get into these jobs? They're not paying their workers right. They're not paying anybody right. They're keeping the bulk of your check, and the systems back them. I don't get it. For instance, if I'm on a prevailing-wage job as an

open shop, and right now it's $53 an hour in our trade, I have to pay you $53 an hour. No matter if it's your first day or your 30th day, you are going to make top dollar and I have to pay you that. You're going to take home that money. But if I'm a union company, you're not getting that. You're going to get 20-something dollars an hour or I think it's 30-something dollars an hour if you have what they call a journeyman's card. Other than that, if you're apprentice, I can pay you 20-something dollars an hour. They have a wage scale that they can go by. They don't allow an open shop company like me to have a wage scale. I just think the system is corrupt, and a lot of people are blind by what's going on with the union. ... The union need to be investigated and criminal charges filed against them because they actually out here robbing people, at least the union I came from. … issues that I have ran across, which it's just really one issue that I have found with the process is that some jobs say union only. I don't like that. If there's a project, government money or whoever money is in it, why is it just strictly union, for union workers? I don't like that. I just feel like that's just limiting the pool for us to all eat. I have run across that on quite a few jobs, especially in Hamilton County where it's a lot of projects say union only. So that's probably one of the major obstacles that I have ran into… I experienced more racism when I was in a union than me being out on my own as far as direct in my face." [#26]

- The co-owner of a WBE-certified construction company stated, "One challenge, certainly, that we've come across, besides the paperwork, with turning in payroll records and all that kind of stuff, which, I understand, and that's fine. They got to make sure you're paying people. But when our people would go and work on a prevailing wage job, and maybe they would make $23 an hour, and then they'd go back to their $15 an hour job, they didn't care for it much. So that always caused the challenge of who do you let do that? And then how do you reel them back in that, 'Well, this job isn't like that kind of thing.' We make that clear that, 'Okay. We were awarded this job. It's a prevailing wage job. So, the pay is for you $23 an hour.' Just as a number. 'But when you go back to X, Y, Z painting, you go back to your regular rate.' Which may have been 15, $16 an hour. It doesn't happen very often … I don't blame them at all, but I feel like you can only pay so much and be competitive. And shoot, we're happy if we get 3% profits sometimes on jobs. It's not like we're or trying to gouge anybody or anything. It's tough. In the last few years, we haven't even bid on prevailing wage jobs. We've gotten to the point where it's just too hard to deal with." [#27]
- The owner of an SBE-certified construction company stated, "The big problem with unions in Cincinnati right now, is that the City allows the unions to set the prevailing rate, which is the union rate, prevailing wage rates. I've heard of my competition paying $13 dollars an hour to operate equipment. The union prevailing rates, to the best of my knowledge is plus or minus $46 an hour. And then also, how they classify the jobs. If you classified the wrecking of a residential structure as residential, the wage rate would be closer to the $25 an hour than the 46 or $48 an hour. But when they do a prevailing wage rate job, they're able to bump that up to 46, $48 an hour. What a lot of people don't realize is, that with all the benefits with that, that turns into 75 or a hundred dollars an hour with your insurances and your FET, unemployment worker's comp. Northern Kentucky, the prevailing wage rate years ago, I seen it at $12 an hour. Over in Cincinnati, it's 30 or $40 an hour for the same exact job. Where the unions didn't have control in Northern Kentucky, they based it on what the different people were getting paid, not just the union guys." [#28]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We are union. And just so you know, we did that on purpose. Just trying to be accepted in the industry as a minority, female owned construction company. People normally don't want to do business with people that look like me. So, we purposely went union to say, you're going to get the same skilled and trained workforce that you're accustomed to that if you go next door. So, no problem whatsoever with unions." [#29]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "My new company, we stay within 100-mile radius because we have what is called the double breasted, meaning half of the company's union, half of it is non-union and it is hard to go with the union company too far and take the travel time and so on, because they would be not ethical to charge the customer that much. We have a tremendous relationship with the union and the chairman of the union's pension board. They treat us well because we are in the same boat together. They know we will not lie to them. Again, the other biggest problem is that right now we are anticipating probably another 70, 80 more people to hire and union doesn't have that many people. So, it will be a problem that we are going to be facing this summer." [#41]
- A representative from a majority-owned construction company stated, "Local 44 union. It's a roadblock. Harassment. Hard for non-union contractor to work with them." [#AV26]
- A representative from a Subcontinent Asian American-owned construction company stated, "MSD has been very tough to work with because they have a union requirement. Otherwise, projects are just so large that minority and smaller businesses don't get a chance to bid because of bonding restrictions and size limitations for prime contracting. I think the marketplace is fine, I think there is plenty of work out there, I think it's just making it more affordable for opportunity." [#AV50]
- A representative from a majority-owned construction company stated, "We do with City of Cincinnati [and] they instituted a program where if you are not union very difficult to do work with them." [#AV53]
- A representative from a majority-owned construction company stated, "I am a non-union company, so when we are inspected it is done by union inspectors which might cause a conflict of interest. That's my concern...it could cause a barrier." [#AV201]
- A representative from a majority-owned construction company stated, "Union, we did the job, we had the lowest bid. They gave us key cards to get in, the union stole our employees, then the employees took the key cards with them [which] limits our work or [means] no work from GSA." [#AV300]
- A representative from a woman-owned professional services company stated, "Losing prevailing wage to all contracts would be beneficial. It makes it very hard to compete." [#AV273]
- The woman owner of an MBE-, SBE- , and EDGE-certified construction company stated, "It wasn't union involved then [when you bid the project]. But then all of a sudden here it comes the union. Okay. So, you've already made that decision what that contract is, but you didn't put aside for the amount of the money that you're supposed to give the union who just comes in and just takes over your contract. You know, if you don't do what they say,

then you off, they can get, you kicked off the job site, job site. Now, as far as the barriers, as I said, the union are allowed to come in, even though you may not have known that this is a union contract, they're allowed to come in and upset, disrupt your whole project. Then you have to pay the union. I mean, everybody gets part of that $10 and you end up with maybe two." [#PT1]

7. Obtaining inventory, equipment, or other materials and supplies. Twenty-nine business owners and managers expressed challenges with obtaining inventory or other materials and supplies [#10, #11, #12, #14, #15, #16, #18, #21, #22, #23, #24, #27, #28, #29, #36, #37, #40, #41, #42, #44, #AV, #FG1]. For example:

- The woman owner of a construction firm stated, "The material acquisition, more if a job is running smoothly, if it's a start-and-stop kind of thing, that really hurts things." [#10]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I mean, everything has gone up in price due to inflation and COVID … the main constraints have been equipment supply. I mean, what industry is not facing that kind of shortage right now with stuff?" [#11]
- A representative of a WBE-certified construction firm stated, "I mean, two years ago, we had no issue, now we got a supply line problem. So, and no more than anybody else right now is experiencing the same problems that everybody else is having." [#14]
- The owner of a majority-owned construction company stated, "Just finding materials and being able to pay for them is what's killing me. Materials are really hard to get right now, and inflation is the worst I've seen it in my career. inflation is... things, they're up 400%. It's hard to make any money when your materials go up that high, especially after you already bid the job and got it, and then that happens to you. And on top of that, just the supply chain is a nightmare right now. You can't get enough material to do the job. I spend most of my day just calling and driving around trying to find things, and usually it winds up coming up as a fail. To be quite honest with you, my job's never been harder as far as that perspective. Well, everybody understands to an extent. We're charging more, but we're still not able to charge compared to what we were making before. I mean, if that was the case, I truly think that the economy in the construction industry would be completely shut down by now. I think a lot of contractors are just trying to keep their head above water like I am, just to keep their guys busy so we don't lose them. Inflation's been going up on a monthly basis. It's not stopped. It's hard to keep going to these contractors after you already signed a contract for multiple increases because all they do is just bring up the contract. It's tough, especially if you bid a job today and don't start until July and the material's double from that time. If you don't put something in your contract that states the bid's only good for this many days, and then we have to reevaluate the materials to see if they've inflated. That's what I've been doing, and it's helped a little, but it's still not covered the total cost. And then, again, like I said, I'm spending free time, as much time, just going around, trying to find enough materials to do a daily job, where I used to just make a phone call and have it dropped off." [#15]
- The owner of a majority-owned goods and services company stated, "Raw materials have historically not been a problem, but since the pandemic, we're all hearing about it, and we see it. I mean, it's ridiculous that something as common as a number 10 window envelope,

it's like suddenly we're on allocation now, and we're having to tell for the first time I've been in business, we're having to tell clients that, 'Sorry, we can't fulfill your whole order. Now we can get you a partial, but they're just not getting any envelopes to us.' For instance. But I view that as a transient problem." [#16]

- A representative of a majority-owned construction firm stated, "The other thing that's coming in quite a bit is lumber. So we had lumber shipments pop. And I think there were a couple things. I think some inventory buildup because of inflation. People were speculating the rising prices and went long on their inventory, knowing that they'd sell it off. There were some different strategies that our customer were employing in their businesses … as they modify their behavior, we see it ripple through our business. … it's been a little more challenging than ordinary because a lot of stock outages. I don't really know what the forecast is." [#18]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I would have to say probably pretty much what everybody else is looking at, workforce issues from the manufacturers and trucking issues that people are dealing with. It's hard to get things because the manufacturer of those items have been really slow. We're at a crunch. With most people that I've talked to in this business, [they] just can't get products. But part of the challenge that I see for my business is that a lot of people went to bigger companies because manufacturers were allocating products to certain companies, especially if your volume has not been great with them before … A lot of people talk about access to capital, my biggest challenge was access to product. And that remains an issue right now for us, as I talked about needing five ounce bowls. And that is real, that we need those, but not having access to them. And the bigger companies will get those and I will not be able to get those as quickly as I'd need them for my customer. So access to the product, and also to it at a reasonable rate. It's the challenges that we deal with ongoing because being the size and not buying things in huge volume, then you have your challenges in order to try and compete with other players in the marketplace. … especially last year during COVID. We could not get a hold of nitrile gloves. I jokingly say this but I'm also kind of serious about this as well, we probably could have cleared about $8 million, just gloves alone if we had access to them. And I could not get gloves anywhere. And I actually did call the County to ask if they can assist me with that." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I would say that all printing companies that I know have struggle with getting cash because it's just equipment heavy, so it's a debt-heavy business. I try to answer the questions pre-COVID, not post-COVID. And pre-COVID, the answer would be no, I have no issue with any of that." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Getting suppliers or getting manufacturers and distributors to work with us. A lot of distributors and manufacturers require that you do a certain amount of sales a year before they even will consider you. And the tie of that is that you can't guarantee, because you don't know who will come to you for service. You don't know. You just don't know. And that is something that has plagued us from day one. We don't keep inventory. That's a no-no for us, and it's a no-no for a lot of companies. I mean, you take somebody like... Let's take Best Buy, for example, best buy. They don't really keep inventory anymore. They order

directly from the manufacturers. It costs money to house, a warehouse, to heat a warehouse, to maintain a warehouse, and again, Best Buy, Home Depot, all these places buy directly from the manufacturer or distributors. Nobody keeps a warehouse anymore." [#23]

- A representative of a majority-owned professional services firm stated, "Material lead times have gone out. I got one right now. I got a large outdoor circuit breaker that's supposed to have shipped to a client in Pennsylvania from the plant and it's still sitting on the dock for three weeks now waiting for a truck. The shipping problems had just started more recently, but the material shortages and stuff that would almost hit instantly with COVID. We saw that right away, pricing is the other really bad part for us. I mean, I used to get pricing, you could get a quote for copper cable and it would be valid for 14 days now. That's valid for one day. … I'm quoting things that are supposed to be installed next summer right now. I've got to buy that cable and price it out. And then I have to project my risk of what's my inflationary risk on the market. So now I got to look at my commodities as anticipations charts of where copper's going, how much it's expected to go up." [#24]
- The co-owner of a WBE-certified construction company stated, "That has been a bit of a struggle getting supplies, but for the most part we've made do and have gotten through it, but that has been a struggle, getting some of our products, yes." [#27]
- The owner of an SBE-certified construction company stated, "Generally, if you go into an equipment dealer, they will figure out some way to get you financed. You might not get the best finance rate. For example, two or three years ago, you could buy a car at two or 3% from your bank, if you had excellent credit. If you went into a dealer and didn't have it, you might have to pay 15%, 20%, 25%, whatever. One way or the other, they'll find somebody to finance you, unless you're just terrible, horrible criminal with a record. They can get almost anybody financed. A lot of times, they mark up the car to hide the finance cost. Same thing goes with equipment. If you rent equipment, it's okay on a million-dollar project, where you can rent equipment. But if you're going to use the equipment long term, you pretty much have to buy it. You can't keep renting because your competition will own a piece of equip equipment and at a much lower cost." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "That is a challenge. And just again, because of the capital. The equipment that we need is very expensive, having inventory on hand, again, the cash flow. We need to be able to purchase and get paid, purchase, sale and get paid. And so that's not a viable option for us because we don't have that luxury to have stock and purchase as we need. We have to rent a lot of equipment just because the upfront capital it costs to buy versus running." [#29]
- A representative of a majority-owned professional services firm stated, "Post-COVID, that has definitely been a problem. it's the same supply chain pains everybody else is going through." [#36]
- A representative of a majority-owned construction firm stated, "Occasionally that does become problematic, especially with the pandemic. Supply chain has definitely been disrupted and we've had the issues there, absolutely. Our issue is more logistics and from our manufacturing standpoint, because with the pandemic, the manufacturing slowed significantly. And so, the availability of product was much lower. So really it was just for us,

was the physical supply being low and in demand as opposed to being shut out. So, getting them isn't an issue, so to speak it is with actually like physically getting and receiving and shipping and all of that aspect of it." [#37]

- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "It is a worldwide distribution problem. However, we are also suffering as being a small player. What I mean by that is we buy computer equipment for our clients. I'll give you an example, we placed an order for some specific access points that we have used for years. And we placed this order in mid-December and here we are in March and still haven't received them. So, it's not so much that we are a minority firm is the fact that we are a small player in this space compared to other large corps that are ordering the equipment. To make a long story short, those who buy large quantities, get it. Those who buy in small quantities, we're in a line that's longer than we can even see." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "The supply chain, what used to take six to eight weeks to get a piece of equipment, [they're] out there quoting us for over 40 weeks it is that this is the industry reality. I've heard a lot of chips and the things from overseas are holding things up." [#41]
- The owner of a majority-owned construction company stated, "The first two, three years, the hardest part was when you are small business, and when you're trying to, for example, apply to some equipment, not necessarily a finance, but there are companies that will lease trucks or trailers, okay? … When you need to lease it, even if you have a good credit, for example, but you're brand new, they're company's not going to deal with you. They say, 'Oh, you need to have the minimum three-year experience.' So first three years, I got loans, bought trailers and trucks. And if I needed more, I was pretty much stuck because you can't even lease it … when you're applying for a loan, sure. I mean, they just look at your financials and stuff, but overall, a lot of stuff goes through like, 'Oh, you need to have experience. You need to be doing this for a long time, then we can.' So, then what I had to do was, I had to go through friends that have been in business for some time, then I would ask them to help me out. And that's what I do for some of my friends if they are new, that if they cannot get a lease, so I could get a trailer lease and then give it to them. It's not good to do it, but that's how we made it to work." [#42]
- The woman owner of a goods and services company stated, "There is a problem with inventory right now with how we... The grocery stores look like they need to go grocery shopping somewhere. ... Hopefully, the supply and demand, with what we're going through with the trucking companies, will improve." [#44]
- A representative from a majority-owned construction company stated, "Right now [is] hard with materials. Material inflation and help. It is the worst I have seen. It's hard to bid. Our bids have been very hard with material. A day or two is okay, but three to four months out is hard. We need to put that in our bids to cover it." [#AV248]
- A representative from a majority-owned construction company stated, "Escalation on materials. Costs are out of control. It's specifically causing the larger, long-term jobs to be bid higher due to risk, or just not bid at all." [#AV300]
- A representative from a majority-owned construction company stated, "The current state of material pricing is making it very hard to acquire new contracts." [#AV333]

- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "If we want to buy something that's not going to build profit, we're really careful about financing things like that because we're a small guy and when the hammer drops, it's going to hit us first." [#FG1]

8. Prequalification requirements. 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, #2, #3, #14, #23, #24, #27, #28, #29, #33, #34, #39, #AV, #FG1, #FG2]. Their comments included:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "So it has primarily been as a result of looking at an RFP and they have what's called term contracts and they have specific requirements that they're looking for. We've gone after them sometimes and have not been successful, but some of the requirements laying towards firms that they were already looking for, the experience of firms that they're already looking for. We know it's just a shot in the dark. One of the barriers in our industry is a lot of firms have been around for a long time. Some of them have even gone through second generation. So, for example, let's say you're talking about doing a library project, you always have to show past experience. A firm that's been around for a long time may be able to show 10 libraries. But say our firm has not been around for that long maybe we can only show two or three libraries so that winds up being a negative on us. I would say probably in the eyes of the reviewer for Hamilton County, when you're looking at old established firm and a newer firm there are going to be some differences in the RFQ. Then just in general, when you think about some of the limitations, so if there's the library issue, then there's also issues in other project types as well say office doing just commercial office build-outs. We can only show two of those. Somebody else can show five. Also, the project sizes that they're able to demonstrate performance on are more than likely going to be larger than ours, larger project size, larger budget, a bigger bang for the buck. It's like just having a project that is with a budget that can spend more in the interiors to make it look beautiful versus maybe we were working with a nonprofit. When a nonprofit does a project doesn't have that kind of a budget. So it just continues to carry on that you can show some, so you're going to be limited in the number and you may be limited in the project size and how grand of a project." [#1]
- The co-owner of a majority-owned construction company stated, "For probably maybe 80% of the work we do was all just low bids still. So, there is no market, just other than for ODOT, Ohio Department Of Transportation, Kentucky Transportation Cabinet, and Indiana, are three states that we would deal with. They all have pre-qualifications that we have to go through every year. Again, once you're in, they're easy to check the box because we're doing that work. We can just show here's a job we did. So, we qualified for all this stuff, but for 90% of the work, 80% anyway, as long as we're ODOT, we'll keep that ODOT, KDOT and MDOT certification. We're fine. We check all the boxes, as far as showing the work, we are capable of doing the work, or qualified. Then it's just a matter of being the low bid… I'd say it's been 40 years. The State started the program I'd say about the same time, 40 years ago, something like that. I remember going through the first one, thinking where do we fit? We'd check all the boxes and turn it in, and they'd just throw it back out, like no, you guys can't do

that. Trial and error. In today's world, again, I don't know how difficult it is for a new contractor to try and break that barrier." [#2]

- A representative of a Black American-owned professional services company stated, "I think the rubric that suggests having prior experience, either with the County or municipality, or that particular entity, could be a bit broader. So, for instance, if this is my first time applying, for whatever reason, to an RFP with the County, and you're going to actually put in the rubric that's going to account for five points, whether I had prior experience or not, I'm going to lose those five points coming in the door. Because this is my first time submitting. Right. I'm going to lose those five points. Maybe there is a way to say, either the County or comparative experience." [#3]
- A representative of a WBE-certified construction firm stated, "I'll just give you one example and it has to do with CMHA, which is Cincinnati Metropolitan Housing, which would be more on the federal level than it would be on the Hamilton County level because public housing is always said it's federal level. So, when we would start a big project at Hamilton County, we fill out this information packet, right? And part of this packet is the diversity training. And if we hire minorities and... or if we would hire minorities for this project. Because obviously in Cincinnati Metropolitan Housing, and this being it's federal money, they would like for that to go to minority contractors. But here's the case that my experience, this information packet to be approved as a CMHA contractor, is drooling at best. And you know it works for me because I've got really two good girls as secretaries that will stay on it and search the information and double check and double check and double check. But I can see where a small guy, a one, two, three-man shop who's just trying to get off the ground, say a woman owned or minority owned business, would not have that resource that I have. So, when they get this packet, it's daunting because they take it off for misspelled words, for sentences not being punctuated right. And you know, then we get a grade and depending on my grade if I can move forward or not. Which like I said, it works for me because I got an office staff, but I could see a small shop not having that office staff and not being able just to fill out the paperwork. Do you know what I mean? But they would be very capable of performing the job in the field. … I'm not exaggerating, this packet when we're done, it's as thick as a phone book. … it takes off a month to get it together. This is the packet to be approved to go ahead and bid. The information packet to qualify as a contractor is tough. I mean, if they're really wanting to do something about minority contractors, that's the first thing they need to look at, in my opinion, they need to make that where you don't need a team, an entire office team to pull that off because when young guys go out on their own to start their own company, they do not have that. That's not what they're trying to buy first. I mean, they got to get trucks and tools and material first, they don't start with secretaries and offices. It takes them out of the game right away and it's not... It probably shouldn't be that way. I mean, there probably should be a program for these young companies that want to come off the ground and say, 'Hey, we'll help you out for a minute.'" [#14]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Pre-qualifications, really, for what I've seen... Most of the pre-quals I see is from other contractors requiring it before you do business with them. That's not a bad thing. I, kind of, do it sometimes too before I will work with other contractors to make sure that they can handle what they're doing. It's a good thing. So, I don't see as being a barrier.

What I do see as being a barrier is getting somebody to send you a pre-qual for you to work them. That's where I see the barrier." [#23]

- A representative of a majority-owned professional services firm stated, "We don't qualify to do a power related project that we've done a million times for clients because we've never done business with them before. … we have more experience than the people getting the work. I know that for a fact, we've proven it, but because we've never done work for [company], they disqualify us as unqualified, even though we do work for other sewer districts, but it's the way it is. I don't even bid projects there anymore. It's just not worth my time. We have never been qualified to do work there [with MSD]. And do you want to know the reason why... Their reason quote, from the purchasing person, 'Because you've never done work with MSD before'." [#24]
- The co-owner of a WBE-certified construction company stated, "Some of the things that they ask and ask for. That can be really tough. They want to know what other jobs you've done, oh, and all the history. So they want to know what jobs you've done, what the amounts were, what the contract amounts were, how long they were. A big one that always seems to hit us is safety. Now, safety is first and foremost. We have monthly safety meetings, and we do all that stuff. But as a small company, one big job that we tried to bid on, they were like, 'Well, your numbers are too high for ... ', but those are based on your payroll numbers. And our payroll isn't as much as theirs. So, if we have one accident, it makes those numbers look like they're high. Does that make sense? We bid on this one job and they made us go, and we had to hire a company to make a whole new safety manual, and I mean a 400 page [manual]. They were like, 'Oh, your safety manual's not good enough for this job.'" [#27]
- The owner of an SBE-certified construction company stated, "That's what they do to keep me from getting a license to hall away the building, which I've been doing for 51 years. They make it impossible to get pre-qualified by either not responding to emails, phone calls. They make the application difficult, if not impossible. I mean, normal firms don't have a glorified, fancy auditor. Normal firms don't need to buy a $50,000 bond to do work. That is a ridiculous qualification to do work in Cincinnati. We go to a meeting, and we spend 40 hours working on paperwork, getting qualified. I shouldn't have to be qualified to bid a job for Hamilton County. Pre-qualified, pre-licensed. If you want to carpet in your house, do you have to qualify all, get licensing, have all the contractors that are going to bid on it, spend 40 hours to put carpet in your house? If you want gasoline for your car, do you have to pre-qualify everybody? Why do I have to go through 40 hours' worth of getting paperwork and bonds and information to work for Hamilton County or the MSD and then get... And then the only reason you didn't get qualified was a typo in your, one of your references. You got five or seven references, three, five, seven references and you got the phone numbers and everything else, but you're disqualified because of a typo. Tell me that's not absolutely ridiculous. Why would I waste all my time trying to do paperwork to become a contractor?" [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "The challenge with the prequalification is sort of like the certifications. It takes time. They want to know everything. You have to jump through all these hoops, and you don't even have a contract. If there's a general

prequalification that says, Hey, we meet it with this company and make it universal, but you can find yourself filling out 10 prequalification forms, asking the same information, different information, prying deeply. And then because you don't have a relationship with them, if they look at what you look like on paper sometimes, they feel like, okay, we can't use you, versus really looking at the experience and what you're able to do. So, it's cumbersome, time consuming, a nuisance, and then it doesn't always tell the real picture." [#29]

- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "If we go for the larger projects, that would be something that a GC will use against us saying we haven't performed any projects of that size. But for keeping it under $100,000, I'm pretty satisfied with providing evidence of that. City work and County work tends to be extensive as far as pre-qualification. And again, most of those projects are just too large for us to be competitive." [#39]
- A representative from a woman-owned professional services company stated, "Cincinnati master service agreement, barrier because they don't do often enough, just open it for the first time in 4 years, if you don't have it you cannot be a prime on a job?" [#AV223]
- The owner of a WBE- and SBE-certified professional services firm stated, "I'll be in business five years in May, and literally last month was the first time I got approval to do work as a prime for greater Cincinnati waterworks. And the reason that happened is because the last time they opened their opportunity for anyone to become a prime was four years ago. I literally was in business this entire time and can only work as a sub to someone else who was already on their list because it wasn't even an application for a list open until... I think it was just open in November, December. I had to submit proof of similar work, project work. I mean, it was probably a 40-page, 50-page document I had to submit showing that I've done similar type work as what waterworks would require or need. And then I had to go through their list of potential opportunities and select which of those things I specifically was capable of doing and then give resumes for all of my staff and histories of why they were able to do the work. And so I mean it was a large submittal. Every, I don't know, three to five years, they release these bids that can allow you to be on a short list essentially, when that opportunity becomes available. And somebody on the call might remember the official name of it [master service agreements]. I can't, it escapes me right now, but we've all done it, where you submitted these huge packets with all the credentials of your staff and everything that you've ever done in life related to that agency. And then they will put you in a small queue so that when you have a bid or when they have a need for your services, they can either do a small award or direct award or something." [#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "You got to help audit overhead rates for example. You cannot do business with them unless you have an audit overhead rate. An audit could cost you $20,000, which means you got to create whatever revenue you can and until you make more than $20,000 and bring a profit at end of day fee until you make that much, you haven't broke even. And it's a huge barrier, especially if you are providing small services. You're not like you're doing $15 million of work over there. So, for small business, that becomes a huge barrier, just to be able to go and sell them paper, whatever services. And they don't have to do that because all

departments are not required to have audit overhead rates, just some. So, it's not Countywide. So, they could choose when to apply and when not to apply." [#FG2]

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 [#3, #4, #13, #21, #22, #23, #24, #26, #27, #29, #32, #33, #34, #35, #36, #39, #43, #AV]. For example:

- A representative of a Black American-owned professional services company stated, "Well, since starting the business, I acquired a master's degree to stay competitive, and to also be able to expand offerings. I have 13, 14 different credentials and certifications in the organizational development and executive coaching space. I'm sitting for a global certification at the end of this month." [#3]
- The Black American woman owner of a professional services company stated, "Will they look at me and say, 'You never done this before, so why should we give you this contract?' You know what I mean?" [#4]
- A representative of a woman-owned, DBE-certified construction company stated, "You get a bigger firm, then they might have somebody that's worked in this particular manufacturing facility, or maybe not that one, but a similar one somewhere. Then, they've got the understanding, but a small business don't have access to somebody that's done this mill, and then somebody else has done this particular industry or this manufacturing facility." [#13]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I would say it's no and yes, is not a problem for us. But I've heard other people talk about it. And it's a matter of do you have time to fill out all these different types of RFPs, which can be a challenge. But also from my standpoint, what type of relationship do you have with the various people that you would need information from resources. And that could become a challenge. And I know I've talked to a couple people, just heard people talk about certain RFPs being too long, being too lengthy, especially the wording of them, a lot of people just don't want to take the time, in my opinion, take the time to read through all that to get an understanding what they're bidding on. But I don't mind reading the various languages of the contracts. So sometimes that frightens people then especially too if you're a smaller company. Do you have time to go through all that because you're trying to run other aspects of your business? So yes, that's been a challenge that I've heard of, from others. ... So how do you kind of condense some of the wording in it. And I think from a County standpoint, they're trying to protect themselves from any organization that putting together RFPs. They're trying to put way too much of the language in the bid or the RFP, as opposed to reduce the size of it." [#21]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "My background, I'm an architecture engineer, construction manager, and I read specifications inside, outside. I know how to put together bids. I know how to break down bids. I know all about how to maintain a contract and a project, schedule-wise, I know how to create schedules and all of that. So that is no problem for me. Not saying it's not for other minorities. I know it is, but I can't say that I had that problem. Not since the '70s." [#23]

- A representative of a majority-owned professional services firm stated, "So I estimated the same thing as before, to estimate the job, you need to have a depth of experience and we just don't have enough people and staff with that depth of experience to pursue all the business we want, we pick and choose." [#24]
- The Black American male owner of a construction company stated, "In the beginning, I didn't know anything. I had to learn these things the hard way. I learned a lot of stuff from scratch, trial and error, and getting beat in the beginning years." [#26]
- The co-owner of a WBE-certified construction company stated, "I guess that's always a challenge. Even doing this for so long, you feel like you come across new things, you come across things you never had to deal with before. So, I guess I feel like you're always learning. I feel like you can't get enough education." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "That is not a problem for us, but that's only because of my background. But I can see it being a problem in the industry because it is definitely very cumbersome. It's definitely you have to have the experience or know someone with the experience to do it. There is a lot of support in Cincinnati, of course. And because I came out of corporate and bigger companies, I had that expertise already. So that's not a problem for us. It is time consuming. It is costly." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Well, just every government and quasi government agency, whether it's CPS or whatever, everybody's got their own way that they conduct their competitive bidding. And sometimes it can be kind of overwhelming all the information that you need to provide. I think that can be a challenge." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "That would be a barrier, and might be why we haven't been able to find any more work, because of our proposals." [#33]
- A representative of a majority-owned professional services firm stated, "When I was looking towards getting into some of the municipal markets or working for the government, it felt like a closed-door community that they only wanted to work with the people they'd already worked with. So, let's say it was ODOT. You could only show the work that you'd done for ODOT, but if you hadn't worked for ODOT, then you couldn't work for ODOT. So very much felt like a closed-door world. For example, I might have designed 100s of miles of waterline for subdivision work. But if the state of Ohio needed a water line designed, I wasn't qualified to do it because I'd never designed a water line for the state of Ohio. … being able to demonstrate the qualifications have been met sometimes can be a problem." [#34]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "It's not the technical training, it's the technical expertise for our business. If that makes sense to you. Let me give you an example. We have challenges being paperless. And we've been working on that for a while. We might complete that task this year, I'm not sure, but we are working on it. It's very difficult. Again, the limitations are in my mind, because I just half the time don't know where to go for help. As far as what systems will do computer wise to make that work, we have an IT person, but they have their limitations as

well. And we do not, again, we purchase when we can afford, and we cannot afford what we need to make our business tech savvy. We had a couple of... There were a couple of contracts that I wasn't sure if I should sign them or not, because I didn't understand the different levels of math. It was really complicated for me. So again, without the assistance, that caused us a problem. So again, it's my own limitations and not knowing where to go to get help, because I'm focused on what I do in here." [#35]

- A representative of a majority-owned professional services firm stated, "I would say no barriers there. I've definitely had opportunities and I can see the value of having an RFP pro on staff, that they just focus on those, because they can be pretty time consuming. But I think the landscape around here gives anybody that wants a shot, the opportunity." [#36]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "Try to decipher, just looking at the bid from the onset, you don't know the size of the portions of what we do until we dive into the project. So that's kind of time consuming, but I guess that's the nature of the beast." [#39]
- A representative from a majority-owned professional services company stated, "Just is difficult if have not worked with them previously, hard to get first project. [They] go to ones they used in the past." [#AV22]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Fourteen interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#10, #12, #14, #17, #21, #28, #33, #43, #AV]. For example:

- The woman owner of a construction firm stated, "Probably the biggest certification we had was this ISNetworld is a... I don't know if you're familiar with what that is. It's kind of a 'check your certifications for pipelines.' They want to know if you've had this training, if you had this drug program, if you have all of this stuff, insurances; basically, they look up your whole company. And getting certified with ISNetworld was probably the most challenging thing that we had to ever deal with." [#10]
- The owner of a majority-owned construction company stated, "It's simply the cost. And then you know, to try and keep up with when it's due and things like that. So, I typically wait until I get a big job and then I'll contact the municipality and say, okay, how do I get on your system? Because being state licensed, you know, that more or less takes care of all the requirements. Most municipalities just want their money." [#12]
- A representative of a WBE-certified construction firm stated, "The only problem I've had with subs here in this area is crossing state borders. So, if you have a DOT and you're pulling equipment, I have subs that won't go into Ohio and then I have Ohio subs that won't come into Kentucky and I'm not real for sure why, but I know it has something about the department of transportation, the way that their equipment's licensed." [#14]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "So for instance, I have a felony from 10, maybe 12 years ago. I have a felony on my record, my wife does not. I'm going for the... There's an applicator's license that you have to do for pesticide. Well, technically, I can't get my license yet until I go in front of a judge to ask, does this license have anything to do with my crime? Of course,

he's going to say no, and then I have to go through the paperwork of filling out and getting him to send a letter to the... I think it was the institution... the state of Ohio Institutional Department, or whatever it is, so that I can be allowed to have a state license, just to apply pesticide to yards. That, to me, is good and is bad. ... One out of every 10 Black men have a felony or something like that, and then you go on and on about, oh, those disparities amongst that. It's hard to get like just certifications and certain things. On certain projects, I can't even participate in because if I participated, that would be a felon on the premise. Even though I've already done all my time, not on probation, I have nothing lingering over me at all." [#17]

- The owner of an SBE-certified construction company stated, "Sometimes the permits can take a year and a month. All the preliminary stuff, requirements, utilities. … Generally, the permits take a month or two, the utility gas can take a month, two, three months. I've had electric take up to seven months to get it turned off. So, with the lead time for the work being so long, you just can't go somewhere else. They've got this new Cincinnati licensing to haul away the demo debris, which I've been hauling away for 50 years, 51 years. I've been able to truck stuff for 51 years. Last year, they wanted us to get licensed, franchised to haul away material. In order to get licensed, you had to fill out the paperwork and everything. We sent them emails. They didn't reply. We called them on the phone. They didn't reply. We were unable to do the paperwork because we didn't have the six British lawyers and the four certified accountants and all the bonding and everything and needed help with that. Basically, they gave the four licenses to the super companies, the giant companies. And to the best of my knowledge, absolutely no SBE, no small contractor got this license to haul this stuff away. The licensing is absolutely just ridiculous. Why would you need a fifth or sixth or seventh bond to do a wrecking job in Cincinnati? Put up a $50,000 bond, which is difficult to get and expensive. They want you to hire a special licensed auditor to audit the books, to see how much money they're going to get. There's no way the new SBE could go through all that with no help. So, my wife said when we couldn't figure it out after 51 years of being in business and paperwork, there's no way a new person could ever get that done. The reason they didn't license me because they found a one letter typo in the name of a reference I had put in my application, which is just absolutely ridiculous. ... permits are always difficult for everybody. For example, the job on Baltimore Avenue, I've got a contract with the City to wreck that house. [The City] won't issue the permit because he wants a Geotech survey. Therefore, I've got, I don't know, $14,000 worth of bonding tied up for a year. I can't wreck the building. Sometimes it takes them five, 10, 15 days to log in a permit application. They don't really notify you about any issues with the permit. You have to have a darn computer and go on the site and figure out why they've not allowed it. There's no messaging. If I go to Loveland, I give them $100 and I got a permit to wreck building. I don't have to have a bond. … It's pretty much almost impossible to work for Hamilton County in the present system … it's not necessarily the people issuing the permits, the inspectors and stuff that are the problem. … The City councilman and Cincinnati and the commissioners, they're trying to get income for the City to pay all the bills. Then all these lower people, their feet are held to the fire. They'll lose their job if they don't do what they're supposed to do." [#28]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "At least the federal government, to do most IT work with them,

they're requiring a certification that is pretty involved and they give you a rating on the different levels you need to be at. So that would be a barrier. It's not a license or a permit, but it's a certification." [#33]

- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "Clearance is the biggest thing on those federal contracts, especially for the defense. Now it is a weird law where you only get a facility clearance if you have a top secret contract. If you have a secret contract level, you don't get the clearance. So now how do you work? If you don't get that clearance, you can't clear people. So even if somebody wants to give me a contract and then I don't have... And that contract does not have that top secret portion, you're screwed basically. You can't do anything. Client wants to give you work, but at the same time, same client says, 'If it's not top secret, I'm not going to sponsor you for the facility clearance.' It's just I want to give you, but I'm not going to give you kind of thing." [#43]
- A representative from a majority-owned construction company stated, "Sometimes it is difficult getting building permits. I wish they would expedite the process." [#AV17]
- A representative from a majority-owned professional services company stated, "It's harder to obtain building permits in Hamilton County." [#AV19]
- A representative from a majority-owned construction company stated, "The building department in Cincinnati sometimes is challenging with timeliness in working through permits. Understanding what expectations are upfront for moving through the process. The order that things need to be submitted being clearer would be nice." [#AV69]
- A representative from a majority-owned construction company stated, "[The organization that manages permits, licenses, and inspections] with Hamilton County - challenging permit process. They require far more, and most electrical contractors are steering away from them." [#AV281]

11. Learning about work or marketing. Twenty-seven business owners and managers discussed how learning about work is a challenge, especially for smaller firms [#2, #4, #10, #12, #13, #18, #21, #22, #23, #24, #27, #29, #32, #33, #36, #37, #38, #39, #40, #42, #43, #44, #AV, #FG1, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "I think both ACI [American Concrete Institute] and definitely OCA [Ohio Contractor's Association], they have an early in the season meeting for whoever wants to attend, where the owners, all municipalities, they'll come and present the program to the contractors. Here's what we're going to do. Here's the jobs we're going to do this year. Here's our plan. We're going to build these six jobs, they're worth X amount of dollars, et cetera. And they should bid and this April or May, or kind of the timing when it is. So, we make our master list off of that. ... That's how we would initially find out. But conversely, we subscribe to, there's several advertising firms that are out there. … Say here's where you could find out about the bids, which is an expense. For some of them it's like we don't want to spend that, whatever it is, three hundred bucks a month, or whatever it happens to be. So, then they're dependent on the general contractors reaching out to them." [#2]

- The Black American woman owner of a professional services company stated, "My dad who was a truck driver and he was an owner-operator, and his thing was trucks. So, he was more about having relationships with the suppliers and people that needed things shipped. But even with him being a business owner, I still was not privy to this knowledge of the fact that I could apply for these contracts." [#4]
- The woman owner of a construction firm stated, "The only barrier would probably be ourselves, not going out and looking for things if we wanted to get into more things. It's just, there's work out there to be had. We get all kinds of emails every day for bid this project or bid that project or go do this… We've got on these email lists for these contractors. if you've looked at our website, we have not kept that up to date; so it could use some updating." [#10]
- A representative of an woman-owned, DBE-certified construction company stated, "Getting through to the people we need to talk to, whether if it's in a paper mill or a government entity in that process, to be able to find out about projects, to get the opportunity to bid on. … the process with the internet and websites and getting notifications and putting certain codes in for where you get the notifications." [#13]
- A representative of a majority-owned construction firm stated, "It was just all very interesting how the contract was let, I don't know if it's Stormwater Management or MSD or who did it, but for whatever reason they don't think to use us. And then we have Duke just up the road, they don't use us. And Greater Cincinnati Water Works has a big plant just down the road on Riverside and they don't ever inquire here either. I keep saying to my brother we should find a way to participate in that, but really we wouldn't know until a general contractor is selected, because they'll take all the different work elements and compete those out. They'll have bid packages for whatever. But typically, if you're not in the stream of seeing those kinds of bid packages, they open for a period and then they close, and they're gone. And then you have to be able to bid in a conforming fashion. Building that capacity or do you have it on hand or do you stand it up for the project? And it just depends on what the proposition is. If it's a long-sustained build or if it's a quick hitting thing." [#18]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I don't know how to know where the RFPs are. I am versed in the City of Cincinnati, where we can go out and get them. But Hamilton County or the Metropolitan Sewer District, so it's more if they happen to knock on my door rather than me being able to go out and seek them out. I have because I'd have to lead up the marketing team, and I don't know anything about marketing. So, it's a challenge for me. And then I go to marketing trainings, and it always is... I don't know how to put it politely. It's always like, throw spaghetti at the wall and see what sticks. There's never really any kind of... I don't know. It never seems like it's very structured to me." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Marketing is a hassle." [#23]
- A representative of a majority-owned professional services firm stated, "We're not doing what we would like to do in terms of marketing. But a lot of that is strictly resource based, because of our technical nature of things, what's happening is I can't outsource marketing. It always ends up coming back to me and the owner. Oh okay, that's great, we need this article written well and they can't write it because it's too technical. So, all of a sudden now

all I've done is created more work for myself and I'm already overloaded. So, our challenge in marketing and that presence is really ourselves because it takes technical resources to do our marketing and our technical resources need to do jobs that our clients are paying us for, because we already have delays going on, on the operation side. Again, if you're larger and I worked for a much larger power firm before this, you have more people and you can take somebody and go write an article. And then next month you can take this guy and say, go spend some time and go write an article. You can afford to do that because you have enough, your overhead is covered by enough hours in the system that it's not a problem. We're just small enough that it makes it very difficult, unless I want to spend my weekends writing electrical engineering stuff." [#24]

- The co-owner of a WBE-certified construction company stated, "Honestly we don't really market per se. We've always been a word-of-mouth company. And then I guess it is a bit of a challenge with the janitorial. Painting has more platforms that you can join, like iSqFt and find out about jobs. The Dodge thing, ACI has their plan room. Janitorial is a lot more challenging to find out about jobs, so that one is a bit harder." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "A challenge of being proactive, being able to get out there and do what it is that we need to do still trickles back to the whole workforce and not having the right people in the right place. So yes, it is a challenge because it's a needed thing that we need to do, and we don't have the right personnel in the right place to be able to do it." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I think we could always have some help on that, learning about opportunities in marketing firm." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Well, I know, for the City, for example, I get the emails from them, but I think, at the County level, I haven't quite navigated that. I'm not sure what the process is for getting more engaged with, at the County level, be it Hamilton County or... Well, I know how to do it in Montgomery County." [#33]
- A representative of a majority-owned professional services firm stated, "You need a certain level of subsistence right out of the gate, so if you can have that when you hit the ground, that's fantastic. And then people that know you and like you, are far more likely to refer you to their business owner friends, than if you're just the computer guy that doesn't really have a personal relationship with them, you're just there to fix the computers I don't come from a marketing background. But I have hooked up with a company that specializes in technology marketing, and I've just began a two-year program with them, so fingers crossed that'll put some fuel in the old engine there and that'll ratchet things up a little bit faster." [#36]
- A representative of a Black American-owned construction firm stated, "Probably getting into the right networks, getting to know the right people, getting the opportunity just to give a bid to customers, getting on their bid list is not always easy to do. I think that was probably the main thing." [#38]

- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "As far as marketing goes, just trying to keep up with the technologies. It seems like it's always changing. Every six months to a year you've got to update something or there's a new process or a new software that you got to jump into." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Well, we got challenges. Everybody has challenges in it." [#40]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "It's just that I'm very small business and not having so much overhead. I'm the only person who does and my wife, and we end share HR and accounting and all that together. So, I don't have any kind of a business developer, or somebody goes and get some business. I'm very busy on the contracts I have. And we try to focus on getting more work through those contracts, and we are very successful actually doing that. So, it just had no time for me, unless somebody brings it and say, 'Hey, I have this, do you want to do it together,' or something." [#43]
- The woman owner of a goods and services company stated, "I have done all of that through the Ohio Business Gateway. And believe me, that was not easy. It took a lot of time." [#44]
- A representative from a Black American woman-owned professional services company stated, "It is hard to get the connections without having to pay someone to get you the connections." [#AV330]
- A representative from a majority-owned goods and services company stated, "Finding the bids and contact people is not easy." [#AV324]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "The context to know when things are happening and being involved in the planning and design stages instead of waiting until the documents are all written.... A lot of companies don't know something is happening until it's already happened." [#FG1]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "When I first started out, it was very difficult getting access. Access is the most important, I think one of the most important factors in being able to be successful, because if you're not at the table, when the contracts or the opportunities are being discussed, then most likely you do not have the ability to be able to speak to that opportunity, address that opportunity, or just to talk about your capabilities, to facilitate that particular contract." [#FG2]
- The Hispanic American owner of a goods and services firm stated, "For us in the Hispanic community, it's knowing where to go to … I'm sure other counties published, there are, request for quotes somewhere. Knowing for me in the chamber, telling upcoming businesses where to go for that information, where to go look up those RFQ, where to see what the qualifications, the requirements are for the County. That's why I was focused early on the website because it's got to be tool that we use to tell people how to get to do business with the County." [#FG2]
- The Hispanic American owner of a professional services firm stated, "You know, at least from our experience, from the federal side, the sooner the better, right? So, if we can have

like a forecast of what contracts are out there, who has them... All the stuff should be public record." [#FG2]

12. Unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Eighteen interviewees commented on personal experiences with barriers related to bidding on public sector and private sector contracts [#8, #12, #19, #23, #24, #28, #29, #36, #37, #40, #41, #44, #AV, #FG1, #FG2]. Their comments included:

- A representative of a majority-owned professional services company stated, "But an example of what I'm kind of getting at… [there's a] City of Cincinnati entity, an urban housing organization. And I was approached probably 15 years ago by an architect who said he wanted us to be part of his team and we would be contracting directly with this housing authority … he sent me some paperwork and I sent back and I said, 'This has an engineering rate schedule.' And he goes, 'Yeah, that's their engineering rate schedule.' And I said, 'Well, that doesn't make sense. They're saying they're going to pay an engineering rate of $80 an hour.' And at that time, my billing rate was a $100 an hour. And he said, 'Well, yeah, that's just what they're willing to pay.' And I said, 'Well, then we're done here because I'm not going to work for $80.' And he goes, 'Oh, well, no, no. You misunderstand.' I said, 'Okay, explain it to me.' He goes, 'You have to bid everything as if you're going to charge an $80 an hour. And when you invoice, you invoice $80 an hour.' And I said, 'Okay, so I lose money.' And he goes, 'No, you just include more hours.' And so, I said, 'So what you want me to do is bill an invoice for more hours than I spend on the job to get the fee I want using their numbers?' And he goes, 'Yes.' And I said, 'That sounds illegal.' And he said, 'Well, I don't know. Maybe it is, maybe it's not.' … When I talked to him, that's what they told me everybody does because there's no engineer in town that has an $80 rate. And I said, 'No, I'm not interested because there's absolutely no way I'm going to be part of a process like that.' And so, I look at something like that and I think, 'What is this entity trying to accomplish?' They're telling everybody that they're negotiating for these lower engineering rates. And the reality is they're paying exactly the same thing, but they're encouraging the people they work with to lie about what they're doing. What kind of people are you hiring if you get people that will lie on their billing invoices? I mean, first of all, that's a gross violation of engineering ethics, and anybody that does that should be reprimanded by the state and lose their license potentially. But beyond that, just in general, why would you want to work with people like that? So that's what I mean when I say sometimes government creates things that nobody else creates. I mean, no other private sector would ever walk in here and say, 'We're going to pay you $80 an hour, regardless of your rates.' They ask you what you want to do the job and you tell them, and then if it's okay, great. If it's not, then they go somewhere else. But they would never, and especially the notion that the people working in that office in a hushed whispered voice say, 'Well, everybody just over bills their time and that's how you make it work.' I mean, that defeats the purpose of what they're trying to accomplish. But more importantly, it's encouraging people to do something that I think is illegal. I never did check into it to see. I mean, maybe I'm wrong, maybe it's not illegal because you're discharging a fee, but it seemed to me inappropriate to do that kind of thing. So those kinds of things, though, where governments require different things than what everybody is used to in the private sector, if it's important and it's

necessary to the transparency of government and the procurement systems that governments need to use, it's understandable. In that case, I think it was an entity trying to make it look to the public like they were getting bargains or something, they're really doing this fantastic job. And the reality was they were probably paying more because they were getting only the people that were willing to mislead on their invoices to actually bid it. And if they're willing to do that, why would they not be willing to do all sorts of other things, like make up just work that they're doing that they're not really doing and so forth. So, I mean, like I say, that's a difference in the process that I don't think necessarily needs to be there in some cases." [#8]

- The owner of a majority-owned construction company stated, "Some things. I've walked out of some bids because they wanted me to do the work up front and pay me afterwards. And I'm some dumb, but I'm not plum dumb." [#12]
- The owner of a majority-owned goods and services company stated, "The bid business can be tricky. Because one of our competitors would write the specs to some product that we don't carry, and we never even heard of. And therefore, we've always kind of just stayed away from bid business. Because it always seemed somewhat unfair to us and other people that were bidding on the government procurement job of office furniture. Because somebody had already written the specs. And had written them in such a way that no substitutions were allowed, or it had to be this product. And in our industry, we have certain lines … certain companies are not allowed or certain manufacturers are not to align themselves with certain dealerships like ours. They can only align themselves with one company, so to speak. And so that's sometimes how the specs are written from a product that we can't sell because we don't have access to it. it's just not us, it's other people in our business that this could truly help and would actually help the end user. Because I think there's a lot of other companies that have kind of decided that they're not going to play that game. And just when we get a bid, we're just like, 'I'm not going to get involved in this.' Because the specs are written so tightly that you can't really work around them unless it's specifically written out in the specs that like products are allowed, these dimensions are... If somebody wrote a spec for a dimension, like a 57 and a half inch wide desk, nobody would touch that. Because there's nothing made like that in the industry. When we come across those types of bids, we're just like, 'I can't bid on this.' Because they're asking for such a specific item on so many different lines of this bid. This isn't going to work, and somebody was wise enough, or smart enough, or sneaky enough to write the bid this way. I mean, they do it on purpose. But to me, that's not the way to do it. The way to do it is to make a generic, 'I want a 30 by 60 desk. I need 25 of them in this area. I need 25, 36 by 72 L-desk in this area. And I need drawers on this side.' Just make it more... What's the word, not so, again and specific, make it more of a generalization, and send me pictures or email me pictures of what you have. nobody wants to run around, or nobody wants to get tied up the details of a bid. They want to, maybe they want to say, 'Well, what municipalities have you sold to? Can you give me a list and so I can contact them and see what their experience was working with your company?" [#19]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Every time I get a specification that doesn't have an MBE requirement, that's restrictive to me. And I'm talking about public works. Taxpayer dollars." [#23]

- A representative of a majority-owned professional services firm stated, "The very high insurance ones, and then there is a push with certain, and I don't see this in the public, but in the private sector, there are some companies that have very bad terms and conditions. Their negligence. They want me to indemnify their negligence. So, if I do get one and it's in the state of Ohio, I wouldn't care because this is illegal, you're not allowed to have that in the contract. I tell them that, but in Pennsylvania that's not illegal. They could ask us to indemnify their negligence. So that means my insurance is going to pay for all their faults. And what if in my business they kill somebody because they're not safe." [#24]
- The owner of an SBE-certified construction company stated, "They got clauses in there. The project's got to be started in 15 days and 45 days. For example, I had a project for the City of Cincinnati that took seven months to get the electric transformers moved … So, you're automatically in default before you can ever get started. You take your equipment over there and there it sits, waiting for them to go. They're always wanting the thing done in a hurry, even though the building might have been sitting there for a hundred years, they might have been working on paperwork and funding for a year, two, three, four, five. Sometimes that funding takes years. Then you're expected to perform in 15 days or 45 days or 30 days. Of course, when you don't perform in 45 days, that's another reason they don't want to pay you, even though it's not your fault. … Right now, you can go get a job about anywhere and not have to put up with all those shenanigans. …. It's ridiculous to have completion time of 45 days when permits are taken. It's not unusual for a permit to take six months or a year. They've got the time so short it makes performing difficult." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Same premise, if there too many restrictive things about that contract, that bidding process or what have you, we won't bid it. We have to be selective on if we think that it's going to take a lot of time. And so we don't want to spend a lot of time and it's no guarantee that we're going to get the work on the other end. So it's just a Journey choice to say, we're not going to start time here when we could possibly get something over there. We just don't have the personnel to be able to deal with that, so we have to make that decision. So that does deter us and it is a problem because it's time consuming and time is money. Absolutely. And especially you nailed it when you just saying past performance, experience, all that. Everybody wants past performance, but how do you get the past performance if you don't allow me to perform on this? So it's prohibitive from letting us really going after things and how do we get in if we can't get in to show that we have the past performance? It's just maddening."[#29]
- A representative of a majority-owned construction firm stated, "If there's anything particularly restrictive, other than sometimes, especially in our line of work, a specific fixture is required and then I've run into issues with obtaining the said type of fixture, because it's only available through one distributor and they have firms that they work with already and they've got deals with, so coming in as an outsider is very difficult in that aspect because of the limitations on what is being asked for. And they're not open to an alternative, whereas it's the same fixture by different brands, so to speak that, match the same qualifications but it's not the one that they picked out. Sometimes a lot of it is, we've been on school projects and things like that and understand what it was during the wintertime is when the project was due to be completed, but you could only work in non-school hours. Basically, you get only a couple hours of daylight a day to complete projects, but then the

timeframe allowed was very restrictive and things along that nature … it opted us out, because logistics wise, just wasn't something that was feasible from our end." [#37]

- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "There are some RFPs that we see that come out from organizations that appear to be biased from the beginning. You know who that award is the going to because the way it's designed, you can read it. If you've been in business long enough, you can read it and you can practically decide, no need in bidding on this, this is going to company X. As well as we know that if there's an incumbent and you typically know in this business who's the incumbent, you[‘re] wasting your time. Even though the representative from the company will give you the line that this is full and open competition when we know that it not because early in our careers, we believe that, and we submitted and they kept coming back with reasons why we didn't win, even when we knew we were better than the incumbent. So multiple issues in there. First of which is RFP can be written in a way that is about size, right? Says you must have this particular size, or you must have this particular insurance, or you must have these particular capabilities. And I have seen in many instances, none of that is applicable to the scope of work. It is designed to exclude opposed to include. Then there's size standards in terms of you must have this size scope in order to even begin to be a part of this or there's performance bonds, when that doesn't appear in any way, shape, or form within the RFP a reason for a performance bond. Historically, it's been a timing materials project, but not requiring a performance bond, now of a sudden it's a performance bond. So, all those types of things come along that exclude businesses from participate. Then it's built in a way that says if they put in different... What do I want to say? The package is so large, that one firm can't do. And what you find out is the winners are ones who've been together for years to begin with. Which goes back to my point, you already know that this was designed for a specific firm to win… In the past, what it has been is basically criteria to say need not apply if. If you have not... Well, and some of this is now changed and is legislated, which is local. It is, if you're not a local vendor, you don't get those extra points. Which, again, I understand maintaining environment of where you want to take care of home before you go abroad. I get that. So, it's been written and in some cases been unwritten... So those are the things that we face here that others would say, 'No, that's not the case,' and we know it's the case." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We do a lot of for Cincinnati Metropolitan Housing. And if they have a requirement for Section Three, which we were a Section Three, but as you know, we lost because of the federal government last year changed the requirement that we no longer qualify and therefore try to get the people that are qualified because at the end of the day my name behind of the work they do. And a lot of them, if they're not qualified, we will not be able to hire them. And because my pocket dozen plumbers are union, we could not use them because we have to use unionized labor. So that is where the challenge would come. What becomes restrictive is if they say that you have to have 15% WBE or so many percentages, sometimes we cannot find a single person to bid those kind of things. And of course, us being an MBE, they don't count it. So therefore, sometimes they are forced to walk away from a project because we cannot meet those requirements." [#41]
- A representative from a majority-owned construction company stated, "Not sure how government works in Ohio, but lots of the contracts are limited in using subcontractors. You

have to be able to do everything yourself. That is very limiting to being able to bid on those contracts." [#AV17]

- A representative from a majority-owned professional services company stated, "Some contract stipulations are a barrier - like an item about hiring or training certain number of minorities or women as part of the contract." [#AV20]
- A representative from a majority-owned construction company stated, "Time frame they give you is not sufficient why: they want it quickly done, by a date and we may be booked out." [#AV208]
- A representative from a majority-owned professional services company stated, "In our business when we look at staffing needs, we look at desired pay rates and sometimes there are obstacles when the organization is looking to pay someone is not the market rate to fill a position." [#AV316]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "One of the things that we face is a lot of times specifications are... We do a lot of equipment sales and a lot of design work where we provide the equipment and the design and the commission. Well, I would say seven times out of 10 when we look at a specification that is already written for University of Cincinnati or a Hamilton County project, that the specification was written two to three years before the project went out of the bid. And even though they say they're taking the low bidder or the most responsible bidder, my product is not in that specification. The manufacturer that we represent is not in the specification. Which means I am not allowed to even submit a price. Our price can be lower. Our bid can be best. And I would say five out of 10 times when they let us bid, we win… We do a lot of government work. And one of the reasons is because when I see the specification on the government job, I can embarrass them into letting my product into the specification. I can say, 'This is not fair. You're not allowing me to submit a bid but you're asking for participation, and you won't use my product. And you're telling me to use somebody else who I compete against.' And it takes an average of three to five years to get a government entity to accept that with meetings." [#FG1]
- The Black American woman owner of an SBE-certified professional services firm stated, "Have you ever found, that they write RFPs for somebody? They have these little pieces in there, you must have this, you must have done this and this. You have the qualifications, you can do the work, but there's some minute things they add for a particular contractor." [#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "RFPs can be slanted, and you know, that's kind of the fact of the business in a way, but you know, if they are clear that this offering, they're looking for a majority firm, or maybe say a large firm versus a small business or a firm that's local." [#FG2]

13. Bid processes and criteria. Thirty-two interviewees shared comments about the bidding process for public agency work; business owners or managers highlighted its challenges [#2, #3, #6, #9, #10, #11, #13, #16, #17, #19, #20, #21, #23, #24, #26, #27, #32, #33, #34, #37, #38, #43, #44, #AV, #FG2]. For example:

- The co-owner of a majority-owned construction company stated, "Say here's where you could find out about the bids, which is an expense. For some of them [small subcontractors] it's like we don't want to spend that, whatever it is, three hundred bucks a month, or whatever it happens to be. So, then they're dependent on the general contractors reaching out to them. I suspect, we are guilty as the most, a lot of our public contractors, about giving them timely notice, here's what's out there, numbers we need, here's what the job entails, et cetera. There's typically two weeks, like the ones those for today, almost all of them, they'll be, we got 14 days when the jobs will bid. So, what I just described, I'll tell my guys to pick it up. They'll pick them up. It'll be like three days go by, by the time we get the plans, where we look at it. Yes, we go bid. No, we're not. So quite often it's the subcontractors have no more than a week or less to come up with the numbers. They're out building projects. We give them three days to come up with the numbers on how much is this, whatever, 3000 tons of asphalt on this job. They just roll their eyes, like okay, we're trying to get this together for you. We have to reach out to them, they're kind of baked into our own inequity, so to speak. Although if we think of the challenge, something that." [#2]
- A representative of a Black American-owned professional services company stated, "It's the primary reason I have chosen not to actively pursue a lot of that work. Is it great work to do? Certainly, it is. Are there opportunities to do it? Yes, it is. The RFQ, the RFP processes are incredibly stringent. They are incredibly labor intensive in the preparation. The mechanics of the forms are not easily navigable. And because their technology is in some ways, fairly antiquated, telling me to fill out a PDF, and it's not an editable PDF, doesn't help me with my timing. So, the time and the labor intensity it takes to put all of those packages together, and then to upload those packages in systems, that themselves are not universally linked. And then there are size limitations to the documents, that if I exceed the size limitation, now I got to figure out what information that you still want that I have to delete in order to make it fit." [#3]
- A representative of a majority-owned professional services company stated, "The negative part of it is the length and size of the contract documents." [#6]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "The gatekeepers. For instance, that's one of the reasons I left the Cincinnati MBE and whatever, because the gatekeepers are not technical. They will not direct you, give you a chance to go speak to the technical folks that will understand what you're talking about. They tend to frustrate you. They don't understand what your services you're providing. And I think that's the biggest barrier. The private companies that I work with globally, I go directly to the engineering folks. They connect me that. They know we talk the same language. They understand. It simplifies it and it has clarity of purpose between both parties. Not even, sometimes we don't even get to the procurement folks. We get to the, I don't know what they're called diversity something, diversity and then the procurement folks. I understand they want to vet... I understand the principle behind it. They want to vet folks before they send them. But you need to then vet based on your capability or capacity of understanding the service or technology that they're offering." [#9]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "There's a website. I guess it's not a website, it's like a service called construction journal that lists jobs that are upcoming or out for bid and stuff like that. So, that service is like seven or $800 a

year. I know what jobs are coming that are within my counties that we work in and dollar range that we would do work in. But I don't know the only City or jurisdiction I know of that has, and I hate to say it because everything else they do is ridiculous. But Middletown has a really great system because I'm on an email list. So everything that comes out from the City of Middletown, as far as, whether it's landscaping or, I mean, you name it, anything, the City is getting bids on [I see]." [#11]

- A representative of an woman-owned, DBE-certified construction company stated, "It seems like, if you figure it out, then they change something, and you've got to start that process all over, and it's frustrating. You spend time trying to get the opportunity to bid on something than it takes to bid on it and actually go and do the job. And it takes time, which is money. And that's one of the reasons we were glad to get the call that led to this, for the City of Cincinnati and the surrounding areas, Hamilton County, to maybe help us where that's concerned." [#13]
- The owner of a majority-owned goods and services company stated, "I haven't made the time or have the bandwidth to try to bid on more, to more public sector work. I don't have a particular reason not to. It's not like I've made this philosophical decision that I don't want to do public sector work because it's still good work. So, it's just that I haven't made the time to try to do the bidding." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "The tools around, for instance, going to... to go bid out a project, and secure it, and do all that stuff, it's a long process, and it's a lot of paperwork at times. That alone takes up man hours. And then when you don't win it, and you put all this time into it, it's just a heartbreaking endeavor." [#17]
- The owner of a majority-owned goods and services company stated, "Typically we would stay away from government business. Because it was always on a bid-type basis… The bid business can be tricky. It can be written so convoluted and so long. I mean, you might get a packet that's 30 pages… I really would like to meet with the buyer and help them through this process. Cause I'm not sure they know what the best course of action is for the City or the County, what they're going through." [#19]
- The co-owner of a majority-owned goods and services company stated, "I guess the RFP process would probably work, but I don't know if that's really what I want to get into because we're small. I don't know that I want to get that big at this point." [#20]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "A lot of things that we do are price sensitive. So [you] have an idea of where you need to be in order to be competitive. I was just talking about this last week with someone, especially when you're doing a blind bid is that for example, someone might ask me what kind of prices can you provide me on toilet tissue. And I'm finding out that I might be competing with Procter and Gamble on providing toilet tissues. And so, there's no way that my prices are going to be lower than Procter and Gamble's. And that's what we run into because it's just totally blind out there. And you don't know what you're dealing with, and allover sudden you get a rejection letter saying that your prices were too high. But where do you need to be? Who are you competing with and how do you need to compete is part of our challenge that we deal with. And if we can get past that hurdle, if we can have an idea as to where we need to be, then I think we can be competitive. That would be my decision if I

need to set my margins at 30%. Or if I want to reduce them down to 10%, then help me to make that decision too so that I can have a better understanding what I need to do to win the business." [#21]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Do it every day, all day. And I hate it. Well, I don't hate the bidding part. It makes it really easy to download a set of plans on your computer and go at it from there. That's pretty much the norm now in construction, but all the particular forms for certification, which is a pain in the neck. It's not that it's hard. It's just that it is time consuming and pretentious." [#23]
- A representative of a majority-owned professional services firm stated, "I've had barriers to some bidding sites. I don't do a lot of bids sites except for the government ones… On the government side, there always is a bunch of terms and conditions are really long … their bid package will be 600 pages. And they'll be six pages of specifications, okay... But not all government has that, but some do. And there are some clients of mine, on industrial level that are that way too. They're what I would say a little bit onerous about how things are done. They want them done their way, they want reporting so often and they want the lowest price in the world." [#24]
- The Black American male owner of a construction company stated, "I like to be taught by a person. So, for instance, the electronic bidding, the software, it's like you pay $3000 a year. You purchase it. Well, you purchase it upfront for $3000, depending on which one it is. Then you have to pay X amount of dollars to keep the service because they upgrade them every year. So, you pay 2 or $3000. And then you're kind of teaching yourself… and that's the problem right there. It's going to take me too much time to learn that technology on my own. I mean yeah, they have people you can call and get help, but that person is like this. We on a Zoom call. I need you there with me, teaching me how to do this. If you come to my office … you can get with me and teach me and go over this product with me, it would just be a lot more efficient or easier for me to learn and to use that product than to learn through a Zoom call or me coming to a facility. It could be challenging learning electronically like that. Sometimes you need a person right there with you. So, issues that I have ran across, which it's just really one issue that I have found with the process is that some jobs say union only. I don't like that. If there's a project, government money or whoever money is in it, why is it just strictly union, for union workers? I don't like that. I just feel like that's just limiting the pool for us to all eat. I have run across that on quite a few jobs, especially in Hamilton County where it's a lot of projects say union only. So that's probably one of the major obstacles that I have ran into. Outside of that, I haven't run into any obstacles as far as the bidding process."[#26]
- The co-owner of a WBE-certified construction company stated, "They hardly give you any notice to turn around and submit the bid. They call you and they want the bid in a few days or even next week. And if it's very big, do you have to take the measurements off of drawings? Do you have to go and look at the job? You know? There's all kind of factors and figuring out all the ins and outs, the materials that you'll need, and how much labor, and oh gosh, the timeframe, the schedules. Don't even get me started on the schedules that they want this work done in. And well, I always feel like as painters and janitorial, we get the short end of the stick, because even when we used to do construction cleanups, the painters

and the cleaners are always the last people in the space. Well other people need more time. They give it to them, but they won't move that finish date. And so all of a sudden, when you said, 'I need two weeks to complete this project.' They now say, 'You have three days because we can't move the bid date.' So, you know. … Having to have a bond, that can be very difficult if the job requires a bond, because you might have to come up with thousands of dollars to get the bond, just to bid on the job. I've seen it where, just to bid on the job, you have to show you have the bond. It's like, 'Wait a minute, I'll get the bond when I am awarded the job.' But just to bid the job and have to have it, that's crazy. And sometimes the prevailing wage can be a little scary when you bid on jobs that have the prevailing wage… that can intimidating with all of those requirements." [#27]

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I've had some bids [in the federal space] where I've had to submit financial, they want them to be by a CPA, like a financial statement. Well, that's just an expense on something I most likely might not win. But you want me to spend so much money to get a certified financial statement. I mean, I think there's a better way of going about that. If a company has not had these issues, I mean, you can check, Dun & Bradstreet, there's ways to free... Even a letter from your bank to say you're just in good standing. It's free … I would say sometimes, for us, the level of past performance has been an issue, the level or the timeframe. Sometimes they require a level of clearance that they don't give you an opportunity to win and get the clearance. You have to have the clearance to begin with. They won't sponsor you for the clearance. So that's been a problem because I will see things that would be perfect for us and that only require one or two people that we could easily fill, but when I'm reviewing it and looking over it, they'll want a clearance ahead of time. And what I'm seeing now is that they're always wanting you to submit personnel, but the start date is never firm and three months, five months, six months, even nine months later is when they award the contract. So, it's like, are these people just sitting around? So that, to me, seems geared towards larger companies who can have a bench or have in-house people with the skillsets necessary to fulfill that opportunity." [#33]
- A representative of a majority-owned construction firm stated, "The only issues we've had for any of that really would be application processes for any large or government style type bids that we've come across. The application processes are a little convoluted and almost excessive I would say. At least for our industry, from what I've seen in the bids that I've worked on." [#37]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "The cons is it's a very complex process because it goes through different department, not only from your core, but it goes to your procurement officers to legal and all that. So many times, there's always office politics takes place, even in a federal government as well. So, everybody has their own favorites and stuff to keep the business, too. And not all, I mean they all perform, but everybody has their own people they know, they have worked with, so they like to bring them on. But yeah, there's a process of starting from RFP or RFI to award the contract. Now there is a long process been defined. At least in our agency, it can take up to at least six months. And that's what they ask for, at least six months of lead time to award any contract. It's a pretty small contracts. If you see 8(a) contracts are maybe max $4 million contract, 4.5. So those are not big contracts, but it still takes about six months. I would say it's too much" [#43]

- The woman owner of a goods and services company stated, "The problem to grow and sustain my business with contracts is the process you have to go through. And the categories that they're allotted for, it's not on your ability or what you can offer; it's basically too much red tape to go through." [#44]
- A representative from a majority-owned goods and services company stated, "We are a parking company and everything goes out to bid. Some companies are automatically given the business without even going out to bid." [#AV247]
- A representative from a majority-owned goods and services company stated, "Just the contracting. Bids are cumbersome." [#AV312]
- A representative from a majority-owned professional services company stated, "I find that in order to get a government job you had to talk to at least 15 people for 2 years. I find that I have to be a salesperson in addition to doing my normal job. Also the bidding process is very expensive. The biggest problem is that in government, in general, there are too many layers to go through. The money strings are kept apart from what the professionals need." [#AV204]
- A representative from a Subcontinent Asian American-owned professional services company stated, "We never get called back. Wait is way too long and there is a lot of red tape to go through. I think Hamilton County should look at how Columbus is handling their County. Hamilton County is way backwards and too much politics." [#AV237]
- The woman owner of a professional services firm stated, "We were invited to present and to submit a proposal for a nice entity and we did. And we took weeks, from the standpoint of it was all hands on deck, and it was an outstanding presentation. We got compliments on a presentation. We did not get the job. They said, 'Well, you came in second.' The way they were grading, they were giving grades and then we could see our grading. They marked through and changed it. Bottom line, we didn't get it. Okay fine, didn't work out with the person who got it. The individual called me and said, 'Oh, we want you to present again.' And I said, 'Well, no thank you. You know what our company's about. We've spent weeks on our last presentation. We did everything in the world. You know who we are, what we do, whatever, and so thank you, but no thank you. I wish you well.' And then, person said to me, okay, 'Well, so you're telling me you want to present in a fair arena where the outcome is not already decided before you walk in the door?' And it was kind of like, we're not a big company. We're lean and mean. We turn out great products, but being jerked around like that, or not going in and knowing you have a fair shot... The politicalness of it… It just would be nice to have it a fair playing field and not have it already decided before you go through all the work. I just think that's... So unfair. I would just wish people go, 'Oh, we want this company. And therefore, we're going [with them]'. Because sometimes I think when you walk in the room, they already know when you walk in a room, who they're going to go with because of the relationships, and everything and what... You have no way of knowing what the relationships are. I guess that's where humans work. I don't work that way and I don't think there's anything we can do about it." [#FG2]
- The Black American woman owner of a SBE-certified professional services firm stated, "It takes resources. You have to pay and [get] other people to help you with it. You have to get ready for the presentation. It is not a little thing we have to do. The RFP itself is slanted, like I said before. It excludes us on purpose, I think." [#FG2]

- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, “I would say just the requirement and the documentation paperwork, what you need to do in order to do business with them, what your credentials need to be to do business with them. It's a lot more in depth as far as the paperwork is concerned to do business with the government, for us. I do business with the state of Ohio, just say, and even in writing or responding to their bid response, I had to do five binders that had to have 20 sections. That was 19 pages in each section just to respond to that bid in order, just to get to the opportunity. So, it's more in depth, it requires more personnel to be able to respond to those bids and to do them." [#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. Ten business owners and managers described their experiences with bid shopping and bid manipulation in the Hamilton County marketplace [#10, #19, #21, #24, #29, #34, #36, #37, #38, #41]. For example:

- The woman owner of a construction firm stated, "They come and ask us for a quote, and we'd spend all kind of time... a lot of times doing design work, figuring out what they want; and then they just take all of our numbers and hand them to their favorites, and say, 'Here. Can you beat this number?' Well, of course he can beat it. He doesn't have any time involved in bidding the damn thing. So, we've run into that a lot. I'd say the private sector, more so than in the public sector. I think there are probably regulations and overwatch that people in the public sector can't play those games nearly as much as the private do." [#10]
- The owner of a majority-owned goods and services company stated, "When a large company, or even a smaller company wants to buy furniture, I mean, they'll come into our showroom, talk to us, we'll explain our process. But I know they're talking to other companies as well. Which they should. It's like when you maybe buy a car, if you're looking for a Mazda, you might go to two or three different Mazda dealerships if you never had a relationship with any salesman in the past that sells Mazdas." [#19]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I'm not aware of that taking place, but I'm quite sure that it does. So that's where the relationship portions come in the play, and those relationships that I'm not aware of. And so that's where we lose out on because I'm quite sure is happening, where someone's friend is sharing information and not sharing it with everyone." [#21]
- A representative of a majority-owned professional services firm stated, "I see some of that out there, I see some of it. It's just not common right now. … it takes me a while to get a quote out nowadays because I try to get quotes back from my suppliers and then pull it all together … it can take me six weeks to quote a substation, okay. So if all over sudden they come back in and I assume by bid shopping, they're going, hey well, you need to lower your price here or we're going to send it out. They're going to give it away to somebody else. Everyone right now, everyone's so busy. It almost doesn't matter. But prior to that busyness, that was happening They'll be like, you need to be 5% lower and then you'll get

this order, and they'll tell you that. That's [bid shopping] in the private sector. None of that's in the public sector." [#24]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "We see that as a problem and we are aware of it. We know that it's happening. And even taking that a little further, and I don't know if that's the next question, but I'm a wrap in together. Being a small minority woman owned company, we know we don't to get the same prices as the larger companies and we've lost bids for that. So, it's sort of that reverse, even before the shopping goes, they already know Joe Blow called and [our company] called, so we're going to make sure Joe Blow gets the better price than [our company], especially when it's specific. If it's in the specs, you know that everybody's going to be calling you because it's this type of railing or whatever the case may be. So, you have to go to a particular manufacturer. They will not give us the same price. And saying that to say we know that's happening, which is madding and not fair, but the bigger companies of course, which makes sense that economy of scale, that they're going to be buying more materials. Of course, they're going to get a better price than the little guy. But all that goes into helping to make sure that we can't be competitive, and we will not win the bid. And it happens, especially in construction and especially in the good old boy network, they're going to do what they're going to do to make sure that who they want to use has as any advantage possible. So, that is definitely very prevalent." [#29]
- A representative of a majority-owned professional services firm stated, "There's always the folks who will try and say, well, I've got other work the line. So do this work for me at this low price and then this future work is going to be coming your way or, oh, I've had an offer to do this, that's much lower. And I'd like to work with you, but I can't do that. Your number is always the... Not everybody plays that card, but it's often what you're going to hear. You just have to discern what is real and what is not real." [#34]
- A representative of a majority-owned professional services firm stated, "Oh yeah, I run into that all the time. I most frequently run into it when I'm trying to do business in the nonprofit space. And there are avenues available to them, like buying a computer for example. They can get those cheaper through certain programs that I can sell them for. But like I tell them, 'Well, if you already knew you could get them cheaper, why did you have me bid at it? I mean, obviously you still need the services, and you can't get those through that avenue.'" [#36]
- A representative of a majority-owned construction firm stated, "We have run into some of that with the individual clients. They're looking for the best deal so there's some of that but we're pretty firm because the way we price our model, it's good for the customer and it's good for us. So usually when we put a price out there, it's our best price to begin with and there's very low room for us to really move, so to speak. However, we have had people use our bids against other bids to lower other people's bids because they may not want to necessarily work with our firm, but they've used our bid, which is better than the bid you've gotten or we're expecting to receive, to go with another vendor." [#37]
- A representative of a Black American-owned construction firm stated, "I do get the problem, they don't give me the bid and I feel they gave my numbers away. To me, they wouldn't call me back, but what they do is they take my bids. Like I got one particular customer that I bid 50 jobs with them, but never got a call back. But they still always want

me to bid. So, my feeling is they take my numbers and give it to their favorite contractors, and make sure he stays and keeps him in line. So that's how I think they do it. They don't call me back ever. Now if they did, that would be a negotiated bid. And that would be okay. If they call me back and say, 'Can you do it lower,' then we're negotiating the bid, it's not bid [shopping]. So, if it's negotiating bid, I'm okay with that because I could say yes or no. So that would actually be a good thing. Because one of my key customers does do that time to time is, 'Oh, that's too high. That's over our budget. Can you do any better than that?' I'm like, 'Sure, let me see if I can get a look at it again.' So, in that case then we're negotiating contract. I'm good with that. But when I don't hear from them, they constantly want me to bid, but I don't understand why not even get a bid, a call, anything back. Nothing, but always sending me bids. And so, what I do is I bid them at 325%. I'm not giving them away. I want to see where I'm at first and I haven't heard any of the prices of my competitors. So, I don't even know if I'm in the ballpark or not." [#38]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "That's unfortunately one of the biggest problems in construction industry. And if there is a project that we are biding as a sub-contractor, if you short us one time, that would be the last time we would get to you." [#41]

15. Treatment by primes or customers. Six business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#10, #17, #24, #26, #29, #35]. For example:

- The woman owner of a construction firm stated, "When it comes to working for a general on a project, they have no end to excuses why they can't pay you: they would say the work wasn't right, or that was wrong. I would much rather be a prime contractor." [#10]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "For one, if they're in town, most of the time, if they're in the City of Cincinnati, if they're in a 275 loop, they're usually great to work with … It's the ones that come from Milwaukee and from other areas, that don't really care about the minority contractors. Because where they come from, they don't even believe in minority contractors anyway. When they come from a place like Arizona, where they don't believe there are minority contractors at all, there are only women-owned businesses out there... There's no such thing as a disparity study out there. Like, what is a disparity study out there? They actually need somebody to hold their hand. They need somebody who local, who is from the City or from the County, to say like, 'hey, we have to make sure that this is taken care of, we have to make sure that these needs are being met.' And if they're not, then we're going to hold you accountable for them." [#17]
- A representative of a majority-owned professional services firm stated, "Change orders are always the biggest controversy. … Nobody ever wants to have them of course. And everyone wants to think that they planned everything right. And it doesn't always happen that way. … That's why good proposal writing is very important and you put it in there and then you got a good estimate for what every good estimate it will have in it. … I think the worst abuse is that you got clients that, and there're companies out there, not all of them, but their contract says you can't proceed without written authority on a change. But it's an emergency. And they tell you, 'Go ahead and do that. I got you covered. Don't worry'. And

then you get to send them the change order after the fact, and then they don't want to approve it. because it wasn't authorized in advance. Even though, it was an emergency, okay. I get to the point now, I need at least an email in writing from you, saying 'you're authorized'. And I won't take verbal anymore." [#24]

- The Black American male owner of a construction company stated, "I actually got some emails. It wasn't really questioning the quality or anything, but it was questioning the fact that ... we were working for [company] at this [project] and the GC, the project manager … Me and him had a few words go back and forth because he was talking as if I was some type of servant at one point, and I didn't like the way he was talking. Even in emails, he was being real disrespectful, and I had to put him in his place. Now, we at a good place now because I wouldn't accepted his ... So he would send emails to his office, just dogging me out and then copy me to the email. So I had to kind of professionally, not derogatory or anything like that, but professionally just tell him if he got a problem with the way we do work, pay me because I had an issue with the way they paid. … They were dragging on paying people and, not just me, but everybody. But then you would complain about production. Don't complain about production unless you're paying people. If you're paying me on time, you would get the right kind of production. He was saying stuff like, 'Maybe we should bring other people in.' Don't tag me to that email because then you going to get me saying something smart back to you. So basically, I just told him, 'Well, if you pay me out of your own pocket since you got a lot to say, then I'll get people there and we'll get this job done.' After I sent that email, the company started making sure I got my checks." [#26]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Because the majority of staffing, I still have employees who treat my employees like they're less. We do a lot of banquets serving for a lot of places and one of them is a convention center. Some of the things they say to about our employees is degrading, some of the ways they talk to my staff is degrading. And I think we get that more from people who we are under contract with versus smaller entities." [#35]

16. Approval of the work by the prime contractor or customer. Two business owners or representatives described their experiences getting approvals of the work by the prime contractor or the customer [#23, #33]. For example:

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "There's a project, a senior citizen building we built. Things didn't work out too well. They did the project in three phases; they had a site contractor do the site work, they had us build the buildings and then they had one of their own doing the landscaping. And when we first started doing the buildings, the infrastructure wasn't matching up with the building layout and this, that, and the other. And it held the project up for longer than what it should have, but they didn't take responsibility for the prior contractors … they blamed us for a lot of the problems with the project, when we had ... along with the architect ... proving that infrastructure-wise, the project wasn't supposed to be the way it was. We had to do a lot of innovations to make things work and they wasn't happy with that, and they tried to kick us off, but they couldn't. We had to spend a lot of money on lawyers, but ... that's the worst experience I ever had." [#23]

17. Delayed payment, lack of payment, or other payment issues. Twenty-three business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#3, #8, #10, #11, #12, #13, #17, #22, #23, #24, #26, #27, #28, #29, #34, #36, #37, #38, #39, #40, #41, #FG1, #FG2]. For example:

- A representative of a Black American-owned professional services company stated, "When organizations tell you, it's going to be net 60, net 120, now that's where it gets under my skin. But I will tell you, in one case, where both the prime and I are MBEs. And the corporate entity was structured and such that they pay all of their vendors net 120. So, mine now becomes net almost 160. So, I'm carrying receivables for five, six months, and having to pay my subcontractors that may be tertiary to the prime." [#3]
- A representative of a majority-owned professional services company stated, "Sometimes we've had problems where a project manager... That might not be their title, but that's kind of how I think of them. The project manager is wanting us to do the work and they get us to agree to it. I send an agreement, they sign it. And then when it comes time to get paid, I hear, 'My accounting department won't cut a check to you until you do these five things.' And I say, 'Well, I have a contract with you that says you're going to pay me. And the contract says nothing about me doing these five things.' 'Well, that's the way our system works.' Once I've done all the work, I'm not in a position to say, 'Well, no, I don't want to do those five things.' Now I'm kind of stuck. I have to do it, or I don't get paid. And I'm not going to fight City hall, so to speak, on what their procurement process is. So, it's kind of a take it or leave it sort of thing and you have no choice. So, I would say in terms of payment, we've had more problem with those kinds of things. Actually, getting paid once we're past those things, I've never had problems with any government entity paying in a reasonable time or in an appropriate way. Again, it's always the upfront part of it that's the issue." [#8]
- The woman owner of a construction firm stated, "When it comes to working for a general on a project, they have no end to excuses why they can't pay you: they would say the work wasn't right, or that was wrong. I would much rather be a prime contractor. One that pops to mind, several years ago, we did a job at Miami University in Oxford; small job, it didn't really amount to maybe $15,000. But the owner of that company kept telling us, 'Oh, well, I haven't gotten paid from the University yet. I haven't got paid.' Well, we went on a field outing with one of our suppliers, and one of the guys from Miami University was on this outing. And he says, 'I sent that check three months ago.' So, I went to the general's office, I said, 'Look. I need to get paid.' 'Well, I haven't gotten paid yet.' I said, 'Yes, you have. I talked to so and so, and he said you've been paid.' The guy, honest to God, reached down in his drawer, and pulled my check out, and handed it to me. That kind of falls under the severe squeaky wheel thing. If he's not bitching enough, don't pay him. So that's my biggest rub with the generals, is that they always find some way to hold your money. And that's why I would like much rather to be a prime. … I think if the public sector people like Hamilton County had some system, where they would sign off on the work that we do as an electrical contractor on a job, 'Yes, it's completed. We're satisfied with this 20% of the job.' At that point, if there would be some way to force the generals to pay us what they owe us at that point in time. It would be a huge help if the public sector people would put a program like that in place that would force these generals to pay their subs in a timely manner. And I

don't know, I've really never been on the general side of things. Do they get the same pushback from the public entities as what we're seeing from the generals?" [#10]

- The male co-owner of a WBE- and WOSB-certified construction firm stated, "Anyone that's in my position will [say that] the challenges [are] finding someone that pays when they say they're going to pay, and you don't have to chase them down to get paid. That almost makes the difference whether a general contractor is worth working for or not." [#11]
- The owner of a majority-owned construction company stated, "I normally accommodate most clients and most clients are at 30 days. If it's longer than that, then I have a serious discussion with them. I let them know that when I first start working for them, that's not acceptable. They need to pay me sooner. But as we develop a relationship, I'm happy to go on whatever schedule they have." [#12]
- A representative of an woman-owned, DBE-certified construction company stated, "We do have a line of credit set up with a bank. I'm not sure what that line of credit amount is. All right. So, we do have that, but, before the company got that, it was a challenge, robbing Peter to pay Paul, or what do you pay and what do you let go until a big check comes in because there's times that we'll go and do a job in a paper mill, and we'll be gone, be in that mill for a week with 30 or 40 guys. And that's a lot of money to get the guys there in hotel rooms and per diem, and then you got to pay them when they get back, and sometimes these mills don't pay for 60, 90 days." [#13]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "I think that the biggest problem with prevailing wage jobs is that you have these bigger companies that come in, and they negotiate terms, yes, which are great. But sometimes they stick to their terms of paying their contractors. If they don't get paid.... For instance, it was a company that we did something for with CMHA, and they didn't pay us for two and a half months. Well, I could carry the load for about two months, but when you start getting into the third month ... We had about $60,000 saved up for just our payroll, but then they added another trade on with us, they wanted more people there, they wanted us to help out some more. It got to where I had $80,000 to pay out, and only had 60 grand in our account for us to pay out payroll. They were pretty much taking us down just doing that. And then, they were challenging our payroll, even though they knew our payroll was correct, and they took six months to give us $30,000 that they already owed us after they asked us to leave the job because they had somebody cheaper doing it. Well, that client that they had at the time, that client was a federal agency. So, they were slow about paying, so that made the general contractors slow about paying it. Had they paid them on time, then we could have maybe gotten paid on time, and that would've helped out with the process. But they were so slow about doing that. Even though they already had the funds set aside, it didn't make any difference. They need somebody to hold them accountable and be the watchdog over it. because even with that construction company, [that kicked us off the project and delayed our payment], we had to wait almost six months for $30,000 that was owned to us in November. I think we got paid last year in May, and we had submitted the invoice back in November. The guy took two months just to call me back, and it took me not signing my waiver rights away and telling him... contacting him with my attorney, which cost me $900, on top of the 30 grand that he already owed us, in order for him to actually pay it up, and him then begging and being like, 'Oh, we can get this... I'm sorry. I forgot

about you.' How do you forget about $30,000 that you owe me, and I've called you a million times? If there was somebody else, I can contact, that can oversee that, that would be great. But we risk being blackballed from agencies by contacting the client directly … because they have so much to gain out of it. The general contracting company has something to gain, and then the client, who is the federal agency, has something to gain. If they both have something to gain, they don't mind knocking you off to get whatever they want. Knowing when you're getting paid sometimes, I guess, that's always a hardship. Because 30 to 60 days, and in some times, if you're dealing with [certain agencies], you have to wait 180 days, in some cases, just get paid. I think that's ridiculous, especially when you're dealing with agencies or companies that have ample amount of cash that they know that they already set aside. That can be a hardship on a company, especially when they've already performed the services, and they're awaiting that amount of money to help keep them growing." [#17]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think private industry does it. They just hold you out for 60 days, 90 days, 120 days, so they can hold on to their money. But we don't have trouble with it with Hamilton County, or with the City, or with the Metropolitan Sewer District." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "We could weather a storm if we're going to get paid in 30, 45, 60 days. Sometimes in 90 days. We can go to storm. But the smaller guys can't. Matter of fact, me and [and a partner] put together a payment plan for the... where the contractor who's a minority contractor had the advantage to work with a bank. … Where the same bank that's financing the project would pay the subcontractor would once the work is done, on a biweekly basis, which helped out the smaller contractor. But I don't know if many people doing that these days. That was one of the things we came up with. And I know the state has tried to do it. I don't know how well it worked out for them. Like I said, it's been a long time since I've been, really, out the construction end. But more in the supply end. But that's a good thing, you can work... It will help out minorities and small businesses if it can be a timely payment. Because I know a lot of times, you'll get the materials in one month and then you can't get the materials in place until the contractor who's in front of you moves out the way to get your part done. And the CM, the owner, whoever's in charge, hold that payment till everything's in place and approved by the architect or whoever does the final improvement. In some cases that could be 2, 3, 6, 7 months. So, it's hard to explain that." [#23]
- A representative of a majority-owned professional services firm stated, "There are several large clients of ours that are absolutely horrible in payment terms. [We] just won't do it." [#24]
- The Black American male owner of a construction company stated, "All the time, yes. Almost every job is a problem getting paid. Hamilton County paid fast. I love working for Hamilton County. When I get done with a job, I get paid. They say 30 days, but I always get paid before 30 days. So, I have to give that to Hamilton County on that. … But outside of the County, if it's UC, a general contractor … it's always a issue of getting paid, and I just don't understand. I do my work. Why am I getting paid 40 and 50 days later? I just don't understand that. What's the problem? I get all my paperwork in. 90% of my jobs, I have problem getting paid on time." [#26]

- The co-owner of a WBE-certified construction company stated, "Those have just gotten ridiculous. Those payment terms have gotten a 100 to 120 days sometimes, or even they say, 'We'll pay you when we get paid.' If I'm working for a prime, or maybe another sub, you know? Even the prime sometimes it's like, 'Well, as soon as the customer pays us, we'll pay you.' for a small business, even waiting the 30 days can sometimes be a struggle because cash flow is everything. But when you talk 45, 60, 90, and now we're getting into 120-day things, it's just you can't pay out all that labor, and pay for the materials, and wait for that money. Then you your credit line gets maxed out, then you start putting things on credit cards and things, just totally go the wrong way." [#27]
- The owner of an SBE-certified construction company stated, "[I've been on a project] at least eight months old and I haven't seen a penny. They declined the bill, one single item in it. Right, wrong or indifferent, and then therefore they didn't pay any of it. They finally got... By the time they get the permits and utilities and a similar stuff done, they're usually chomping it to bit, can't wait to get the thing wrecked. So, they tell you to hurry up and get Caterpillars down there and wreck it. I think they told me I couldn't get paid because I did not have a letter to proceed, even though they'd told me to get down there. Then the next reason or another reason let's see, no letter proceed, then said I didn't have the wrecking permit, and then they've declined the bill two times because there's an item on there. They find one item they don't like and don't want to pay it. They think money is just unlimited and the contractor can eat all the problems there's laws and rules, they're supposed to pay within 30 days. But if they can find any reason not to, they do. Instead of helping you with a delay, they use it as a non-pay thing." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "That is definitely a big hurdle for us because the terms, we can't extend out. We pay weekly. We have a large staff, and they get paid well. We're a union company and so making payroll, so that is always a challenge. And that prohibits us from getting certain contracts because a lot of people, they don't want to be our bank. Pay us first and if there's discounted rates or whatever, our margins are not large enough to say, yeah, if you pay us, do this and that. So that is a huge challenge and that's where, again, to access the capital, not having the cash flow to be able to tolerate the lingering rates that are out there. And unfortunately, even the owners that are trying to bring about diversity or whatever, they're not thinking about the little guys that they're not quick to pay. And if they're not quick to pay and you're a second tier, it's just trickling down. So, that is huge. That's always a barrier. Because we've been burned by them through lack of payment, not great place to work, different things like that. Just bad experiences. So yes, we have a small list of contractors that we just will not work with … because we have worked with them in the past and it was not a good fit for one reason or another. Either like I said, slow payment, no payment, the working conditions, just it was not good." [#29]
- A representative of a majority-owned professional services firm stated, "Anything that I've been involved with the state of Ohio or even a municipality, you make the proposal, you don't hear anything for quite a long time. And then all of a sudden you get a notice that it needs to be completed in the next 30 days. So, there you are with a big project to complete, but not the manpower left because you had other projects that you had to be able to make money. You needed to have projects in your pipeline, and then you can't invoice until the end of the project and then not expect payment for several weeks or months. So, for a small

company, managing the workload and the payment schedule can be a real detriment. … There is always that issue of people who don't want to perform their side of the bargain. The delays [in payment] that come with doing it in the public sector are hardship. And then on the private sector is knowing that you have somebody that you're working with that has integrity." [#34]

- A representative of a majority-owned professional services firm stated, "A few times, but for the most part, no. I did have to hire an attorney once. But slow pays were pretty common during 2020, that was almost completely gone in 2021. And then this year, I've only got one or two clients that are slow paying me, and I'm trying to work with them as best I can, because I know they're struggling. They had some good things going on, COVID hit, and they're just having a hard time getting their legs back under them. And I'm trying to help them, but you can only go so far." [#36]
- A representative of a majority-owned construction firm stated, "Most of the time it's going past people not paying on time, is when we really have issues with things and then it has to either reissue or... Basically, at that point we haven't anybody not pay for nonpayment, but sometimes payment is sluggish and [there are] issues there." [#37]
- A representative of a Black American-owned construction firm stated, "That's why I pick my customers, I pick customers that pay well. That's who I look for, for people that pay well. Otherwise, I don't want the business because there is no business if you don't pay me. So, I'm okay with 30 days but I'm not okay with that 60, 90 days. I can't wait that long." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "Some of those larger projects could take you out of business. I mean, if it takes you three months to six months to get paid, I mean that could break you." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Not to say that we haven't had problems with companies paying us, but it's more internal errors on their part than it was anything else." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "When like 2008, 2009, when economy was bad, people held on to payments. They didn't release payments for 90 to 120 days. That's the first time we ever had to go tap into our line of credit. …Some of them is problem. We make sure that our contracts are incorporated. There are contracts such as General Electric that literally would say they will not pay any sooner than 120 days that's after approval. So that almost 150, 170 days. So, what most contractors do and they tell you that if you want to get paid sooner, you got to put so much percentage in advance of this and that. So again, because of who we are and because of our strength of our company, we have the luxury of being choosy. So, if you are a client that doesn't pay soon enough or fast enough, or you play games with the payment, we just [don't work with them] anymore." [#41]
- The Black American owner of an MBE-certified construction firm stated, "I do work for some of the contractors and sometimes it's 60 days, 45 days and up to 90 plus days and that's really tough when you need to have cashflow, you need to pay your guys every week and all the expense that comes with running a business." [#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "If I work with a County, I tend to get paid every 30 days consistently and [if I] work as a sub it's 65,

70, 80 days, it's because it's always dependent upon the approval of the prime's bill and they can have problems in their bill, but their bill gets paid. We don't get paid. And so that's always an issue … my bill is held up with theirs." [#FG2]

18. Size of contracts. Thirteen interviewees described the size of available contracts as challenging. [#5, #10, #19, #22, #24, #26, #27, #28, #29, #34, #37, #39, #AV] For example:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "When we go upstream, it takes pretty much the same amount of work to work on a $100,000 account, which that's going to be monumental and allow you to reinvest in the company, and you really strategically have a sustainable financial package when you have a number of 50,000-plus premium type of organizations. We haven't got a crack at those larger ones ... You tend to have this high volume of smaller companies who you all love and you love helping them be able to chase their dreams and be what they want to be. It doesn't help me chase mine because it's a lot of work for not a lot of money." [#5]
- The woman owner of a construction firm stated, "There was something with the Metropolitan Sewer District; but I think the scope of that job was out of our reach. I looked at it, and said, 'No. This is not something we can handle. We're out of our wheelhouse with this one.' So, we didn't bid." [#10]
- The owner of a majority-owned goods and services company stated, "It seems like government … they want to use a one stop guy company to do everything. I don't I'd really would entertain doing that cause we're not contractors. We just focus on office furniture. And I know some people that do painting and do again, flooring. But I can certainly put people in contact with them." [#19]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I don't think that's an issue at all. That's not something that we see. Because most printers can do something really tiny, and they can also handle something pretty large. Most of the time, they're just so small, so the issue becomes that they're not really doing an RFP because the order is so small that it falls underneath the threshold to do an RFP. So, then you just don't ever get the business because they use the person that they've always been using. ... I think they end up with the people that they do all the time, just like we do so much work with the City. And I know the City does bid out projects, but I think they just bid them out to the same ones. And the same ones get them all the time because they know who is in that bailiwick that can do it. So, it's hard to break in as somebody new because they don't really include people." [#22]
- A representative of a majority-owned professional services firm stated, "We go after big stuff. We're not intimidated. … Between the owner and myself, we've built just about everything you can related to power. I've been in just about every situation, any that I haven't been in, he's definitely been in." [#24]
- The Black American male owner of a construction company stated, "For instance, I told you I only got four people that work for me currently on my payroll. And then me and one of my subs that I'm real close with, we get out here and we're finding people. So, two weeks ago, [client], they told us they wanted us to take over a part of a project that they gave a union contractor. They came to us, and they asked us for this help. We already have a contract that

we're working on with them. And then they came in with this large scope of work and they needed 20 guys. I mean they need 20 guys, and they need them right now. I don't turn stuff down a lot of times. If I feel like I can do it or at least try, I'm going to put my best foot forward and I know God going to have my back. Now, if it's something I absolutely know better, I'm going to say, 'No, I can't do that.' But I felt I was up for the challenge. So, we haven't even got the contract, but I got 10 guys already. I just sent the quote off to them last night, detailing the things that I need upfront and detailing how we would be able to get this project completed and done. So, we got 10 guys through the process already, and we got 10 more guys we're working on getting through the process." [#26]

- The co-owner of a WBE-certified construction company stated, "I would say a lot of them are too large. I've gotten together with a couple other smaller companies, and tried to team up, and bid on things. But I would definitely say some of the RFPs are way too large for smaller businesses." [#27]
- The owner of an SBE-certified construction company stated, "For example, they'll put 10, 20, 30 houses on a contract. So that basically, the only local demolition contractor that can get the work would be [a well-known large company]. Any small business can't get a $5 million bond to do a big building. MSD, they were pulling... they would put 20 houses on a demolition contractor. That eliminates pretty much all the competition. And then [the large company] could turn around and sub the work back to the little guys. So, they're paying him extra money and he's not even doing the work." [#28]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "It limits what we can go after because of our limitations of no bonding and no access to capital and all that good stuff. So, when there's RFP or RFQ out, depending on the scope, the size, we can't always and be responsive because we won't meet all the criteria." [#29]
- A representative of a majority-owned professional services firm stated, "It does prevent some barriers for smaller companies that you have to be able to match up your capability and your availability to the job scope. It is a consideration. I don't know if I would call it a barrier." [#34]
- A representative of a majority-owned construction firm stated, "The one that really comes to mind is the largest one that we looked at and … the scope and size of the project and the deadline to complete it by was astronomical. It shut out firms basically of our size and would require only the largest, and I do mean the largest companies, that were able to complete the style of work because it was a monumental undertaking to get it done in the timeframe. I actually sat down and figured out the work that would be required and even if we were to subcontract the work and find the number of people that were needed, it would be absolutely insane. The amount of work that was still required to complete it in a reasonable amount of time, let alone that the time that was given to complete the project." [#37]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "City work and County work tends to be extensive as far as pre-qualification. And again, most of those projects are just too large for us to be competitive." [#39]

- A representative from a Subcontinent Asian American-owned construction company stated, "MSD has been very tough to work with because they have a union requirement. Otherwise, projects are just so large that minority and smaller businesses don't get a chance to bid because of bonding restrictions and size limitations for prime contracting." [#AV50]

19. Bookkeeping, estimating, and other technical skills. Fifteen interviewees discussed the challenges back-office work such as bookkeeping, estimating, and other technical skills present [#12, #15, #16, #20, #21, #24, #25, #26, #27, #28, #29, #35, #37, #AV, #FG1]. For example:

- The owner of a majority-owned construction company stated, "It's not so much that I think you need more of them. I think they need to be better exposed to me so that I can find them. I recently found a bookkeeper, maybe about a year ago, and she works from home. We do QuickBooks online. And then, like I say, I had an accountant, and I've had many accountants over the past since I've been in business. A lot of them, they seem my books, and they want to hand me this huge tax bill. And I'm like, look, you see how much money I have. I can't afford that. And I'm forced to find another one. And I tell them the same thing, and the same thing happens. You know, you're going to see how much money I have. So, if you hand me this $2,000 bill, you know I can't pay it. But I'm with a guy now. He suggested that I try and get a small business loan, so I can pay him to get my taxes straightened out." [#12]
- The owner of a majority-owned construction company stated, "Estimating all up until this inflation issue and supply chain issue was always easy. I mean, I spent a lot of time doing it, but now I'm scared to death to do it." [#15]
- The owner of a majority-owned goods and services company stated, "I'm a chemical engineer by training. So, I'm pretty comfortable around numbers, anyway. When I bought the business, and being part of the franchise, and that's the real helpful thing, is that they already had QuickBooks, chart of accounts set up for me. I bought an existing business, so I didn't start from scratch. … the previous owner was already using QuickBooks, the chart of accounts were very similar. The minor transition, the franchise helped with. … so the bookkeeping was pretty straightforward." [#16]
- The co-owner of a majority-owned goods and services company stated, "It's a struggle because we do it all. I mean, we have a CPA, but we have to provide everything to them. And it's the IT, technical, QuickBooks and stuff like that, it's just time consuming." [#20]
- A representative of a majority-owned professional services firm stated, "Bookkeeping no, estimating yes. So, I estimated the same thing as before, to estimate the job, you need to have a depth of experience and we just don't have enough people and staff with that depth of experience to pursue all the business we want, we pick and choose." [#24]
- The Black American male owner of a construction company stated, "It's three of us in the office. As you know, I'm in the field and in the office. So, I'm running around from job to job. Then I'm also estimating a lot of my work. And then I have people in the office that handles the bookkeeping. Well, we actually have an accountant that works with my office administrator on the bookkeeping side of things, but I always feel like things could be handled better and documented better. … I'm just trying to find a way to manage these

things a lot better than how they've been managed in the past. So, it's been tricky as far as that aspect. It's been a rough ride. I would love to learn how to get stuff out faster." [#26]

- The co-owner of a WBE-certified construction company stated, "I certainly do like when it's a public bid and you get to go, and they open all the bids, so you know what everybody else has bid because that's a big learning experience, too. It's like, 'Okay, why are they so much less than me? Is it just my overhead's more? Or did I miss something?'" [#27]
- The owner of an SBE-certified construction company stated, "Bookkeeping is always very difficult. If you don't keep excessive records, pictures, and everything for years, eventually you get into a problem where they don't want to pay you for something. Bookkeeping, you have to have a very good bookkeeper. At times, the bonding company will want a... Just licensing and franchising, for example and bonding, to get a bond like that, you have to have an auditor with special licensing. You can't just hire a bookkeeper or somebody that's got a business degree. They want a certified accountant, and those guys are busy doing taxes three to six months a year. I mean, they start doing the taxes at the end of the year, until April 15th. Then they file extensions for a large percentage of their customers, and they spend another two or three months doing taxes. So, if you're not pretty big company and don't have excessive funding to hire this auditor, no little guy's going to start in business and be able to legally do all that. I mean, you have to have the attorneys, the accountants, the certified accountants, the bonding." [#28]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "Bookkeeping has always been a challenge, but nothing else has been a challenge. And that's just for me, I don't think it has to do anything with race or industry. It's just part of our company." [#35]
- A representative of a majority-owned construction firm stated, "Overall bookkeeping issues really aren't so much. It's the fluctuation of shipping and logistics wise because honestly, bids have been changing so quickly and trying to keep... Say it's the project is being bid on months in advance, by the time the project comes around, shipping charges have doubled or things to that nature. So, trying to adjust to that is very problematic currently." [#37]
- A representative from a woman-owned construction company stated, "Some struggle on pricing and bidding from what I have heard around here." [#AV236]
- The owner of a WBE- and SBE-certified professional services firm stated, "MSD has now required... it's called a FAR (Federal Audited Rate), or something like that. For example, I used to build projects at a 2.97 multiplier and now I'm at a 2.4 because I'm small and I don't want to pay 20, 30 whatever, a thousand dollars to have this audit. So now your choice is you keep your multiplier, but you get this audit done. I don't even know if it's annual because it's far too much money for me to even consider doing. So, it's cheaper for me just to go at a 2.4 multiplier and just suck up the loss than to try to do that audit." [#FG1]

20. Networking. Fifteen interviewees discussed barriers experienced when networking and building relationships [#1, #7, #14, #18, #19, #22, #23, #24, #25, #33, #36, #38, #FG2]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "A lot of it is just being out there going to industry events, word of mouth,

networking, networking, networking and a website helps quite a bit. We get people just contacting us saying, 'I saw this on your website, can you give me more information?' Now those don't always turn into projects, but at least we know that our website is working for us. So, I said, obviously you knew about the RFPs, but I would say for professional services like what we do, a lot of it is networking." [#1]

- A representative of a WBE-certified construction firm stated, "A lot of these relationships would've been made on job sites. I would've met this guy on a job site when we were doing a job together and the conversation and been, 'Hey, I got this other job, can you go look at it,' kind of a thing. So, they're pretty always informal." [#14]
- A representative of a majority-owned construction firm stated, "COVID is... Well, it's still around, but we're lifting the restrictions around movement and meeting and people are feeling a little more comfortable getting together in an office or something. So, we are getting back out to the trade meetings. It's really a networking thing. You got to go where the customers are. So, the trade association type events are the big draw and then the internet billboarding and interface with the customer." [#18]
- The owner of a majority-owned goods and services company stated, "We try to recommend companies that we've seen their work in the past and know how they perform for our customers … like I have all the faith in the world with my carpet recommendation guy. And he's done the same with me and recommended us for his clients that are remodeling and need office furniture the bigger companies that are buying stuff, and they've already got a relationship with other potential vendors already. And it's hard to break through that relationship. And it's almost like beating your head against the wall to try to do that." [#19]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "The thing that I would do is somehow get people in the same room where they can meet, because I think it's relationship-based. So, if there are places where people that would bat and people that would sail, or people that would be subcontractors, under-contractors, the more that they can meet, the more likely they are to bat with one another, or work with one another." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I have couple people that go these job... Not job fairs, but these B2Bs, and the outreach things. It's the same... I don't go to them anymore. It's just I've been doing it for so long, I really don't even believe them half time, but they go to all these things, and promises are made, they smile in your faces, shaking your hand, 'I'll give you a call, here's my card,' and hell, you never hear from them. You call them, they act like they don't know who you are. It's the same old thing over and over." [#23]
- A representative of a majority-owned professional services firm stated, "Once you find somebody that tells you the truth in business you will stick with them even through a hard time. No matter what. Because you trust them, not to take advantage of you. I mean, it's, that's the big part because there's a lot of people out there that are shady and do things wrong." [#24]
- A representative of a WBE-certified construction company stated, "The best process we've had to so far is handing out business cards and then meeting people face to face. I mean, I

can talk to you on the phone all day, but until I meet you face to face, it's... that's really the best. They get to know who you are. What kind of business you do." [#25]

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Are they going to have, what do they call those, pre-bid sessions that give you an opportunity to kind of network? That would be [helpful]." [#33]
- A representative of a majority-owned professional services firm stated, "I'd say network is probably the biggest thing, but I'm getting out into the different groups as I'm hearing about them and meeting people." [#36]
- A representative of a Black American-owned construction firm stated, "Probably getting into the right networks, getting to know the right people, getting the opportunity just to give a bid to customers, getting on their bid list is not always easy to do. I think that was probably the main thing." [#38]
- The Hispanic American owner of a professional services firm stated, "In terms of doing business with other companies, larger businesses, sometimes they do have commitment to minority own businesses. Sometimes are imposed by the government, that they have to flow down quote on quote quotas, right? But more often than not, they'll find one company that is friendly to them and that's the end of it, whether they use it as a pass through or, yeah, sometimes it might be because they do the way they do business. But at the end of the day, it all goes back to the networking part that we've been talking about, the who knows who. That applies in government as well as in the private sector." [#FG2]

21. Electronic bidding and online registration with public agencies. Twelve business owners and representatives discussed online registration and electronic bidding with public agencies [#1, #13, #17, #22, #26, #27, #32, #36, #40, #AV, #FG1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "With the City that they just have a whole lot of paperwork getting onto their website and I still have not mastered their website. I think that that's the most confusing, the username and password. I've gotten new ones I don't know how many times and they're just never same too." [#1]
- A representative of a woman-owned, DBE-certified construction company stated, "There's three different websites to go to. Why is there three different ... I mean, why can't this be more streamlined and easier? The first one is bidsync.com, Hamilton County. The next one is hcjfs.org about interested vendor notification request. And the next one is hamiltonCountyohio.gov. So, we've got to go to all these, and then you've got to fill out these forms." [#13]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Hamilton County, to me, doesn't run it through any technology. They just want you to submit the bond. They want you to print out the papers, upload the papers, and that's it. And then they read over. That's their whole process. Whereas other places, like ... Building Connect, you can go in, look at the blueprints on their site, you can submit your numbers through their site, you can even do your takeoff, like the measurements and everything, on their site. It's really helpful. If you needed technical support, you can call them. Hamilton County does not have that at all. You can actually have

a calendar, too, that you can look at and determine what projects are a month out or two months out." [#17]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think I could probably get more business if I knew how to get in. It probably took us six years to get the City of Cincinnati to be able to work with us outside that system. They just did everything outside the system because we could never get the system to work. We're not stupid. So, I would think that if we can't do it, neither can others. I would say training, except problem with the bigger issue is how are you going to get people to show up for the training." [#22]
- The Black American male owner of a construction company stated, "I would need somebody. I'm the type of person, really, I like to be taught by a person. So, for instance, the electronic bidding, the software, it's like you pay $3000 a year. You purchase it. Well, you purchase it upfront for $3000, depending on which one it is. Then you have to pay X amount of dollars to keep the service because they upgrade them every year. And then you're kind of teaching yourself. So we had done it in the beginning. We actually had one called Blue Book 360. We was using that, too, as well. But you're teaching yourself, and that's the problem right there. It's going to take me too much time to learn that technology on my own. I mean yeah, they have people you can call and get help, but that person is like this. We on a Zoom call. I need you there with me, teaching me how to do this. If you come to my office or I really prefer not to come to yours because the work is going to be done at my office. If you can come to my office and you can get with me and teach me and go over this product with me, it would just be a lot more efficient or easier for me to learn and to use that product than to learn through a Zoom call or me coming to a facility. It could be challenging learning electronically like that. Sometimes you need a person right there with you." [#26]
- The co-owner of a WBE-certified construction company stated, "That can be a little challenging. But I have, with my husband and my daughter, they have a lot of computer knowledge, so they have helped a lot with that. But yes, I have struggled a little with some of that, especially the Ariba thing. Their thing, I just think, is ridiculous. But the City of Cincinnati's I think I have figured out, because I've dealt with it for a few years now and navigated it. And then WBENC, luckily they use the same platform or whatever. So that has helped." [#27]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "That is Hamilton County's BOLD vendors. I forgot what is stands for, but it's what you're supposed to do to register with Hamilton County if you are a certified SBE, WBE company. They don't do the certification themselves, but they say, 'Oh, fill out this paperwork, be on our BOLD vendor list.' But once you're on the list, it does absolutely nothing for you as the business owner. It's just a name only as evidence by my experience going through with Hamilton County, because if the BOLD vendor list meant anything, then I would've gotten some points for being on the BOLD vendor list when compared to the other vendors who applied for the same contract, but I didn't." [#32]
- A representative of a majority-owned professional services firm stated, "I think those are good. I've only signed up for maybe one or two of them. But the ones I've seen seem like they're pretty easy to work with I can say at least for federal government stuff, my company

is not GSA, so I'm not bidding on any of that stuff. Obviously, you have to be on that list before you can. That's the only example I can think of." [#36]

- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Let me put it this, those systems do not prevent biases or discrimination. They just don't. They just expedite the process or automate the process to procure." [#40]
- A representative from a majority-owned construction company stated, "We've had a fair number of difficulties with the procurement department with the City for jobs we bid on with the MSD. They have a fairly outdated system for online bidding that cost us an $11M job." [#AV48]
- A representative from a majority-owned construction company stated, "I submitted an I-29 in the Ohio Business Gateway, and I've had difficulties doing that and reached out multiple times, but never got a response beyond acknowledging they got my ticket, but never any help with the problem." [#AV63]

22. Barriers through the life of the contract. Interviewees discussed barriers experienced throughout the life of their contracts [#8, #27]. For example:

- A representative of a majority-owned professional services company stated, "When we are subcontracting… [the prime has] an agreement perhaps with the owner, we have an agreement with them. And our agreement with them doesn't say, we're going to do all these things that their agreement with the owner says they're going to do. But somewhere in their agreement with the owner, it says, 'And you will have all your subs do this as well.' So, it's a poor management on the part of the prime not paying attention to the contractual terms and making sure that flows down. … The other part of it though, is even when we worked directly with the entity, like in the case of [a local] County, the project manager on the last project … he signed the contract we sent him and said, 'Okay, we're good to go.' We did all the work. And then when came time to be paid, the County auditor or whoever it was that was making an issue of it said, 'Well, no, this is not the way we do it.' And then he started sending us all this paperwork and said, 'Sorry, guys, but I forgot, but you need to do this.' Well, that's not something you forget to do. I mean, it's a contractual issue. And so, at that point, well, I have a signed contract and I did the work that the contract requires and I've abided by it and now you're not abiding by your side of it. And because it's a small project, I'm not in a position to even contemplate that I'm going to fight you on it because the cost of an attorney would be prohibitive. And so, I have no choice. I either don't get paid my few thousand dollars or I roll over and just accept whatever you're saying I have to do. And so, we ended up in that case, I had about six hours of time on that project that we actually worked on and did. I was just going out and looking into building and assessing it and providing some information. I ended up spending an hour and a half doing paperwork so I could get the payment at the end. Because I had given him quote for the job based on the number of hours it was going to take, I ended up getting paid for six hours and putting seven and a half hours into that project. I mean, it's a small amount of money to lose, but if you approached me and said you wanted me to bid on a large project that was 150 manhours, I would really think twice because it's like, 'Okay, well, if they do this to me again, I can't eat,' that kind of loss. I mean, an hour and a half loss is not a big deal, but if I lose 20 or 30 hours, because of things I don't know about until after the fact, that's a

problem. I mean, it does leave a bad taste in your mouth when you have those experiences because it's like, 'Well, why bother? Why am I even working with these people?'" [#8]

- The co-owner of a WBE-certified construction company stated, "I always feel like as painters and janitorial, we get the short end of the stick, because even when we used to do construction cleanups, the painters and the cleaners are always the last people in the space. Well other people need more time. They give it to them, but they won't move that finish date. And so all of a sudden, when you said, 'I need two weeks to complete this project.' They now say, 'You have three days because we can't move the bid date.'" [#27]

23. Size of firm. Fourteen interviewees mentioned barriers experienced because of the size of their company [#20, #36, #37, #38, #39, #40, #42, #43, #AV, #FG1, #FG2, #PT1]. For example:

- The co-owner of a majority-owned goods and services company stated, "This business is very challenging, because they are all on budgets and they're always looking for the cheapest person to do their work, to do their uniforms. And so, like I said, the competition's stiff, because, for instance the big uniform store here has a big presence. They have five have locations throughout the US. And so, they can service these companies, departments, whatever you want to call them, at a much lower price than what I can provide. Their service is terrible, and that's all the complaints I hear. Well, [the big uniform store] is cheaper. And I said, 'Well, I can't compete with that.' It's always a struggle." [#20]
- A representative of a majority-owned professional services firm stated, "The most common thing I run into with being a small business is, 'Hey, this company over here they're going to give us a team of 20 people to do this project. What are you going to bring to the table?' And it's like, well, in the case where it's something that's specifically within my skillset, it's like, 'Well, it's going to be me.' It's like, 'Well hey, if it's just you, what are you going to do that these 20 people can't?' And my response to that is, 'You should be asking that question in reverse. It's like, why can I do it on my own, and they need 20 people? But it's your money, you can spend it how you like.' In the private sector, I'd say that's probably cost me, of the opportunities that I didn't close, I'd say at least half of those were because of my company's tiny little size. But I couldn't really comment in the public space." [#36]
- A representative of a majority-owned construction firm stated, "We have [found that] as a small vendor, that we have been outsized, so to speak, out of projects. The requirements of the project itself is what kept us from being able to comply to the standards that were set. So, like I said, going back to the project in the Hamilton County, it was just the timeframe in which they wanted the project completed just was unfeasible for us to even subcontract out the work. It was just outlandishly so, for our firm. We would have to multiply in size with subcontractors many times over to complete the project on time. I think that sometimes there is some stigma attached to a smaller vendor as opposed to maybe a larger company, just because inherently, if a company's large enough, there's some inherent trust already there. There's a reason there're a little larger. They've either been around for a longer time, or they're more trusted in their field, so they've grown larger as opposed to a smaller. And so, you may be overlooked off hand just because you're a smaller business." [#37]
- A representative of a Black American-owned construction firm stated, "I've had that problem before where they didn't feel we are large enough to handle a particular job, and they went with one else. We were the little bidder, but they didn't feel comfortable because

they didn't know us. But now that same customer knows us, and I've got a lot of work for them. So, it turned around pretty easy." [#38]

- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "People tend to think you're a small, well, we are a small company, but people tend to hold that against you sometimes in the commercial realm." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "First of which is RFP can be written in a way that is about size, right? Says you must have this particular size, or you must have this particular insurance or you must have these particular capabilities." [#40]
- The owner of a majority-owned construction company stated, "Our goal, our ultimate goal is for every trucking company to have a direct contact. The problem is, when you're small, again, it goes back to that, they don't want to deal with you. They say, 'You know what? I'll just deal with TQL, because TQL has access to thousands of trucks.' So, they have companies like us with 40, 50 trucks, maybe 100 them. So, if we cannot cover, they'll call somebody else and somebody else will cover. … We had talked in the past to some warehouses, not primarily just from Ohio, but from Illinois, from other places. I think a lot of them, they want you to have at least 100 trucks, that way they know that you can cover majority of their loads." [#42]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "It's just that I'm very small business and not having so much overhead. So, I'm the only person who does and my wife, and we end share HR and accounting and all that together. I don't have any kind of a business developer, or somebody goes and get some business. I'm very busy on the contracts I have. And we try to focus on getting more work through those contracts, and we are very successful actually doing that. So, it just had no time for me, unless somebody brings it and say, 'Hey, I have this, do you want to do it together,' or something." [#43]
- A representative from a majority-owned professional services company stated, "The only barrier is our size because the projects we submit for go to companies that are out of state." [#AV67]
- A representative from a majority-owned construction company stated, "My only feedback would be that it seems like the same large companies in the area get all the contracts. I don't know if it's just that they're so much larger [that] they can do the work cheaper." [#AV70]
- A representative from a Black American-owned goods and services company stated, "From my experience when I have tried to work with the government and being a small business it is difficult to place these bids when most contracts are locked in with larger and more well-known companies and it creates a barrier when you are not a larger." [#AV225]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "One of the things that I had to learn over the past 22 years in business is that when someone asks me how many employees I have, I never answer that question because that's a question that's sizing me up for capacity instead of contacts… My size and capacity's double when I make a quick phone call to [a friend who owns a business] and say, 'Hey, can you help me out today?' So does his. And if I know five companies that can help me that I

help as well. It has to be a two-way relationship. It can't be them always just helping me. But most companies don't do everything themselves, but a lot of minority companies are sized up and people decide what type work we can do based off how many people we have coming through our doors every day as opposed to how far we can reach to get projects completed. So, my capacity is as large as my Rolodex and my experience with the people who I support, who support me." [#FG1]

- The Black American owner of an MBE-certified construction firm stated, "It limits what we go after as a prime." [#FG1]
- The Black American owner of a DBE-certified professional services firm stated, "From a larger government standpoint I think there is an issue because sometimes scopes are written where capacity is an issue. So, I think at larger government jobs, I'd say there's an issue there." [#FG1]
- The Black American woman owner of a SBE-certified professional services firm stated, "[We're] underrepresented, because small for an accounting firm is two or $3 million in professional sales and that's not small to us."[#FG2]

24. Other comments about marketplace barriers and discrimination. Eleven interviewees described other challenges in the marketplace and offered additional insights [#10, #22, #24, #42, #44, #AV]. For example:

- The woman owner of a construction firm stated, "I think the biggest thing that all of us contractors deal with on the government side is the regulation. OSHA is... The numbers that I've read with OSHA since they've been in business, they've done a really good job of fining contractors for ridiculous little items. And from what I understand, since they started in '70 up till today, there hasn't been a significant drop in onsite deaths and injuries per man hours worked. Even with all the money we've spent on OSHA, it's just another government oversight that is a burden to all of us contractors. I don't want my guys getting hurt. I lose my good people. I've also got workman's comp issues to deal with it. And we had a situation, we don't need to get into all the details, but just if they would make OSHA and those kinds of organizations advisory, as opposed to punitive, where they're... They justify their existence by writing fines; so, they don't really care about what's really going on. The biggest thing they could do to help us would be to make OSHA and IOSH and those kinds of places, advisory; make them a service to the contractors, and a service for us to help keep our people safe, rather than coming in, looking for a way to arrest us." [#10]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think our biggest hindrances is they just go to the people that they've always used. So, it's hard to break in as someone new." [#22]
- A representative of a majority-owned professional services firm stated, "It's difficult to sell because you're specialized and it's not necessarily a high volume, continuous business with a client. It's very intermittent. It's very... Your client may not talk to you for nine months and then all of a sudden, they've got three or four projects to work on. And so, as a result of that, it's very tough to sell in this industry because you've got a really broad amount of clients you're calling on with the amount of engineers that you have. So, we might have 120 different customers that we're working with at any given time out there. And some may not

have a project for two, three years, and then they'll all of a sudden have projects. So, there's not enough reason... A sales guy would be in there to get orders all the time. Right? Well, there's just not orders to be gotten, because it's so specialized. So, it's very different from us over just general economy because of that. We struggle with bringing in a salesperson who can actually generate enough revenue because visiting the number of clients they have, is tough because they're so spread out." [#24]

- The owner of a majority-owned construction company stated, "After hauling and doing everything, if we make anywhere from 10 to 15%, we're pretty happy. In trucking this is good margin, because trucking is by volume, it's like Walmart, you do a lot of stuff, but your margin is small, but volume is big. some old truck drivers, they tell us that, 'Hey, when we first started...' I mean, this is way back, maybe '50s or '60s, when they started, they'd say, 'We used to be viewed as knights, people respected us because we were building America and hauling all these loads.' And something happened, maybe, I don't know, since I started, that's how it's been, maybe the last 20 years or something, that anywhere you go, you don't get a lot of respect. So, I think that's why a lot of people don't want to do this job. You go there, everything is truckers fault for some reason. Let's say if I pick up from Ohio and I'm going to Chicago, if Ohio delays my load by three, four hours, my driver, he's stuck. And because of that, when my driver gets late to Chicago, Chicago doesn't care. They say, 'Well, I don't care if they loaded you late, that's your problem.' So, it's always, at the end of the day everything comes down to the trucker. He doesn't have to be a minority or woman, it doesn't matter, this is overall in the industry" [#42]
- The woman owner of a goods and services company stated, "[I've] heard about opportunities always being offered to people who have priority because of certain situations, if you know what I mean, like if you're women-owned or a disability, I like to be able to get contracts, and I wish there were ways just based on your ability." [#44]
- A representative from a majority-owned professional services company stated, "Seem to be set number of firms that are hired by them. Seem to use same consultants." [#AV16]
- A representative from a majority-owned construction company stated, "Most barriers come to awards being given to female or minority organizations since we don't check any of those boxes." [#AV213]
- A representative from a majority-owned construction company stated, "Because I am a white male in business, they don't want to do business with me. If I was Black or female, I would have more business than I would know what to do with. I feel like the County is exclusionary when it comes to white owned businesses." [#AV282]
- A representative from a majority-owned construction company stated, "Contracts are limited by us not being minority owned or female owned." [#AV308]
- A representative from a woman-owned professional services company stated, "I am registered with Ohio government and have bid on contracts but what gets me is I am not a minority or disabled but I have the ability over all of those sections to provide great service, but I don't get the chance. The market is always changing with strategies to get your brand out I have a lot of training and know the newest and fastest ways to promote." [#AV310]

I. Information regarding 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 the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of a contract;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environment for minorities or women;
9. 'Good ol' boy network' or other closed networks;
10. Resistance to use of MBE/WBE/DBEs by government, prime or subcontractors;
11. MBE/WBE/DBE fronts or fraud;
12. False reporting of MBE/WBE/DBE participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. Eleven business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#3, #7, #20, #23, #35, #36, #38, #39, #40, #44, #FG1]. For example:

- A representative of a Black American-owned professional services company stated, "Municipalities and companies, because of their stature, and because of their iconic nature, will pay a [large company] top dollar. They'll ask me to do it for a fifth of that and expect me to deliver at the same level of excellence. I could come in 10% lower than [a large company] and give you [the same] quality in certain areas. We're not a research firm. But in terms of delivery and execution on what we scope, we can give you that level of quality and service, which is why I've had the caliber of clients that I've had for decades. ... You couldn't possibly be worth that much. It's very subtle."[#3]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "I don't know if we've experienced price discrimination. I'm not sure. I think everybody, once we are in the room, we'll work with us an acceptable fee. That's more of the barrier than actually saying you're not worth 8%. You're only worth 4%. Very rarely do I feel... I mean, if it happens, it's because the client's cheap, not because they're discriminate." [#7]
- The co-owner of a majority-owned goods and services company stated, "Pricing. Yeah, they have the volume, and I don't, so they get special pricing because they have the volume." [#20]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "There's so many things, but we as a small business do not get the best pricing from our suppliers or distributors. [There are] other supply houses in town that does the same thing that we do, they have stockpiles and stockpiles and stockpiles of stuff. I cannot buy materials at a lower price than a lot of our competitors are, who are bigger and multigenerational companies, which then again is discrimination, because the same materials that are being put in that building is the same materials, whether it is higher lower price. Now, so if a guy's putting the material in the building at a lower price than I am, then something's wrong. That's discrimination." [#23]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I don't do it because I was turned down too many times in the past with top credit collateral, the whole nine yards. I just don't try anymore." [#35]
- A representative of a majority-owned professional services firm stated, "I assume this works this way in every business. I can only say what with certainty that it occurs in my business. But when you're buying whatever as a reseller, the price that you get is dictated by how much of it you sold last year. As a small business, if I'm bidding against a billion-dollar company that sold millions of dollars' worth of X, whatever the product is, as a result, in a lot of cases, they get as much as two to two and a half times the margin potential as I get. Something that I'm able to get for 10% off of list price, so if I give it away, I can offer my client a 10% discount over list price, there are products I can think of where the top tier partners are getting 30%. And I understand you want to reward your top performers, but that does create a barrier to entry for the smaller firms, because all they have to do is discount the thing 11%, they're 1% cheaper than I am, and they made 19%. That makes it pretty hard for the little guy." [#36]
- A representative of a Black American-owned construction firm stated, "I would say no, but it wasn't racial, it was size of the company. It's because of who, not how. It was more because they want to protect their company that they already have in place." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I wouldn't have any for certain evidence as far as getting materials, but they have ways of getting around being overtly, showing bias towards race. But a lot of, we'll just use asphalt as an example, a lot of asphalt plants that make the material, they'll you use your pricing or the amount of material that you use per year, and they'll say, 'Well, you don't use enough material for us to offer you $20,000 or $30,000 credit line.' And those are some of the things that would hinder you. Where it might cost me $70 a ton to get material, but somebody else is paying $40 a ton, so you can't compete. Whenever you walk into a bidding session and I see those individuals there, I might as well just leave because I know I can't compete." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "It's difficult in terms of quantities as it pertains to pricing. As you well know the more you purchase the lower your price can become given that we're not making large purchases over years, over year, over year, then that becomes the area which being competitive can make you less than." [#40]
- The woman owner of a goods and services company stated, "Other promotional products, companies, how they would be competitive is if they get end quantity pricing on certain

product that I don't, because I have the access to get the same items that any distributor could get, but it depends what the supplier's going to make deals with me for." [#44]

- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "The president of the bank that I was talking to… With great credit, excellent credit, with a 25 year history, with a house and a car, and all the things that they say are barriers to our company, with bonding, with everything that I need, for some reason, the bank's last question is to me is, 'How do I know I'm going to get my money back if I give you this money?' When we started our company, we were the small... Well, we're still the small glass on the block, but we were unproven. So, not only were we unproven, but we were different in our industry. So, when you're unproven and you're different, the bank hasn't... I would be looking at me too, 'What's this brother coming along for asking me for a million dollars to do an acquisition. I haven't had anybody like him come in here and ask to do an acquisition before.' And they're nervous. Doesn't matter how the history looks. The last thing that matters is this guy wants to know how is this dude going to give me my money back. It's very frustrating. It is a slap in the face. All of these years working to complete projects on a small line and working that money around should prove that we should get the money. And I don't understand what I need to look like or... on paper, I mean. … what do I have to do to finally... It's very frustrating. And it is a slap in the face after never owning anybody money. Never defaulting on anyone. Never... like people say, 'I don't need somebody to tell us how to work on a credit. I don't need somebody to tell us how to decide what a company's work. I don't need that help valuating our company or deciding where we're going to invest.' I just need somebody to look at our stuff and say, 'Yes.' And it's not happening." [#FG1]
- The Black American owner of a DBE-certified professional services firm stated, "I think that the way that an underwriter manages risk, the way that risk factors are evaluated, there is a double standard. And I know that from the brief time that I worked in corporate. I work for a Fortune 500 here in corporate for quite a while and I know that there is a difference." [#FG1]

2. Denial of the opportunity to bid. Seven business owners and managers expressed their experiences with any denials of the opportunity to bid on projects [#3, #25, #26, #29, #32, #35, #41,]. For example:

- A representative of a Black American-owned professional services company stated, "Do I know it happens? Sure, it does. Is it discussed in the industry? Is it discussed in round tables, in one-on-ones? Sure, they are. But I can't cite where it has happened to me. And quite frankly, I have probably been as selective in who I choose to work with, intentionally for that reason." [#3]
- A representative of a WBE-certified construction company stated, "We put a bid in for the City of... What's the name of that City? I can't think of the City it's over by Bethel, Ohio. We put a bid in for that and they denied us, which was fine because our pricing was too high. Then, the people that got the bid, said they couldn't man it. So they gave it to us. We went over there and we were a week away from work and the guy that gave it to us passed away. They put it back out for [bid] and told us we had it. Then we put it out for rebid, again. We bid it, again. Then, they told us that we had it. Then, something else come up and then we bid, again. Actually, the last time we couldn't bid because they wanted us to turn the bid in

by hand. Didn't tell us it was going out for bid until the day of bidding. The final day of bidding. We had to... they called me at 11:30 and said, 'It needs to be here by 12, if you guys want in on it.' It's just no ways. It's an hour from the house." [#25]

- The Black American male owner of a construction company stated, "So in the beginning and it's sad to say it. Really, when I think about it, it's kind of hurtful. So we won a project. We had outright won a project. I can't remember the exact name of the project, but I think it was a nursing home. So my estimator at the time, who ended up becoming one of my business partners ... I'm the lone business partner now, so that's another story. But I had a business partner at the time, two of them, [business partner 1 and 2]. [BP 2] was our estimator. He won his very first project, which I can do some research and figure out which one it was. I'd just go back through the emails or the folders. He won a job outright, got the contract. So I was excited, '[BP 2], you won your first job. Let's go look at it.' We went to go look at the job, and he introduced me as the owner. The general contractor looked at me. I knew it was over, too. When he looked at me, he could not believe this Black man was standing there and being introduced as the owner. You could just see it. He didn't say it. His demeanor showed it. And then when we got back to the office, we waiting to get the schedule. We never received the schedule. So I said, '[BP 2], call the guy to see what's going on with the job. We got the contract. I mean when are we going to start this work? When should we order our material?' You got to be in the loop. You got to coordinate the job. So [BP 2] called the guy, and the guy told [BP 2] that they gave it to someone else. So they took our contract and ended up giving it to someone else. So [BP 2] sent him a long email telling him that we were going to sue for discrimination and this and that, but we never followed up. I was just like, '[BP 2], from now on, just don't introduce me as the owner of the company. Let's not tell people.' It was a private project. That's why I say now I don't really go after private projects because if they know I'm Black, I don't get it. I don't get the job. So I try and go after jobs that's got inclusion. I know my chances are better. I don't want to waste energy on jobs that I'm not going to get." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "That one, I don't know on a firsthand basis. I would think that yes, but I have no proof. And saying that to say, yeah, well we should have been awarded the contract. And then because instead of us getting awarded, somehow something happened and they had to put it back out on the street and somebody gets something out. But they of course don't use that reason other than, oh, okay, well, yeah, it was over budget or we changed this or we changed that. So I can't say a hundred percent that I know that for a fact, but yes, I do believe that is the case. Instead of being able to award it, they'll come up with some reason at why they have to get another number and then you're not low and whatever." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I had a contract with Hamilton County that was competitively bid. I won it. And that contract that I had, which was with Hamilton County Job & Family Services led to me doing work for other departments in Hamilton County. And then, and this is part of the reason I wanted to talk, then the pandemic hit and the County started using a different company, male owned out of Kentucky for some of the services that I was providing, giving me no chance to bid, no chance to quote. And they said, basically, well, we didn't have to because we're in an emergency. And basically they are way, way, way overpaying this

company. I don't know if they're still using them or not, but this is the reason that I wanted to do the interview because I've been doing good work for the County for five years, and suddenly they just illegally picked somebody else who was not an SBE. And I don't know what the reason was, but it has to be some sort of personal connection with somebody or whatever. And they didn't get three quotes as required by their own policies, even though they were in a pandemic and it was an emergency, three quotes are still required. And I did a public records request to see, well, who else did they ask to make a quote, no one. Also after this happened, I tried to talk to people at the County about what happened and nobody would speak to me, including commissioners that I tried to contact. I'm thinking about Hamilton County. When they had something that was directly in my daily wick and I'm already working for them, they didn't even ask me to give them a quote. They went with a company that somebody must have told them, 'Oh, you should use these people. They're great.' That's discriminatory against your female vendor." [#32]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I think I've been in a situation because of who we are that we weren't allowed to... Our work wasn't taken. How can I say this? And this has happened a couple of times. When you have a person in the middle of who you're doing business with and they make it clear that they have other friends in other places, when you... Let me see. I had a contract where the managers and every department were allowed to choose who they wanted. And I went to a couple of managers and said, 'Well, I haven't heard from you for a while.' And they said, 'Well, I ask for you all the time, but they always give me a different agency.' So to me, that's discrimination because they gave them a white agency even though they asked for Eastern personnel, they did not call and give us the order they called and gave it to someone else. Does that make sense?" [#35]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "You know how many times when I came to Cincinnati, when people heard my voice, my accent, when I ask them to be put on a bid list, they laughed at me and hung up the phone." [#41]

3. Stereotypical attitudes. Twelve interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#11, #13, #22, #26, #27, #29, #34, #35, #38, #41, #AV, #FG2]. For example:

- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I have a couple Spanish people that work for me and there's been a few times that they've gone to pick a material or something and the supply houses will call me to validate that they really work for me, which so, I mean typical white guy bullshit where they're like, oh, the stuff that I never experienced, but other minorities probably more experience. And that's a pretty crappy thing for anyone to have to deal with. … it was like, you got to be kidding me, man. They're wearing shirts so. … they've never once done that for one of my white employees going to pick up material." [#11]
- A representative of an woman-owned, DBE-certified construction company stated, "If anything, it's welcoming, and people embrace it and want to help a small woman-owned business." [#13]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I would say I'm aware of some of that I'm definitely in a very male dominated field. There are certain customers that I talk to that... and I have an accent from the South, so they think I'm a dumb woman from the South. So, they would rather talk to somebody else until they realize that really I'm the brains of the operation. I've most certainly been dismissed until they realize that I really am the one that has it all put together." [#22]
- The Black American male owner of a construction company stated, "When he looked at me, he could not believe this Black man was standing there and being introduced as the owner. You could just see it. He didn't say it. His demeanor showed it… A lot of my employees were African American and we out there in [City] and [City] and we doing these houses. … it was strategic on my part, my salespeople have always been Caucasian because we're out in that area. But once we get the job and deposit, I send minority people out there to do the work. My guys used to come back and tell me it was side eye. They wanted to be home when they worked or they want to stand there and follow them around the house as they are working or follow them around the project to every room and sit in the room and won't say anything, but just watch them work, stuff like that. One project, we even got reported to the BBB. I went to the job site. … she reported us to the BBB, Better Business Bureau, saying that we did horrible work. Well, I went out there, saw the work. The work was great. I asked this lady, what can we do to make her happy? She just didn't want us there. At the end of the day, she didn't want Black men in her house doing this work, at the end of the ... That's what I got from it because she wanted us to just take the insulation out. I'm like, 'We're not taking the insulation out. You already paid. You done paid us. Give me a reason why you want us to take it out. If it's a valid reason, we will. But we did your job the way you asked for your job.' A white man came out here. You gave him the job. I didn't say this, but I knew what it was. We ended up winning. The BBB found that we did nothing wrong. It was just the thing she had to say about our work and the way we done the job and it just wasn't true. The pictures didn't lie. The work just didn't lie. It was that she just didn't want Black people on in her house. The guy that's running the job for them, I had to have a talk with him because the attitude he had towards my guys was racist. He didn't want them on the job site. I'm like, 'You don't determine who I have working on my jobs. You a worker yourself. You just running this job.' I mean he was yelling at one of my guys, telling him he's going to beat his ass. I mean because you don't like who they are, their background, you can't just talk to them any kind of way. He's like, 'Well, that guy stole my tape measure. I don't want him back on this job.' It was clearly a misunderstanding. The guy had six or seven tape measures that looked like his, and he still wanted him off the job." [#26]
- The co-owner of a WBE-certified construction company stated, "I'm almost embarrassed to even say it, but on the painting side, I've had people that wouldn't even talk to me, thinking, I guess that I don't know what I'm talking about. The janitorial is a little easier, I guess, because maybe they associate women with cleaning. I don't know. But the painting side, I've had a few times where they just had no interest in talking to me. If I had my painting manager along, they would strictly talk to him like I wasn't even there. And it hasn't happened a lot. And I know, just as a woman, I felt that, so I know women of color or other aspects are hit much harder, but to actually see something like that, it just astounds you." [#27]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Absolutely. Here they look, oh, you're a minority. Oh, you're a female. Oh, you're a small company. Well, you're not going to pay your bills. You're not going to be able to perform. We're not going to extend you in a line of credit. The terms are different. And yes, that's definitely that stereotype type of you're not a good company." [#29]
- A representative of a majority-owned professional services firm stated, "Not that I've ever been aware of. There's always the supplier who assumes they're speaking with the secretary and not the owner and those kinds of things, but I don't think it's affected supplier price. Just the attitude. Well, like I said, there's a presumption that I must be the secretary and not the owner. And there is some prejudice occasionally to the fact that I'm a female in a male world, but it's not terribly prevalent. It's less prevalent now than it was 20 years ago. 30 years ago." [#34]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "How can you explain when you go in a room, when you can feel [it]? You can feel it. How do you explain that? Sometimes you can just cut it with a knife." [#35]
- A representative of a Black American-owned construction firm stated, "I can pull up on a job, walk into it up on a job and a little helper. Somebody that's a nobody will walk up to me and say, 'Who are you? What can I help you with?' And everybody working there is working with me. But there's something about that stereotypical because I'm black they don't believe I could be the boss. So, I've just dealt with that my whole life. It's just one of those things." [#38]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I have known discrimination, not personally, but I know contractors because I mentor several minority contractors and I know God love them they have been discriminated. And if anybody tells me there is not discrimination in this country, I challenge them to the nth degree." [#41]
- A representative from a Black American-owned professional services company stated, "Challenges always starting or expanding a business just because how people view companies owned by non-Caucasians." [#AV14]
- The Black American woman owner of a SBE-certified professional services firm stated, "For the professional services it's as if the world thinks that, oh, can a black female with all those black other females, can we really do? Can a woman do it? I had a lot of Chinese employees too and white women. So, it's like they didn't think we could count." [#FG2]

4. Unfair denials of contracts and unfair termination of a contract. Eight business owners and managers discussed if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract [#17, #23, #26, #39, #40, #41, #AV]. For example:

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "As soon as I come in contact with that person, I'll pull them aside and say, 'Hey, what about this?' Or I'll ask questions, or I'll send out a polite direct email. But it doesn't come off as being so polite. I don't cuss or curse, or anything like that, I try to

be very professional about stuff. But a lot of times, I had to go to the people that are over those people, and the people who I just went over their head, they come back, and they'll say like, 'Oh, that person's not good for a contract.' For instance, this year, we got turned down for certain amount of snow removal contracts with [a local] agency because of my interaction with a certain individual, who handles all the procurement and contracts, and me and her getting into a dispute about something. She owed us, and she hadn't paid us in two months, and she owed us $25,000. She thought that because I went to her boss, who was the CEO, that I didn't deserve to get granted any other contract. even though we were capable, and we did... I think we did $70,000 with them last year in just snow removal, and that's it. Just in snow removal last year. This year, we've done, I think, maybe five or 6,000, and we were the most capable company last year. But this year, they said, 'We'll just keep you on standby and let you know.' I heard from procure that, hey, you have some bad blood. You know what I mean? You have made somebody mad in our circle, and they're not trying to allow you to get any more contracts here. It somewhat is what it is because some battles just aren't worth fighting. You just give it time and space and let it kind of work yourself out. Players in positions are always moving around, so I just give it time and space and move on to the next one. I can't rely upon their stuff. So, I just move to the next project." [#17]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The private sector, you can bid a job. You can be a low bidder, but if they don't want to tell you, they don't tell you. I put together a proposal, good proposal, great proposal. And didn't get it. And the reason he said we couldn't get it was first of all, when we ran [another project with this prime], we stayed on their tails about being paid, and the plans and specs wasn't the best in the world and so we had to fight the architect, the ... and developer and all that. So that ...I guess they didn't like the idea of a minority company being so strong. And when [this other public job] came up, we put in a proposal ... a great proposal and the only reason he said why we didn't get it, we didn't list in there the percentage of minority participation. Well, in the beginning of our proposal: 'We are a 100 percent minority business.' 'We will endeavor to hire as many minorities as we can as subcontractors and suppliers.' He said that that wasn't enough. You should have given me a percentage. Well, hell, we 100 percent minority. That was blatant, just blatant discrimination. That's the biggest one I can think of." [#23]
- The Black American male owner of a construction company stated, "He won a job outright, got the contract. So, I was excited, 'You won your first job. Let's go look at it.' We went to go look at the job, and he introduced me as the owner. The general contractor looked at me. I knew it was over, too. When he looked at me, he could not believe this Black man was standing there and being introduced as the owner. You could just see it. He didn't say it. His demeanor showed it. So, they took our contract and ended up giving it to someone else. After that incident and there's other incidents similar to that one, in the beginning, I got denied a whole bunch of work opportunities. After I received emails or phone conversations that I won a project and they then got snatched from under me, I just don't go after private jobs that much. So, in the beginning, yes, I have had that happen a ton. But now, with that certification, it doesn't happen much." [#26]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I'm going through a process right now of one that could possibly be some type of

denial of maybe who I am. But again, they might be looking at my track record saying, 'Well, you haven't completed enough projects of this amount, so we might give you just a partial award of that project versus a full one.'" [#39]

- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "I found this many years ago with buyers. I had one gentleman tell me in a corporation, he came in, I had been doing business with this major Corp for years. Contracts would come to us at half a million dollars, A million dollars, and in between those. … the gentleman that had been running the purchasing area, which we were doing business in retired. Another gentleman comes in and he shortly invites me into his office and doesn't know me from Adam. And he says, 'You've done very well here.' He never say anything else to me. His whole tone, his demeanor said, 'You're not going to do this well going forward.' And here's one of the ironic things that transpired, had a senior manager that called me and said, 'You got an $800,000 opportunity coming to you.' I said, 'Okay.' And I didn't get the notification, waited, contacted her, and said, 'I have not received it.' She says, 'You haven't?' Said, 'No.' So let her know, then I contacted this gentleman who had came through his area. He said, 'I awarded that to somebody else.' I said, 'You do know that that was earmarked from me.' He said, 'Yes, but I decided he was going to get it.' I said, 'But you're not the user and that's not out of your budget.' He said, 'But I'm purchasing and I'm making the decision who's going to perform that work for that user.' I turned around, picked up the phone and called her. She says, 'I'll take care of this.' Here's one of the things I learned, people don't necessarily know who you got relationships with, so what ultimately happened was us in six months, he was out of that role. He went all the way up to the top, to the C-Suite where their management met. And he couldn't justify what he did because we had a history of years of having served them as a corporation and we had a special skillset that serviced her organization. And what ultimately came out of that was, I'm not going to let a person that looks like you become wealthy. So that has gone on and it will continue to go on until some of the municipalities move people out with that kind of thinking. But if the thinking is we are looking for those who can provide us with a service that exceeds our expectation is going to be different." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We very much so in that case, I have personally experienced it as a strong of a company we have a person experienced it. There was a client that we could not get as big as a company we are we could not get a job with them. And one time I asked one of my managers to ask what is the problem? And they said that because your owner is a foreigner. I do not know of any unfair termination, unless it was for cause denial as you well know again, I cannot think of any because they are smart enough to handle it in a way that it is not because of your skin color or your gender or nationality. They find other reasons to deny you." [#41]
- A representative from a Black American-owned construction company stated, "I was awarded a project thru MSD and one week prior to starting the project they cancelled the project because the commodities code was incorrect with that project." [#AV304]

5. Double standards. Ten interviewees discussed whether there were double standards for small, disadvantaged firms [#1, #23, #26, #3, #33, #34, #36, #38, #40, #FG1]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "The project that I'm thinking on that we were the primes on and we did that, we did basically a tour with other companies in the same space. Did you know they did not believe we did that project by ourselves? Literally the facility managers questioned whether we did the project. They're walking through the project. It was totally done. I mean, even as frequent as late as just a few weeks ago. We've had somebody tell us, 'Do you think you need to bring in another firm to help you?'" [#1]
- A representative of a Black American-owned professional services company stated, "It's okay if you qualify and you're an SBE. But the minute you identify as an MBE, there may be an attitudinal change as to the quality of work, the level of experience or the depth of experience, credentialing, structure, and ability to actually perform the work or service." [#3]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "They would look at you differently than do a majority contractor. You drop one thing or you make a little mistake here, they make it sound like you done blew the whole project. They are not as forgiving as they would for a white contractor. I have seen it. I've been there face to face. You have a legitimate problem that they don't want to understand but [when] the white guy had the same problem, it's no problem A truck got some mud on the street. Well, we have a guy that cleans up the mud two or three times a day. And I was just sitting there talking to the project manager and this litter patrol woman comes in, 'You got to get this mud off this street,' yada, yada, yada, yada. 'You people don't...' I'm like, 'Oh, my God.' That's a City employee. I cussed her out. Told her to get out my trailer. And next thing I know I was being arrested for assaulting that officers. No respect whatsoever. No respect. It's like in life. You experienced that. I know you have. Where you get treated differently than the main stream." [#23]
- The Black American male owner of a construction company stated, "No, not really, because I don't say that, well, because I know what I know what the work's supposed to look like because it's my background, my trade. So a person that doesn't do the work or even GCs, they don't do your work. They just project manage it. So they can't tell me how something's supposed to look or go... Even the engineer don't know or the architect, they don't know. They just know that it's a system that had to be in place and this is what the code is." [#26]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I think a lot of it has to do with, since we do provide bodies in seats, how the client feels about the person that we've provided. I see some favoritism at times and other times I see some double standards of what one employee can do and what another employee can do. But I navigate through that." [#33]
- A representative of a majority-owned professional services firm stated, "Double standard in performance. Yes. Maybe sometimes in the, not in the engineering side of things, but on the surveying construction layout, the assumption that I couldn't possibly know more than they know. But I've also learned that sometimes in that world, that is just the attitude of those folks. Sometimes it has to do with being female and sometimes it just has to do with that's how that person operates. They presume that there isn't anybody who knows anything that they don't know." [#34]

- A representative of a majority-owned professional services firm stated, "I have encountered that my entire life in every scenario. And it's aggravating, and I don't know what I'm doing to attract these kinds of people into my life. But it's like, I'm a resourceful, above average intelligence guy, and very capable. And for whatever reason, I keep running into people that see that. And as a result, the expectation placed on me, even if I'm sitting right next to somebody doing the exact same thing, the expectation on me, for some reason is higher. And I always get this fake response to it. It's like, 'Well, I know that you know that other people around are not performing as well. But we know that you can perform to a higher level. That's why we have a higher expectation for you.' And it's like, on the one hand, that's a compliment that I don't know if it's coming off as confidence that you know I'm capable. Or you've just got to know me and see how I do things, and you know you can get a little more out of me. But it's like, at the end of the day, I'm doing this for a paycheck, and if it's all the same thing to you, I'd rather do the smaller amount of work for the same paycheck." [#36]
- A representative of a Black American-owned construction firm stated, "Yes. Always. It always has been. In other words, our work has to be absolutely perfect no matter what. And we just adjusted and just become, we just make our stuff perfect. And when a job has to be perfect, I got a perfect crew for them. So I charge them more for it. So it doesn't matter. But I've learned. I have done jobs where people are crawling on their hands and knees trying to find something, got to be something we made a mistake on. But my white contract, I steal so many jobs that are absolutely terrible. They didn't say one word to them and they paid him and they walked out the door. So that's what I dealt with for 40, 50 years or whatever." [#38]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "It's disappointing to say, but it's still the historical items. The challenges of are you as informed as your white counterparts? What's the depth and breadth of your capability? It's the challenge to that. Not that you don't have it, it's the challenge to that. Do you have the capacity or do you have the scale to meet our needs? It continues to be the historical negatives that we've always faced opposed to, 'Wow. We respect what you have to share with us. Now, let's discuss how we can incorporate that into our business and how it makes a difference.' I don't even use the word, give in my presentations. Word is earned. Thank you for the opportunity to earn your business. Give just doesn't, because again, that word implies to them you don't want to do any work, you just want me to hand you something. No-no, I'm here to earn this. I'm here to demonstrate I got the skills to be on your team and what I'm going to contribute to your team." [#40]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "Brand reputation that small and women owned businesses sometimes are perceived as literally less than, not capable, not qualified, not skilled enough, not experienced enough, and therefore the value of the product or the service is diminished… The other [thing] is that the grace or the lack of grace for the relationship building. In other words, there are majority companies who are incumbents with their clients who may have made a mistake or a misstep. And because of the relationship are able to recover. They're able to recorrect, redirect. But oftentimes with small and women owned businesses, minority businesses in particular, it's kind of a one and done type of relationship. And so I think that is something

that from a philosophical business relationship perspective needs to be addressed or should be addressed." [#FG1]

- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "We have to start proving ourselves before we get to the site. And then after we get to the site, if we make one little mistake, if we park in the wrong place, anything at all... I mean, we're starting off behind just because of what we look like. And that's a major barrier because we have to prove that yeah I'm black, but I happen to be a fire alarm guy today that happens to be black. Not I'm your fire alarm guy." [#FG1]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor was mentioned by five interviewees as barriers to success in both public and private sector work [#17, #29, #33, #36, #41]. For example:

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "I had one private customer … He has section eight properties, and we did water mitigation for him … we signed a contract with him, his insurance company signed off on us doing the work. Well, when it came time to pay, they paid him, and he took all the money, which was like $10,000, and went back to Miami, and said that he wasn't paying us. Well, I sued him for three and a half years. We finally went to trial last year, and we won. But it took three and a half years, and he almost took me under when he didn't pay us that money out, because we owed out the contractors doing work. Things like that, and the mentality that what, if I have a bigger bank than you, I can go to court, and you may not be able to sue me. He's a company downtown, he's a minority-owned company. What he's known for is getting minorities to do work, and then renegotiating when it comes time to pay, and nicking them out of their monies. He did the same thing with us. He claimed something was faulty about our work, but never got it fixed, nor did he ever even say anything. He just didn't pay us for about he's basically the liaison between general contracting companies and minority firms. What he does is, his best... He lumps up his job up all in one. What he's able to do is bring my minority contractors to a project, so that those general contractors don't have to go look for them. So they pay him as it go-between. … in his contract, he put, you are giving up all your lean waiver rights, all your rights in the beginning of the contract. You're not allowed to do that. But a lot of minority contractors don't know that, and when he goes to court, he brings this to the judge and say, 'Well, they signed off on it.' What he does, he'll counter sue you for double the amount that you're suing him for. So, therefore, you have to settle for a lower price. And then he tricks you and never uses you again, and you have to take that on the chin. Because I had to pretty much swallow that. That was thousands that I wasn't able to get back at all. If they had some free lawyers, that would be great. If they pay for some lawyers to go to court for you for... Because some guys have bigger pockets than you, and you can't always be spending all your time in the courthouse and attorney fees." [#17]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Definitely in the pricing, like I said, prevalent there. Bonding, I believe so. I'll put it that way. We have not been able to get bonding on our own, and I think it's a direct result of they look at you're a minority woman owned company… We've been paid slow … It's been some long payment. Has it been discriminatory? Probably,

but I can't say for a hundred percent yes. But I'm sure they paid somebody else [who] didn't dot that I's."[#29]

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I've had slow pay. I've had no pay. I think they get a little convoluted at times. And then when it is time to pay, they don't make you aware of the interest that you could have gotten for... I had an invoice sitting out for maybe two years that didn't get paid. I mentioned the interest and was told, 'Yes, the interest will be there.' But, at the end of the day, it wasn't there because their contracting system didn't have the line items, so it wasn't as if it had been sitting there the whole time, in their eyes, so some trickery and double... But I said at that point I was just happy to get my $50,000 and I wasn't going to make a big fuss out of it. I'll know next time." [#33]
- A representative of a majority-owned professional services firm stated, "The people that are slow rolling me, of course, that's why they're doing it [because I'm a small business]. And I'll even ask them, 'Well, we're emailing each other right now, so clearly you paid the electric bill. When is my check going to be going out?'" [#36]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I know some clients frankly, that because they're trying to help they pay sooner to minorities than they pay to the majority contractors. So, in that case, I cannot tell you that I know of anybody that has been discriminated for payment. But the only other thing that I can tell you is some clients I know for a fact, because if they don't think you have their financial strengths and so on, they may require a dual check and not pay you directly and pay your subcontractors or suppliers directly, which is... But that is a lot is based on reputation and based on what kind of a track record you have." [#41]

7. Predatory business practices. Three business owners and managers commented about their experiences with predatory business practices [#21, #29, #PT1]. For example:

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I've heard about things, but unable to prove it." [#21]
- A representative from a public meeting stated, "We were one of the minority companies that was on [a large] project. So, we're thinking … this is a way to build a relationship with the bigger company. Well, when the contract came down, the contract was supposed to be for a certain amount. But when the contract got to us, they wanted to negotiate. They wanted to take your [contract value] down. Even though they had millions, they wanted to negotiate. … I think that something needs to be done about that because once you have a set contract and they have millions, they should not be allowed … if something else comes in far as a dollar issue, then it needs to be renegotiated to where the small company can make money and the larger company can make money. But it seems like the smaller companies always end up last and you're not making any money. … [the] unions, we get in, and then they attack you. They attack you, they attack you and they almost make you shut down. And you done worked so hard to get to that point. And it's not like you cheated nobody. I didn't take these lavish vacations. I don't go around with rims on my car, spinning rims. Didn't put money in the bank. All my money went to my business." [#PT1]

8. Unfavorable work environment for minorities or women. Nine business owners and managers commented about their experiences working in unfavorable environments [#11, #15, #23, #24, #26, #35, #40, #41, #42]. For example:

- The owner of a majority-owned construction company stated, "I mean, these Hispanics are the hardest working people I've ever met in my life. They don't complain. They do fantastic work. You show them how to do it your way. They never try to do it another way. I mean, it reminds me of myself when I first started. When they first started coming over here, I was kind of against it because they were working for half the cost, but that wasn't them. That was the employers charging less in treating them unfair. That's probably the biggest thing. I mean, it doesn't happen as much as it used to because they got smarter. They realize that their worth, their value, is more than how they were getting treated. They got the courage to say, 'You know what? I've had enough of this. I'm going to go find someone else to work for,' and sometimes it takes multiple companies to go through, but they know right away, this guy's just going to treat me the same way the other guy did." [#15]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Are you familiar with the ... used to have what they called a set-aside program, the City? The stuff that they set aside for the minorities was the stuff that the white contractors just wouldn't do. The sloppy stuff, the nasty stuff, the stuff that they just… They would do that the minorities. That's where your set-asides ... and they, 'Give them to the black folks, they can do this stuff. We don't want that crap. You guys can [have it].' Hard to get people to do it and some of them was very dangerous, and things like that." [#23]
- A representative of a majority-owned professional services firm stated, "This is a very male, power is very male dominated business. I do not see that from professionals. Okay. More of the contractor ranks. Engineers don't say anything, they don't make comments, but I've seen plenty. And I've had to verbally admonish people before in the field, a subcontractor here or there, and just tell them this is not acceptable." [#24]
- The Black American male owner of a construction company stated, "A lot of my employees were African American and we out there in [City] and [City] and we doing these houses. So my salesman had to say, and it was strategic on my part, my salespeople have always been Caucasian because we're out in that area. But once we get the job and deposit, I send minority people out there to do the work. My guys used to come back and tell me it was side eye. They wanted to be home when they worked or they want to stand there and follow them around the house as they are working or follow them around the project to every room and sit in the room and won't say anything, but just watch them work, stuff like that. The guy that's running the job for them, I had to have a talk with him because the attitude he had towards my guys was racist. He didn't want them on the job site. I'm like, 'You don't determine who I have working on my jobs. You a worker yourself. You just running this job.' I mean he was yelling at one of my guys, telling him he's going to beat his ass. I mean because you don't like who they are, their background, you can't just talk to them any kind of way. He's like, 'Well, that guy stole my tape measure. I don't want him back on this job.' It was clearly a misunderstanding. The guy had six or seven tape measures that looked like his, and he still wanted him off the job. It was just that's how they are. I mean sad to say, it's probably 90+ percent white male in construction. So you're going to have pockets of white groups of males that don't like Black people there or Mexican people there. I experienced

more racism when I was in a union than me being out on my own as far as direct in my face." [#26]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I had an employee working for a company out in [City] and another employee told me that his manager was calling him a word. And when I asked my employee about it, he said, 'Oh, don't worry about it.' He said, 'Because I don't want to lose my job.' Well, I removed all my employees from that company because I understand they really wanted to work there but for my employees to have to bend over for discrimination or discriminatory treatment, I did not feel was in the best interest of anyone." [#35]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "I've had employees that have been on clients' sites and some of their employees have said less than stellar things to them, direct as well as indirect." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I have no doubt for women. Again, is construction industry unfortunately… There is a lot of inappropriate comments made. A lot has been cleaned up the last 10, 15 years. But undoubtedly, there are some still there. We will not tolerate it if ever anything that they would be a dismissal in our company. As far as the minorities, racial, yes, the comments I made elaborate indirectly they would not do it in front of you. As soon as you turn your back, they make those comments. But again, illness of the society that is the sickness, the cancer that has been growing not just in construction, but in the whole world." [#41]
- The owner of a majority-owned construction company stated, "You don't see a lot of women truck drivers, but we actually, so far we had three, we recently hired one. So overall they're more responsible. The only challenge that we see from pure... If you compare men truck driver versus women, some physical work could be hard for women. And then some places you could not send because of the safety reasons. And we only found out after hiring them, because we never even thought about it. So we recently hired one woman, she's been doing really good. And then she told us, 'Oh, I specifically go to this truck stop.' There are different brands of truck stops. We're like, 'Why?' 'Oh, because this is the one, the whole parking lot is lit. So it's light, at night I feel safe.' I'm like, 'Oh, we never thought about it, because we have all these guys and nobody tells us that.'" [#42]

9. '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. Thirty-one firms shared their thoughts [#5, #8, #10, #12, #13, #14, #16, #19, #21, #22, #23, #24, #26, #29, #32, #33, #34, #35, #36, #37, #38, #39, #40, #41, #42, #43, #AV, #FG1]. For example:

- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "Overall, I think it's going to be that we are in an industry that is predominately white male, and it's based on relationships and deep-rooted relationships that are hard to break apart unless there's some catastrophic event of relationship failure or delivery of service, or that kind of thing, unless it is in the non-profit government space where there tends to be a more regular cycle of opportunities to select and bid on, and I'll get to that bidding process part later. … Even when there's a chance for change, oftentimes, unless there's some directive of some sort to be more inclusive and then look at diverse vendors, you don't get that shot. It's twofold. Well, it's threefold for us. One was, 'Hey, you're new on

the block. You haven't been around that long,' so you get 25 more questions than anybody else gets. You're an MBE, so that's a second piece, so you don't really fit into the standard buying pattern, if you will. Then there's that long-rooted relationship, which everybody in the industry deals with that part, but then we have two other hurdles to deal with as a part of that." [#5]

- A representative of a majority-owned professional services company stated, "[There] was a prime that we were trying to get work with and I asked why they would never let us bid on certain projects that were with certain government entities. They said, 'Well, another engineering firm in town, the owners of that firm are friends with the people involved in this, and they're going to get the job anyway.' And so, if all the other architects bidding the job are using them as their consultant and then my architect lists me, it puts them a notch down before they even start. I said, 'Well, then that means by default, this engineering firm gets every job there.' I mean, because the prime can change from job to job and on paper, it looks like the entity is switching around between local firms, but the reality is on the sub consultant part of it, they're using the same firms over and over again. … So I suppose there is an advantage to having teams that are used to working together, the projects tend to go more smoothly. And so I understand why it's beneficial to anyone, government or private, either one, to hire a team of people that's experienced with one another. But at the same time, if you're truly looking for spreading the wealth around … But for professional services, if you said we're always going to hire all of the MEP, the structural, the civil. I mean, if all of those were separate contracts that had to be done independently, then you would notice, 'Hey, we have done every project for the last 20 years with this one engineering firm. We just didn't notice it because they were always working for somebody else.' And again, I mean, I don't know that that's good or bad because it would create more effort for the municipality or whatever government entity. It would create more effort for them to have seven or eight or 10 contracts than to have one. And it would also present potentially the issue that you end up with a team of people, half of with whom may have never worked together before. And that doesn't necessarily foster a good outcome." [#8]
- The woman owner of a construction firm stated, "One of the districts we worked at, there was a change in maintenance supervision. And actually, they went through several different entities there, that everybody was wanting to bring their favorites in. Because a lot of these guys that come into those positions used to work for X Y Z contractor; so those are the guys they are going to try and drag in there to get the work that's going on. And those of us that have been there, that know the business, and know the district and everything, we're just kind of shoved out. And that's just business. That's just the way it is." [#10]
- The owner of a majority-owned construction company stated, "I did spit some jobs there, but I didn't get anything. And I got the distinct impression that it was a good, good old boy network that, you know, I just, I didn't know who I needed to know in order to do this. … You have to know who the person is, and then you have to develop a relationship with that person. Otherwise, you're not getting any work. Typically, that's the feeling I get. If I find them, they're happy to talk to me. They're happy to listen to me. But you know, I really, you can tell that they're not, they're not really paying attention and they don't really care. They have their people; it's already set up and it's easier. They can call this number, and this gets taken care of. They don't have to get me into the system, and get my W9, and get my tax ID and all this kind of stuff." [#12]

- A representative of a woman-owned, DBE-certified construction company stated, "Yeah, I think that happens every day, but that's business." [#13]
- A representative of a WBE-certified construction firm stated, "I know that good old boys' club's working and it's not, unfortunately, it's not going to be something I see, because I'm not in that circle. I don't know the projects I'm missing out on, you know what I mean? … I think they're definitely out there, but I mean, until they show their face, you don't know who they are, you know what I mean? But you don't see it in the school district, like Boone County School District, we do a lot of school, lot of work in their district and you won't see it at that level because that's state money … I don't see that old boys' club at the state and federal level. You only see it at the County and City level." [#14]
- The owner of a majority-owned goods and services company stated, "I was a member of the Home Builders Association for a while. And that to me was the biggest, good old boy network that I could ever come across. And that just wasn't a good fit for me. I left after a couple years and I attended some of the events and was marketing to table to those trade show type things that they put on. And man, it was just like, 'Wow.' I felt like such an outsider. And now I belong to the greater Cincinnati Northern Kentucky Apartment Association, complete opposite, complete opposite. It's a great organization. The people are friendlier. I don't feel the good old boy network. I mean, there's some big companies that are in there, big real estate companies. You just don't feel the good old boy network at all in there. They do business with me." [#16]
- The owner of a majority-owned goods and services company stated, "I kind of think the world is changing a little bit in that respect. And the good old boy networks are still there. But I don't think they're as strong as they used to be. And people are more open to shopping and realizing that the good old boy network may not be the best thing for the company that is procuring whatever product is needed. I don't know. I'm over here in Kentucky, I shouldn't say this, but it's kind of a good little boy network in this state over here. We often compare the two locations, and Northern Kentucky, it's more of a close-knit community. And people want to know what school you attended over here. When you mention a college, they're saying, 'No, no, no. What high school did you [attend].'" [#19]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I have heard of it, but haven't experienced that regards to the County, I have not." [#21]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "A good old boy network exists and it's very, very, very strong. Found this out working with the top dogs at [the big construction companies] who have you ... they belong to the same country clubs. I can't belong to the country club … I wouldn't be in the inner sanctum of what they were discussing … you're not hanging with them because you're not like them. They don't want you there." [#23]
- A representative of a majority-owned professional services firm stated, "Oh, that really does exist. I mean, to the point I say, my network consists of people I know I can trust. Okay. It's really hard just to leave things open when your reputation is at stake." [#24]
- The Black American male owner of a construction company stated, "I mean the challenges, to me, is like I said before, those jobs where it's union only. To me, that's like the good old

boy network right there in itself. The system allows that. If you saying this job is only a union job, to me, that's an issue. I think it should be open to anybody. … I don't know who makes those calls and how those even come about. But that's, to me, the good old boy network. The guy that's running the job for them, I had to have a talk with him because the attitude he had towards my guys was racist. He didn't want them on the job site. I'm like, 'You don't determine who I have working on my jobs. You a worker yourself. You just running this job.' I mean he was yelling at one of my guys, telling him he's going to beat his ass. I mean because you don't like who they are, their background, you can't just talk to them any kind of way. He's like, 'Well, that guy stole my tape measure. I don't want him back on this job.' It was clearly a misunderstanding. The guy had six or seven tape measures that looked like his, and he still wanted him off the job." [#26]

- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "They would rather, in construction, go with the good old boy network … that's prevalent a hundred percent of the time. I mean, construction is still good old boy network, period. Which if they're not a minority, a female or whatever and they can't beat the good old boys that have been doing it forever, then in that respect, I think there's a problem with them refusing to use them. I think that we've experienced some of that, again, for the same reason. If they could use us versus the majority, they're going to go with majority because it's the good old boy and we know them and we don't know you." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "My normal contract that I had was up for bid, they had renewed it four years in a row and that's all they could do. And then it was rebid, and I didn't get it when it was rebid, they picked another firm. He's in the City, but he's not an SBE. He's not an MBE, WBE any of that stuff. I heard that this guy, [a non-Hispanic white] guy had done work in the past for the new guy who took over at [the agency I was working with]. That's probably why he got the contract. [It's a part of] Hamilton County. I'm furious. Pandemic hits … it was the good old boy network or maybe it was the good old girl network at work when they chose the company out of Kentucky that is not a small business." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I see that with just having the opportunity to present capabilities at certain agencies. And then, on the other side of the token, just being familiar by knowing contract officers or small business specialists. I get to hear the other side of it and the struggle that they go through to get other businesses in the pipeline, instead of just going back to the same provider each time." [#33]
- A representative of a majority-owned professional services firm stated, "There is definitely a good old boy network, and that has played into things occasionally. Oddly enough, occasionally I've got to be a good old boy and realize that I'm being benefited from those connections and networks to, and other times I've been excluded from them. So, I guess it's cut both ways for me, there's a big chunk of what I do that's right here in my own hometown. And knowing that people assume that they know me and that they trust me because I'm here and that because they know somebody who knows me, that has been a definite benefit. But there are times when I know that I'm excluded because I'm female and

that some people would just prefer to work with a man. It has occurred. But rarely, I guess I would." [#34]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I think I've been in a situation because of who we are that we weren't allowed to... Our work wasn't taken. … When you have a person in the middle of who you're doing business with and they make it clear that they have other friends in other places, when you... Let me see. I had a contract where the managers and every department were allowed to choose who they wanted. And I went to a couple of managers and said, 'Well, I haven't heard from you for a while.' And they said, 'Well, I ask for you all the time, but they always give me a different agency.' So, to me, that's discrimination because they gave them a white agency even though they asked for [other] personnel, they did not call and give us the order they called and gave it to someone else. Does that make sense?" [#35]
- A representative of a majority-owned professional services firm stated, "Something I have seen in the whole world of RFPs and bidding out contracts, and maybe this is a dirty little secret, maybe it's not. But the company that they are most likely to utilize, typically is who is helping them develop the framework for the RFP in the first place. Which makes me feel like they've already got their mind made up who they're going to go with anyway. And so, I don't know, maybe that's a defeatist attitude. But I've picked up on that, and it seemed like, well, if that's the way it works, that doesn't sound like a really good investment of my time." [#36]
- A representative of a majority-owned construction firm stated, "I think sometimes that does factor in. Once again, companies, they have long-term relationships with vendors and such, but a savvy business owner will always look for something new. However, if price is comparable, we may be discriminated against in favor of somebody that they've used in the past and things like that. with outstanding relationships, long-term relationships with vendors and things like that I think is really not all necessarily good old boy network, but people who have established a business relationship over time. That maybe you consider that like a closed network type, but I understand some of that to a degree, but I don't think it shut out us necessarily. I think if anything, it prohibits us from maybe like a newer opportunity, if someone's just looking for vendors, that may be part of it." [#37]
- A representative of a Black American-owned construction firm stated, "The good old boy network comes from the manufacturers, [that] don't want to sell me because I'm not on their list, and they don't know who we are." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "You kind of see that across the board, whether it's asphalt or concrete, or just in the construction general. If you don't have a relationship built with that prime, and you're not one of the boys, going out and having beers and eating with them, they kind of tend to work with you a little different, more of an outsider. Yeah, more of an outsider than someone that's like an equal. I think that would be more so as far as not being in the room, looked at as an equal. And I'm sure it happens; I'm probably not invited to certain things because I'm not buddy-buddy with them." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Cincinnati as a whole is really focused on people they know, like, and trust. And so, there are relationships in the governments that are long term that it is

difficult to penetrate and get an opportunity to actually demonstrate what you bring to the table. One is, are you looking for the best suppliers. And the assumption, if you asked anyone of them and these municipalities, they would say they got the best supplier. And that's not true. It's just not. So that's, one. Two is admission of, we don't necessarily have the best, we have at best good but recognize we also got mediocre And the reason we got mediocre is because we've been doing business with these firms for years, and they've just taken it for granted that they going to get the business year, after year, after year. It's understood, and since I'm working nationally, you find good old boys within user groups that want to keep you locked out. You find them in buying, they want to lock you out. And the unfortunate part is, or the fortunate part is, they're usually middle management. Because you find the support at lower-level management and you find it at the highest level in management is the people in the middle that are preventing you to get the breakthrough." [#40]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Country club mentality. There's tremendous amount of deals are made that minorities are left behind. On the private business they typically do not. And if there's a discrimination, they never do it publicly, they do in writing, they just hint on it." [#41]
- The owner of a majority-owned construction company stated, "Let's say, if you see a road construction, you see all those smaller trucks that actually haul sand or asphalt, they're called dirt trucks. So they do a lot of local. And those are good-old-white-boys pretty much, so it's really hard to get in. I don't know how, but that's how it is, and everybody knows, and we didn't even try to get in The dealerships that we buy our trucks from, they would tell me, 'Hey, this is very lucrative, but you need to know somebody to get in because that's how it works.'" [#42]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "it could be then giving out the contracts sometimes it's they get people who know gets it. Sometimes the very deserved people don't get it. That kind of a discrimination. That's something I have seen. Don't you think that DC works that way? It's a closed network. It's hard to get through those circles. … as I said, my contract is 11 years in making, so I have pretty much bang every door I know, every people I know personally. But I could not get through for 11 years." [#43]
- A representative from a Black American woman-owned professional services company stated, "It's just the whole good old boy network, just not the level of support needed to get into the door. We work in a lot of different states in 7 or 8 different states, and we would like to work in our own backyard. We have had more success outside of the area more than inside." [#AV231]
- A representative from a Black American-owned construction company stated, "There are a couple of big players who seem to have a lock on some of those [markets]. My thought is we have been unable to win any. Anyone starting a construction company need to have their head examined." [#AV294]
- A representative from a woman-owned goods and services company stated, "Very difficult to get into that clique." [#AV311]

- The Black American owner of an MBE-certified construction firm stated, "One of the challenges that I face is a lot of my competitors have had relationship with customers for a long time. And so even when you say, 'We want inclusion,' or 'We want to see a diverse team,' or whatever, it's still tough. It's still tough for those facility managers, for the ones. They drink beer and all that stuff together for all these years. In the end and say, 'You got to bring somebody else new in.' And that has been one of a great challenge. Even when we give a bid or estimate on the project, we could be right in ballpark, but [they're] going to go with so and so because they did that building or they did this and that's still a challenge." [#FG1]

10. Resistance to use of MBE/WBEs by government, prime contractors, or subcontractors. Fifteen interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#4, #5, #7, #17, #21, #22, #23, #26, #29, #33, #34, #38, #40, #41, #FG1]. For example:

- The Black American woman owner of a professional services company stated, "When I took [my full first name] off of my resume and put [my first initial], my phone blew up, but that's on a personal level." [#4]
- The Black American co-owner of an MBE- and SBE-certified professional services firm stated, "Well, the preexisting also goes along the line of I don't look like them. Even when there's a chance for change, oftentimes, unless there's some directive of some sort to be more inclusive and then look at diverse vendors, you don't get that shot. It's twofold. Well, it's threefold for us. One was, 'Hey, you're new on the block. You haven't been around that long,' so you get 25 more questions than anybody else gets. You're an MBE, so that's a second piece, so you don't really fit into the standard buying pattern, if you will. Then there's that long-rooted relationship, which everybody in the industry deals with that part, but then we have two other hurdles to deal with as a part of that." [#5]
- A representative of a Black American-owned, MBE-certified professional services firm stated, "I don't know if this is a real thing or if it's just perception or black trust. But if I, as a black man leading a black company, solicit all black consultants or black females to say, 'We're going to continue to do work together like this. We're going to look like this.' I just don't think there's been an ask and an acceptance, and I don't think it was going to be successful to approach it that way. So that's been one of the reasons we haven't built a process to hire black." [#7]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Like I said, people who speak Spanish as primary language... Like one of my guys, he went to a meeting with me before, and he pretty much just had to sit in a corner after a while. Because even though he spoke English, a lot of the contractors really... they were trying to get his information. But after they found out that his English isn't that good, they kind of drifted away from him like a little bit. And so, in those cases, like I said before, a lot of Hispanics and a lot of people who don't speak English very well, they get kind of blackballed, and they feel like, what's the point of even going through this process? That's what usually gets them to settle for lower wage jobs, to be honest, where they can be effective on prevailing jobs. He brings an army with him every time he does a job, and they knock it out. They did a siding job, a whole lady's house, 4,000 square feet, they did her siding in the snow last year, in the snow, while it was snowing, and they did a superb job. I

mean, waterproofed the whole thing. I don't even know how they did it, but I was like, 'Hey, here's your money. Good job.' But they do great work, and a lot of times they get blackballed from even doing those major jobs because of who they are, or they have to settle for lower payments they get because they don't have the knowledge that they are supposed to get paid more, or that they're supposed to be getting paid a certain amount." [#17]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Just the opposite. My experience is they want to use me." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The hardest thing is bidding to a person, individual, or a company that totally don't know you, but they know you're a minority. You have some hills to climb there, in most cases." [#23]
- The Black American male owner of a construction company stated, "When I was in a union, I always spoke about the law of attraction and what you put out, you get back and this and that. I always talked to the apprentices that came in about these things. You got to work as if this is your business if you want to be successful in this trade or if you want to open up your own company one day. In a nutshell, one of the apprentices was listening to me talk. He went back and told his father about me, and his father wanted to meet me. He had a residential company in [a nearby City], which is where I'm at now. I end up going out there to meet him in business. We had a conversation. He told me he wanted me to be his business partner. I said, 'I would be glad to do it,' but he was into residential insulation. I do commercial industrial. I got laid off. So, I said, 'Forget that. Let's start the business.' Called [business partner]. We formed this partnership, filled all the paperwork, got everything going. So [business partner] had the expertise with residential. So, I used to take him to these meetings at Metropolitan Housing or the City of Cincinnati had other meetings over there on Central Avenue. We used to go to those meetings, too, just so I can get him in the loop. But me being a younger Black man and him being an older white male in his 60s, I think he didn't ... It was almost like when they voted for Obama, then they woke up the next day like, 'What the hell? We done put Obama in office.' I think it was one of them deals. It was like, 'What the hell? I got this Black guy telling me what to do.' I think it was kind of a defiant type of actions that he had. So, I can't blame it on the County or Metropolitan Housing or City of Cincinnati. I think my partner just didn't want to follow through with those jobs." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "The government does not implement the things that they say that are in place. So, I'm looking at that to say, they want to use them. They have opportunity to use them. But yet they just go with the almighty low dollar. Which if they're not a minority, a female or whatever and they can't beat the good old boys that have been doing it forever, then in that respect, I think there's a problem with them refusing to use them. There's just no checks and balances. They don't care. I think that we've experienced some of that, again, for the same reason. If they could use us versus the majority, they're going to go with majority because it's the good old boy and we know them and we don't know you." [#29]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Not that I have seen, but I do know, by knowing a few small

business folks on the federal side, I do know that the certifications sometimes can be looked at negatively from the program people. I haven't knowingly experienced it, but, based on what they tell me, and it's their job, that sometimes the certifications are looked upon negatively, especially if it's something that a large company has provided to them in the past and their go-to tends to be the large companies and dependent on the agency and the small business specialists themselves, it's a matter of how much they want to battle to get that set aside for a woman on 8(a) or Hub Zone or whatever." [#33]

- A representative of a majority-owned professional services firm stated, "There is resentment and it's palpable for the requirement to include a percentage of a project for somebody who would traditionally be seen as an outsider. And that's just my perception. I mean, I don't know that I could point to it specifically, but I have noticed that resentment or reluctance on the part of those who are doing procuring to know that they have to deal with that. I know that I've been approached to offer a bid just so that they can say that they asked somebody availed that qualification, knowing that probably it wasn't going to go anywhere or that they are not, what's the right term? They're not enthusiastic about having that added as a next qualification to their bid package, trying to fulfill those requirements. And I guess not to the point that I felt discriminated against, but I guess I did feel discriminated against. I felt marginalized." [#34]
- A representative of a Black American-owned construction firm stated, "I never experienced that. They encourage it. The government's does encourage it." [#38]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "As I have shared with many buyers and in public speaking, as you know I do, is you say the attitudes that many have when people like us show up is one, they feel like we're coming in for whatever reason and say, 'Put us on the team,' which is not our case. When we show up, we're showing up with our... Given that baseball season this year, we show up with our bat, our glove, our ball, and our cleats to compete for a position on the team. But you don't permit us to compete because you've assumed that someone has said, 'Put us on the team,' so you're going to treat us in a way that prevents us from getting on the team. You want us to go down the street to somebody else, right? Let's say, but here's the fundamental problem that you face, is that you don't know how good I am. And as a result of not knowing how good I am, you may have lost the championship because you didn't give me an opportunity to contribute to the team. I could be that Jackie Robinson that you needed that changed the chemistry on your team that makes you so stronger and more robust team. I tied back to baseball and said that baseball, and I learned this from Reverend Jesse Jackson. He said, 'Baseball, it wasn't as good then as it is today, strictly because when you let the best play, it's a diverse group of people.' So that's the focus is give us an opportunity to legitimately compete to be on the team and you're going to have a more diverse feel. And that's the fundamental problems that I see at Municipalities and government work. It is more monolithic than it is diverse. We know who they are. They may very well say that 'Hey, here's an opportunity,' or do outreach to those certifying agencies, but it reminds me of what the governments do, the City and the County does. They have this line in there that says doing business with minorities who are subcontractors and all of that. And after you go through all of that, there's a line that says, 'A good faith effort.' That's the out. I think they just accustomed to doing business as they have always done business. And they don't see a reason to change. And it's comfortable sticking with the people you

know versus people you don't know. And also, the biases of if you minority, you can't possibly have the same skills and ability of the majority. It's all of that nonsense that prevents people from utilizing more MBEs, WBEs, a lot." [#40]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Actually, my experience with that has been the reverse of it. They actually been pushing for it, tremendous pushing for the MBE and WBE. … of on government basis especially federal government." [#41]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "I agree 100%. If it weren't for programs that require me to be there. There have been companies that were mad at me for working for them while we were there on an MBE or [inclusion] program. But after we did the project, they've been customers for 15 years. It makes the person that you are trying to get to like you mad. Because they're used to doing the same thing. They're used to calling the same people and here's this guy that I have to talk... They're thinking, 'Here's this guy I'm being forced to be talked to because he's black,' and there's really not a problem, but I have to talk to him. So, there's a period of time that I have to go through in massaging this person to understand I'm just a regular guy that does fire alarm. I'm not trying to attack your position. I'm just here because somebody's making me be here too. And especially in construction because It's not a politically correct... the job site is not a politically correct place with hard hats and bullets and people that tell you how they really feel about you being there just because you black. And I've dealt with that for years." [#FG1]

11. MBE/WBE/DBE fronts or fraud. Fourteen business owners and managers shared their experience with MBE/WBE/DBEs fronts or frauds [#8, #10, #22, #23, #24, #29, #32, #33, #34, #35, #39, #40, #41, #44]. For example:

- A representative of a majority-owned professional services company stated, "I know there is a local firm that is registered. I forget what the term is for it, but it's a government program. The firm is owned 51% by a woman that has been with the firm that is in their marketing department. And somehow they have gotten some sort of economically disadvantaged rating Well, honestly, I can't say if she's leading it or not. I mean, we have our suspicions that whether or not she's really the leader of the firm. But here's a firm that's been in business for over a hundred years. How is that an economically disadvantaged woman owned business that's struggling to get by? And yet there they are and they get their points or however many they get for being that. And so it makes it much easier for them to get work. And if I see I've got a competitor, she just started her firm within the last five years. She's grown it out, I think she has four or five people. She's working very hard. She is a small business. She is a woman owned business, there's no two ways about it. And in terms of how difficult it is to find women engineers, the fact that one is out starting a firm I mean, giving her a leg up over other people, I can understand why society says, 'Yes, this is a positive thing.' A firm that's been around a hundred years that was owned by three white guys until they wanted this special status, and then all of a sudden this woman owns 51%, sounds a lot like just cooking the books to make it so that they can get points and get jobs. And I don't see that as promoting women in the engineering industry or doing anything positive. Their business is not growing, it's the same as it was 10 years ago. So they're not doing the things that the program is supposed to be making happen. What they're doing is

using it as a means to beat their competitors in an unfair way, in my opinion. I'm not opposed to kinds of programs, but at the same time, I'm opposed to them when governments don't do what they should be doing in due diligence to make sure that things are appropriate. I would characterize it shouldn't necessarily be a difficult process to get it, but there should be, I would put the effort less on documentation coming from people and more the effort on if it's Hamilton County or if it's City of Cincinnati or whoever it, that they actually go out and investigate more. So if you're a woman owned business and you want to file as a woman owned business, send in a piece of paper that says, 'I'm a woman owned business, I'm more than half owned by women and I'd like to have this special status.' And then send somebody out or contact them and start asking those questions. And I mean, my daughter is working in my business and my wife is working in my business. I could flip three switches and make this a woman owned business. And it would be totally dishonest because neither one of them is running this business and that's not what the program is for. But I've had more than one person that does government work say, 'You're crazy. You ought to be doing this. And then we could get these points. And we could put you on as our preferred vendor and it just greases the wheels and wouldn't that be wonderful.' And on principle, I just can't do it. The other thing of the two person firm that gets a $20 million job and sub out the entire thing to a contractor that's two guys, they get the job and they sub it out to [a major construction company]. I mean, that's ridiculous. Who are we kidding? I mean, that's not helping anybody except those two guys, because they're not growing a firm, they're using it as a tool to line their own pockets. If we were interested in growing a firm, what we would see is 10 years later, those two guys would have a 30 person firm and they wouldn't be subbing everything out to [the major construction company] anymore. But 10 years later, they're still subbing everything out because it was never their intention to grow a business. It was their intention to find a way that they could make money. And a lot of times, from what I see there is a certain in breeding in that those two guys maybe used to work for [the major construction company]. How about that? And now they're off on their own doing their own business. And even if it's legitimate, shouldn't somebody be asking the question, is this really what we want to accomplish if 10 years later, the business hasn't grown?" [#8]

- The woman owner of a construction firm stated, "I think affirmative action was a horrible program, because there were electrical suppliers and there were electrical contractors that I know of that should not have been in those positions. I have nothing against them because of the people they are; they just weren't qualified to do that. There was one supply outfit, it was an outfit called [company name]. And that's been 20 years ago. And the company I was working with, it's been longer than that. The company I was working for had a job at Miami University. They had to buy a certain percent of their material through this affirmative action-established supply house. Well, when they would turn in the orders to him, he would turn around on his computer, and type it into [a major electric supply store] in Cincinnati, and all the material would come from [the major supply store], and he's getting 15% on all of it; and all he is going to do is type in the orders. He had no idea what anything did. It was unfair to the taxpayers, for one thing; because there was a lot of money got wasted on those companies, and not just black-owned companies or woman-owned companies or Asian-owned companies. Any of those companies, if a contractor is qualified to do the work, they should be allowed to bid it." [#10]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I only have one that I think is fraud, and I brought it up with [a contact at Hamilton County]. He said they're not, so..." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "There are other companies around town that are EDGE. I know what they're doing. They're putting their income and the value of themselves into a will. Not into a will but into a trust, to some other member of the family. Which is totally, to me, not fair to everybody else. I know a couple. I know a couple companies that are around right now that really are not MBEs; they're owned by majorities. I won't say the companies because I don't want to start no stuff. No stuff. But they're owned ... on paper, they're owned by a minority. But behind, in the backroom; right there, they're not." [#23]
- A representative of a majority-owned professional services firm stated, "I've noticed a couple times where I thought I was getting something I wanted and it was not self-performed by that organization. And which is kind of a no, no, to what we were trying to achieve, but it's, it all... you got to monitor it. It takes time I have seen that, but they have enough show and talent. They can pull it off. You can't just be a person with a show company and get away with that. But if you have a few employees and you can make it work, but I've seen that before. Only once though, by the way, only once." [#24]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Yeah, they're still prevalent. They are definitely still prevalent and that's how the government and other entities are getting around. We are using a WBE. We are using an MBE because they have their buddies who have figured out how to do this and not be a legitimate one. So it's that whole catch 22. So definitely there are way too many still out there." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "We all know the story of [a major company] and their little front company that they had. So I would think that it's still going on in the industry, especially construction." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I do know, on the federal side, the woman-owned certifications tend to have that [falsifying GFEs] problem. I just recently had talked to a company who was interested in possibly teaming. It just raised a flag for me. It was a woman-owned company. It was a male, and he just kept saying, 'I, I, I.' It was just like, 'I bid on...' So I really would not be engaged with that company at all. It just didn't sound right." [#33]
- A representative of a majority-owned professional services firm stated, "I know that I've been approached to offer a bid just so that they can say that they asked somebody availed that qualification, knowing that probably it wasn't going to go anywhere or that they are not, what's the right term? They're not enthusiastic about having that added as a next qualification to their bid package, trying to fulfill those requirements. And I guess not to the point that I felt discriminated against, but I guess I did feel discriminated against. I felt marginalized. Ooh, there are those, and I watch some big guys do that and I've watched them not have enough consequences. And when the certification first came out, I had the prove that I was female by providing a birth certificate, but I watched other people prove that their business was female owned, when I knew that the spouse had absolutely zero to

do with the company, or I watched companies to be a minority when at least in presentation, they were certainly not minority at all. And it felt like there weren't enough consequences for those choices that those people were making." [#34]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I've seen quite a few." [#35]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I've known a couple of individuals that were getting or being awarded contracts because they were listed as a minority when they weren't necessarily, or they would put their business and their wife's name to get that minority classification. It was strictly fraud, yeah." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "They still exist." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "That has been going on for many, many years. What they do is the minorities will bid it and they turn around on subcontract it to large corporations. You look at federal government as a disabled veterans category. It's not minority disabled veterans. There are so many disabled veterans from that they are never even know how to spell the word construction. They set up the companies, they bid the job. They ask somebody like us bid the job, they do it and turn around sell it to us." [#41]
- The woman owner of a goods and services company stated, "I have a really good friend who is Indian. And she said, 'Why don't I just be a president of your company?' And that's what you do see, too, is lot of a lot of men have their wives, the owners of their company, and they don't even work there. I know of companies that try to get all of the sections that they can get, so that they are the frontrunners of the bids." [#44]

12. False reporting of MBE/WBE/DBE participation. Ten 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 [#7, #32, #33, #35, #40, #41, #FG1, #FG2]. For example:

- A representative of a Black American-owned, MBE-certified professional services firm stated, "There's others [that] take advantage of your diversity certificate and they put you on a team just so that they have a black face or they got a black local person and you're... This happened years ago. We've learned how to get away from that. But there was one time there was a UC job and they put our name on the billboard and we never did anything on the job." [#7]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I think that sometimes companies will say that they're going to partner with the SBE/WBE and they include that information in their bid. And if they win the bid, then they don't necessarily follow through and hire that company that they said they were going to partner with." [#32]

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "They've had that [mandatory subcontracting minimums] for years on the federal side, with that said, they just now recently have started kind of monitoring that and making sure that that actually is happening. What was happening was the team would, the large company, would submit the proposal with these subs on it, and there would be no work. So, from a business side, you need to guarantee in the actual agreement, in the contract, that you get A, B, C, whatever work specifically, but the government is now monitoring that. I think they've, and I might be wrong about this, they're even starting to tie some of the federal employees, their pay or bonuses, to the success of meeting these numbers, and so forth." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "No. The two times that I tried to get setups, they took my information and ran with it and bid on the contract themselves. And that's, I mean, that was a low blow." [#35]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "These corporations go out and find a diverse firm, put them in their proposal. And then when it comes to awarding the business, they get awarded the business then they don't use the firm. They don't use the firm. And there's so much history beyond that in and of itself, which says that alone, you need not do a crossing study. You already know, just looking at, show me you did a good faith effort. The good faith was I went and found one, but I'm not going to use them. Right? And there's many MBE that has been in that position. And so we want to make change, change that statement because if you don't use them, you shouldn't be awarded to business." [#40]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "That happens every second unfortunately, but there's also I know for a fact on a large project, it's still going on a large contractor, put his men, white men under a minority person, and then hired them back on the same job. So they took the calculation that this so many men working for minority, which it was a sham. That is why MBEs and WBEs have not advanced because there are people that are willing to compromise their ethics and their standard for their own pocketbook at the cost of the rest of the people." [#41]
- The Black American owner of a DBE-certified professional services firm stated, "Sometimes I've been called, and we've been called late. But in our segment of business and you got to be very careful about who you're going to do sub work for." [#FG1]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "It is not okay to simply have a program. From a federal perspective, this kind concept of good faith effort needs to go away. The good faith effort says that we tried. There's no measurement, there's no accountability. And at the end of the day, that language of we tried will definitely run or rule the day… It has to be measurable and the entities have to be held accountable for their spend. And if it's a public entity, they should be public sizing. Publicizing their spend across the demographics as well as across the categories." [#FG1]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "It was only then when I realized the ability to be able to facilitate these contracts because they have certain goals and then they have to give a good faith study as to, 'Did you go look for a minority company? Did you try and partner with the minority company?' and etc., etc. But the challenge was, when I partnered with those majority companies, they

wanted me to be a pass-through. They were just perfectly fine with the fact that, 'Here we'll do what we need to do and we'll use your credentials and then we'll pay you a little bit on the side for these contracts.' Me being who I am, starting my business from scratch, not having anybody to help me in building it, building the infrastructure, building my employees, totally unacceptable… So, over the years I have, I say taught, I have taught my majority partners how to be able to facilitate and work with a minority company, allowing that company to stand alone as a viable company by itself, allowing it to be profitable so that it can continue to do what these minority contracts was intended to do, which is to grow the footprint, the minority footprint, within our City and within our state… So that has been my success over the years, as far as my pain with trying to get them on board with allowing me to be who we are without being a pass-through company… We have been able to do to keep ourselves as a viable company, but it was only until I was able to tap into that with a majority firm where I was able to be successful in doing so… That part is so true about the subcontracting, because my name has been used in some contracts, but they didn't call me…And there was no work. And then, so the City or the County doesn't follow up to say, 'Hey, contractor, subcontractor, how's it going?' They don't audit it. They don't check to make sure that either, I said no, or they don't make sure that if I said yes, that they are actually paying me, and then they don't make sure that 10% or 15% is really part of my revenue. They don't do it. They don't make sure.7 And another thing, when you, when you're doing it too, as an auditor, I find that people... when you do an RFP, you bid on something, you get the contract, the majority firm will also negotiate extra stuff that needs to be done, but we're not included in that piece. And I think that is wrong too. " [#FG2]

- The Black American woman owner of a SBE-certified professional services firm stated, "Somebody required them. I think it was Messer and maybe P&G, but they wanted to do just a pass through like, okay, please just call me. I'll send a check, blah, blah, blah. But they didn't want us do the work that would build our firm to be… I don't want the $20,000 check, I want to be here so that we are the prime…. [It's]not just goals, but don't give them an out, the majority contractors in these contracts, they have to try and if they don't, they have to say, well, we tried, but we couldn't. And that's what you usually see when they respond. " [#FG2]

13. Other forms of discrimination against minorities or women. Two interviewees discussed various factors that affect entrance and advancement in the industry [#23, #FG1]. For example:

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "It's getting so hard now. I know it's there; I've seen it in the past, but here lately, I see it, but it's so big I can't identify it. It's like the guys going down the street with their khakis on, the blue suit and the tiki torches. Those are guys you might be working right next door to, but you don't know who they are. You just don't know. But I think the lower and latter part of this whole thing is that I just think the discrimination because of race or gender, I really do." [#23]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "From a more local perspective, there is the adage in internally to buyers that we just can't find them. Believe it or not, that's still out there. We just can't find good women owned businesses or minority or disadvantaged or small. And if we look at say, for example, small

businesses or disadvantaged, I have contracted with disadvantaged companies after selling to the company that wasn't certified disadvantaged, that they too are disadvantaged. And this is particularly working in Appalachian. So, it could even be like Butler County or Warren County. And once they certified and, 'Oh, we are disadvantaged,' then it became... actually it worked. It worked for them." [#FG1]

J. Insights Regarding Business 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. Other small business start-up assistance;
9. Information on public agency contracting procedures and bidding opportunities;
10. Directories of potential prime contractors, subcontractors, and plan-holders;
11. Other agency outreach;
12. Streamlining/simplification of bidding procedures;
13. Unbundling contracts;
14. Price or evaluation preferences for small businesses;
15. Small business set-asides;
16. Mandatory subcontracting minimums;
17. Small business subcontracting goals; and
18. Formal complaint/grievance procedures;

1. Awareness of programs. Twenty 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 [#1, #2 #4, #8, #11, #13, #18, #19, #21, #22, #23, #29, #33, #35, #36, #38, #39, #40, #44, #FG2]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "I think the African-American chamber has been helpful. Sometimes the Cincinnati Chamber has been as well. Then I'll go, just stay with the African American

chamber when there are opportunities or they get with an opportunity, they let us know. 'Hey, you might want to check this out. I heard this is coming.' Something like that. But for the most part because I'll be really, really frank people don't understand professional services and they don't know how to help outside of, 'I know Joe, you want me to introduce you to him?' 'Hey, it might be good for you to go talk to Sally.' They just don't understand that this." [#1]

- The co-owner of a majority-owned construction company stated, "there's no limitation at all. The fee to pay to join and to maintain membership, which seems to be reasonable, but it's all relative. The fee is based on size of volume, standard. So the smaller you are, the less you would pay. So I think entry level is pretty open for most folks, I would think … The HUBZone program through the Federal government [is another program that helped with growth]." [#2]
- The Black American woman owner of a professional services company stated, "SuperJobs offers financing for short term training. I was directed to a program called SCORE. I still get emails from SCORE, but I didn't go any further than... And it was just some quick information that he gave me that kind of set me a certain way too, where I was kind of like, 'Wow, I've got to do all that on my own.' So yeah, I was assigned a mentor and again, I didn't capitalize on that. I reached out to an ex-classmate who works for Urban League, and I believe she was the one that told me about SCORE." [#4]
- A representative of a majority-owned professional services company stated, "The Hamilton County business development center ... When I first started my business, there was an organization SCORE that I connected with and provided a mentor to help me out. And I talked to a gentleman and gave me some good advice on my business and all. I thought about renting space in that building, that incubator. And one of the things that struck me as funny is I had another competitor who I am personal friends with and they started their firm. They went to the [business development center] building and they got kicked out. I think it was like seven years because the program's whole purpose is to foster businesses to grow, but not to be an office building. And so, they kind of timed out and they were really bummed out because they really liked the location, but they had grown from three people to about 10. So, it was time to move on. And I liked the fact... I told myself, 'Well, that's good because if you were allowed to stay, that means the program's not working like it's supposed to, they ought to be kicking you out. In fact, you should have already left on your own.' I mean, I think there are successful stories in that regard, it's not all bad. … SCORE was one that I got help from. I think there's a lot of positive examples like that too, it's not all bad. … that Hamilton County incubator program, I did talk to them and toured the facilities. It didn't work for me because I ended up deciding to just work out of my house for a period of time instead of having an office when I first started the business" [#8]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I wasn't aware, I'm sure there was some, but we weren't overly aware of local ones and the state ones, usually those kinds of larger meetings end up being in Columbus that I'm aware of. And we haven't traveled up to one of those before, so I would have to say no to that. But yes, I'm sure if we were more aware of local, County level meetings and groups and stuff like that, [the owner] would be probably much more active in those organizations." [#11]

- A representative of a woman-owned, DBE-certified construction company stated, "The PTAC you're talking about, it's terrible. I'm talking about you cannot get anybody on the phone. If there's a procurement opportunity pops up on my computer, then I click on it. Okay, I think that's something we can do, makes sense for us. But I've got to be able to talk to somebody to answer questions about this, so many variables that go into putting a bid together. What kind of safety requirements are there, okay, first foremost? Okay. Do we have to be in ISNetworld? Do we have to recognize that we're bidding on this with ISNetworld, so we don't get through this and then, well, we didn't do that, and all that time is wasted. There's so many variables that a government employee putting this out there, that they don't know, and they really don't care, a lot of them. Why can't PTAC send out an email to everybody that's registered in PTAC, small businesses, woman-owned, whatever it is, say, here's a list of, let's say, 400 prime contractors that do big government projects who look for small businesses, so they get credits and all this, however that stuff works, to where we can reach out to them, instead of going through all the hoops of, well, we have to go and look at PTAC. And then we click on this, and then, well, we have to go through them, and then they don't even tell you who the prime is that's got it. Okay? This is not a good system. And it's borderline broke, especially for a small business. And at the end of the day, the people that are putting this stuff out there, they don't care about our company. Okay? They're doing their job, and they're getting a paycheck, and they probably don't even care if it gets awarded." [#13]
- A representative of a majority-owned construction firm stated, "I mean to the extent that we're participating in the trade associations, most definitely there's a lot of industry and trade information that comes down through those organizations. We were very active in the formation of CORBA, the Central Ohio River Business Association. And CORBA was instrumental in the redesignation of the ports of Greater Cincinnati in Northern Kentucky." [#18]
- The owner of a majority-owned goods and services company stated, "I think the SBA is a great thing for small business in general, so glad it's there." [#19]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Well, I would have to say doing a better job of working with Southwestern Ohio Regional Workforce Board might be helping. … making people aware of that opportunity, because I would say, probably 90% of people don't know that organization really exist and might even say 98% might not even know it exist, or what it's there for. So how do you train people, or at least educate people of these opportunities that might be out there, then also to the County's connection here. In this region, of course you see, you got Cincinnati State. So, it's easy to call and develop relationships with those education institutions, because all of them have some type of internship program, or co-op program that they could tap into, and take advantage of those opportunities that might be out there to help people with the workforce and training issues." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I'm aware of ones inside private and construction and the City of Cincinnati. I can't say that I'm aware of the ones in Hamilton County. I assume they have them because everybody else does. I go to the UC Health meetings, and anything that they're doing, they have goals that they have to do minority spend. So, I do a lot of construction signage, and so I know things

that are under construction generally have a 10 to 15% spend with a WBE or MBE. From my perspective, I think they've been helpful. They're not necessarily super helpful to me. They have been some helpful, but I think that they're helpful because they force people to give other people a TRA, which is what I said at the beginning. It's hard to get into a client because they won't give you a TRA. So, if you're forced to step out, and you're somebody new, then you found out that they can do it well. … the educational series that are put on by different people. I've been to ones for DBEs, I've been to one for the City of Cincinnati. The education is nice, but when you're there, it's also a nice networking event. I've been to ones for the City of Cincinnati, and I've been to ones that are put on by DBE, so that would be the federal government. I've been to tons of them for WBENC, but that's not public." [#22]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "The US government... I can't think of any tax-based organization that's better than the US government. The City is somewhat okay. The state: I don't know. But the County; they're nowhere on my map. So, I would say the best one would be the City ... that does this ... is the federal government and maybe the City. That's my only ... the state is ...the state, they more or less abolished the MBE and SBE program far as I'm concerned, so that's all I'm saying. It's the federal government. We haven't got our first contract yet but being involved in this program they got going ... it's called e-Market, by the way ...I'm happy to be involved with it. I mean I see a sincere effort by the military and the federal government to work with more MBEs. Can't say that for the City, I can't say that for the County." [#23]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "There's thousands of them out there in Cincinnati, through the City, through private industries, through the nonprofits, there definitely are plenty programs out there to help." [#29]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "The African American Chamber of Commerce… I would say there's quite a few. SCORE, which is not so much caring about your certification, but PTAC which, I mean, it kind of just depends on who your PTAC person is, which I've not been too impressed with who we have locally. They're helpful sometimes because they offer some training, webinars, networking opportunities. I've attended some, where they would even bring in agencies to kind of present and explain how to do business do with them. So that has been helpful. The SBA… Just sometimes, within the agency, just that small business office, just having an office dedicated to help businesses do business with the agency is helpful. I'm trying to think of anyone else. I can't think of anyone else outside of what I had already... I think that was the women's, the weTHINK. It's been a while. I haven't been attending these events and, for them, I would say the downside was that you had to be WBE certified. I would go to the conferences, but you couldn't get any matchmaking unless you have the WBE certification already, and I'm just like..." [#33]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I know the City always offers training. The African American Chamber offers training. The Collective Empowerment Group offers training. It's just that the level and what they're offering training in is not always something I'm interested in, but I do know that they have it. The SBA does have programs. And SCORE." [#35]

- A representative of a majority-owned professional services firm stated, "I was involved with a thing called ComSpark for a couple of years. I learned a little bit. I got some exposure maybe I wouldn't have otherwise had. But all in all, that ended up being a pretty neutral experience." [#36]
- A representative of a Black American-owned construction firm stated, "I'm a member of HCI, so we have access to their plan room. So, we can see most of the jobs are going around." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "ODOT offers some training as well as the City Community Action Agency has a construction program to where you can get employees. [And they] put you in contact with some primes that would possibly be willing to work with a small business." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "There are corporations that say that's what they do, that have diversity programs. Many of the companies that are members of NMSDC and WBENC, many of them say they that's what they do. They have supply diversity programs and within their supply diversity programs, they have tier one and tier two programs, where they're tracking spend and how they're growing them. And they have KPIs as well within. Now, as you well know the success of those programs within corporations vary from corporation to corporation. And much of that you can see based upon the support of the CEO." [#40]
- The woman owner of a goods and services company stated, "The Small Business Association. When you bid on, what they're called jackets, when you bid on their jackets, they specifically categorize who gets top tier, looked at first. That helps the women-owned [businesses]." [#44]

2. Technical assistance and support services. Seven business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses [#1, #11, #19, #22, #23, #26, #33]. Comments included:

- The male co-owner of a WBE- and WOSB-certified construction firm stated, "Estimating would be a really big thing. You know, I'm always getting emails and calls from like randoms in Florida or India and California that offer estimating services. But if there was an estimating service [here], because I don't do enough business per year to hire a full-time estimator … I feel that if I could utilize some sort of an estimator, even if that's just someone I pay per job, to do estimates for. That would be very helpful. I mean, very, very helpful. I'm sure I'm not alone in that." [#11]
- The owner of a majority-owned goods and services company stated, "I don't think small businesses that are using the SBA realize … they could produce a video of the process, before the client gets too far along in the whole thing. So the client knows what they're getting themselves into. That would be really helpful actually … seeing what's needed, giving maybe time parameters, like this is going to take a month and a half typically, or this is going to take two months to get this approved, and processed. And I just think it would be nice to know all that time wise, upfront. I mean, cause they do give you like a menu, I believe of things that you're going to be needing … the SBA could say, 'Watch this this 12-

minute video, whatever it is to understand the process that you'll be needing to go through the SBA, and how long you should expect for each step to take.'" [#19]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I would be grateful to have somebody look and give feedback on all of those different parts of an RFP that are not about pricing, but about the regular business. I almost look at it and review it, rather than I've been to classes where they tell you what you're supposed to do, but more specific, like having a mentor that says, 'If you answer it this way, then that looks better,' or things that we could do different in our business to make us look better on paper." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "You need to partner with an organization like, say, Cincinnati State, who I deal with. I used to be one of their mentors over there." [#23]
- The Black American male owner of a construction company stated, "I would want them to actually come to my shop and work with me, per se, work with me at my shop and my facility. I think that would work out a lot better because sometimes going from a classroom setting and then back to your office or something like that, it's kind of two different worlds. If I had for somebody, for instance, somebody that had expertise in estimating come in my shop and work with us on projects that we have, that we're going after, that would be easier than me to go in a classroom and open up a book because then it's right there. I got the drawings, the blueprints. We're sitting there. We're actually working on the exact project that I'm going after or that I have, and they can break down the things that I'm doing wrong or the things that I'm not doing or tell me the things I'm doing right or a way I can do things a lot more efficiently and better. Because, like I said, I'm pretty much self-taught." [#26]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "Whatever it is they're offering, it just has to be useful and targeted to help the company actually learn the process, follow the process, and try to be successful." [#33]

3. On-the-job training programs. Nineteen business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries [#11, #13, #14, #15, #17, #21, #22, #24, #26, #27, #29, #34, #37, #38, #39, #41, #42, #AV, #PT1]. For example:

- The male co-owner of a WBE- and WOSB-certified construction firm stated, "I've definitely looked at a couple times. I know there is a couple programs that they could get into down in Cincinnati, but it's been keeping talent, because that is an investment on my part. So, I would want people to sign some sort of letter of commitments, for X amount of time. But I really haven't been able to find enough talent to make that investment yet. If I could find someone that's remotely skilled coming out of [County name] where I'm originally from, they [have a] Career Center. I don't know if there's an equivalent in Cincinnati or not. Or if there're kids that are coming out of it and that are like, Hey, we need a job. Be like, well, I don't have to teach them from like square one. You know?" [#11]
- A representative of an woman-owned, DBE-certified construction company stated, "On-the-job training for this, it's hard to bring somebody in who's never done anything like this. To

spend ... You've got a certain amount of time to get a job done when we're out in the field. We don't have time to train a lot of people." [#13]

- A representative of a WBE-certified construction firm stated, "You know, we're using them all. So, I mean, we've hired out a Job Corps, so I can hire through the door as long as I can get them signed up at the hall. You know, Job Corps here in Cincinnati has an electrical program. We've hired a couple kids coming out of that program that was probably, didn't have the greatest childhoods in the world. That's the reason they've probably been in Job Corps to start with. And from my experiences, they've both been great employees. And fact their matter is, is that they came here, worked hard for us, got really trained and they both got bigger skies and moved on to the bigger things. So, it worked for them. Any training programs, it's a really great solution to big college bills." [#14]
- The owner of a majority-owned construction company stated, "The trade schools and these kids, I wish the high school would teach kids more about... College, isn't always the best option for pretty much majority of the kids. Our trades are struggling. Like I said, we can't find nobody to do nothing. A lot of us, my generation, we're getting old, so we need some younger kids to start stepping up and taking some of this stuff because once you get to a certain age, you just can't hardly do it anymore. kids that are struggling in school, that flat out, tell you, 'Look, I don't want to go to school no more after I get out of high school,' encourage them to get into trades and help them make those decisions, and offer programs that put more of these kids hands-on in school instead of teaching them pointless stuff that they're never going to learn anything from and use the rest of their life." [#15]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "There's programs, for instance, how to manage your money as a felon. Guys who have had drug money their whole life, and then they get out of jail, and then they don't know how to manage their money. Programs like that. But if they had group homes for just people who were trying to get back on their feet and work, and who were trying to sustain themselves, who wanted to learn about finances and how to save their money to where they can get to a place and get into good habits of doing things... eating habits, working habits, where they have substance abuse habits, where they can just regroup and get themselves together and go off, that would be great. Also, learning construction etiquette or job work etiquette. I have a lot of what have been trained at different places, like the Urban League and stuff, but then they go to a person's house, and they're smoking a cigarette, and they throw it right out on her property. A lot of guys, I've gotten rid of because they just couldn't get it together, I'm not giving them chances. One guy, I was drug-testing him every week, trying to keep him together, and he just kept failing. And then it got to a point where he went... We were doing a renovation at a hotel. He went and stole the tools in the middle of the night and sold them and got drugs, and then was complaining why I wasn't giving him a check. I was like, 'Dude, you just took everything I had.'" [#17]
- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I would have to say doing a better job of working with Southwestern Ohio Regional Workforce Board might be helping. … making people aware of that opportunity, because I would say, probably 90% of people don't know that organization really exist and might even say 98% might not even know it exist, or what it's there for. So how do you train

people, or at least educate people of these opportunities that might be out there, then also to the County's connection here. In this region, of course you see, you got Cincinnati State. So, it's easy to call and develop relationships with those education institutions, because all of them have some type of internship program, or co-op program that they could tap into, and take advantage of those opportunities that might be out there to help people with the workforce and training issues." [#21]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "Potentially grants to help pay for the staff to be trained. ... my problem I said was staff, and my problem is I don't have the money to bring them on and train them. And there's not a program set to train them anymore, because Cincinnati State kind of moved away. So, a grant that would pay for people to be trained in the print production area. because Cincinnati State redid theirs, and I think they got rid of their print background. So, I really honestly don't think there's anywhere in the City that you can get trained to be a printer." [#22]
- A representative of a majority-owned professional services firm stated, "All we can really do is on the job. It's just there's so we hire electrical engineers. That's pretty much all we hire, sometimes project managers, but most of them have all engineering degrees. ... In electrical engineering school, they do not teach you any of the things that we do at all, zero. You can do the math on everything that we do, but they don't teach you how to do it. They don't even teach. This is the NEC code book. Right? You have to design everything to this code book. Do you know, I didn't have a single engineering class on this code book and yet I'm supposed to design to this code book. There's not one engineering class on this in college. … that's the thing is that we have to get training done. Very, it's just like they're brand new meaning they know nothing. I mean, the college is a test to see if you're smart and after that you can join us and then we'll begin to teach you." [#24]
- The Black American male owner of a construction company stated, "I don't require anything. I prefer it. I prefer for people to have a background in insulation. It makes things a lot easier on me. But if they don't have a background in it, we teach. We'll teach people. We start off at $18 for those that don't have any background. We have on-the-job training. And then I went through that when I got in the trade with the union. That's one of the good things about the union. It taught me how to really, in the beginning, get people aboard before they found a way to fall into this I-don't-want-to-be-there attitude or whatever, so to say. People getting paid to learn was a big selling point for me to get people to come aboard with us. And then for the union to get me to come aboard was the fact that I had a family and I can't just go to traditional college and bring home money. You got to graduate. If you do work, it's probably some part-time job. So I'm a big advocate of that right there, on-the-job training." [#26]
- The co-owner of a WBE-certified construction company stated, "I know that that does help, but if you can't even get them on the job, you got to get them in the door first to do any training. So yes, I would agree that that does help." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Not in our particular industry. And I'm going to break this apart just so you understand where I'm at. We're two-fold. I have a workforce in the field, and I have an office workforce. My workforce in the field is trained. We're union,

so they're getting their training on the job and we have the apprenticeship and everything else. In house with our office, it's unique to [our company]. So being able to just come in and train other than just say maybe in admin even, or something like that, but having the detailer and even the construction account and then the estimators and everything like that, we're sort of unique and can't imagine how we can do on the job training without having enough personnel to." [#29]

- A representative of a majority-owned professional services firm stated, "In fact in our younger days, that's exactly what we did. We hired co-op students through the University of Dayton and the University of Cincinnati for our professional staff and found that very useful." [#34]
- A representative of a majority-owned construction firm stated, "In our business, we've had employees and contractors in the past that we've worked with that had little to no experience in our field. And we've done on the job training, which is very beneficial, because then they know what they're doing. But even a qualified person may have issues that are still... There's always training to be done of some sort and learning experiences to be had." [#37]
- A representative of a Black American-owned construction firm stated, "I would love to find more because in this industry it's not like you can just learn something overnight. This is a journeyman's trade. You have to work at it for a long time to really become a master at it. So, I consider doing some training programs and training from younger guys and women too, if they want to do it. But it's difficult to just get somebody off the street to do this kind of stuff. You really need to put them in a training program. So, if you said if I've had trouble with that, I'd say yes, because I do need it. That's the only way you can learn that could be on the job. There may be a little classroom in there just so they can understand things, but most of it is on the job." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "If we needed to seek some type of school resources, they're out there to train some individuals if need be. ODOT offers some training as well as the City. Again, if you have a need for it, you just got to seek those other alternative methods to get employees up to par." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I have actually set up dummy interviews, teaching, … [but] on one case I can tell you, I offered three times, three positions to them none of them showed up. … [the] apprenticeship training for unions offered them to come get. And they said, 'Well, we don't have money for the fee.' We said, 'We'll waive the fee.' Then they said, 'We have no transportation.' I said, 'We will provide transportation to come for interview.' They didn't show up. The problem is that again, it has to be at a different level. Right now, it's the best time to get minorities, best time. But my approach has been on a one-to-one basis. I go on a rifle approach, not shotgun approach, meaning I target the person. [For example,] this African American young man came to me and said, 'Mr. can I talk to you?' I was running for another meeting. And I said, 'Come to my office tomorrow you'll talk.' So, he showed up and he said, 'I'm 30 years old. I have a 13-year-old daughter, nobody would hire me. I just graduated. And would you give me a chance?' And I had my safety director run a background check just seven pages of rap sheet, nothing bigger marijuana, this marijuana

that stupid thing that gets to. And I told him, and I said, 'Something about you I like, I'm going to give you a chance. I personally going to monitor you, if you make a mistake, I will personally fire you.' And he has been with me over 10 years starting on apprenticeship, became a gentleman. He right now makes almost $100,000. I wish I could call him, but that is what I'd rather do than all this through the money, the programs that I then doesn't show much of results." [#41]

- The owner of a majority-owned construction company stated, "We are working with one recruited company. They were able to get [a school on a base] with the US Army. ... All the veterans who are leaving from army, they're training them and they're providing with truck driving jobs. So, if government would somehow help and make it easier for some schools where, I don't know, maybe there are some trade schools or people who, I don't know, let's say if Hamilton County would work closer it with unemployment office and say, 'Okay, we're going to go through these top 10 schools, let's test them. If they're really good, have them work with them, and get them trained and get a job.' Truck driving, it pays really, really well. A lot of people don't think about it, but our guys on average per week, they make minimum around $1,500, and we have guys making all the way to $3,000 a week. So that's, if you multiply per year, minimum seven, 80,000 to 100-some thousand a year. can we somehow have the municipality work closely with unemployment office and come up with some kind of solution, because hey, unemployment office, they're getting paid from government, all the tech sellers are going there. And then on the other side, all these trucking companies are needing the people. Well, why don't we use their money and train them and make them ready so they can go and work? Can government do this, let's say Hamilton County will say, 'Okay, if you're unemployed, we give you three months, you need to go through this school. If you don't, your unemployment is going to stop.' Maybe then it's going to move them to do it." [#42]
- A representative from a woman-owned construction company stated, "Hamilton County government and MSD required company workers to having an apprentice program to do work for MSD and we stopped working with MSD because of that." [#AV8]
- The woman owner of an MBE-, SBE- , and EDGE-certified construction company stated, "I think if they really want to help, I think they ought to have an apprentice program to where you can train these guys from three to five years. They start off at a certain amount, then they work it well. And that way you'll get more good help. And as they grow, because it took me about eight years before I started making money in the trade. You know, back in the day we busted our butt. And we didn't make no money, you know? So, and then for the pay these guys almost $50 an hour. Now, I want everybody to think about that with no experience." [#PT1]

4. Mentor/protégé relationships. Seven business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses or participate in unofficial mentoring relationships with other firms [#2, #3, #4, #8, #33, #39, #41]. For example:

- The co-owner of a majority-owned construction company stated, "The State started the program I'd say about the same time, 40 years ago, something like that. I remember going through the first one, thinking where do we fit? We'd check all the boxes and turn it in, and

they'd just throw it back out, like no, you guys can't do that. Trial and error. In today's world, again, I don't know how difficult it is for a new contractor to try and break that barrier. I don't think it's a barrier now other than learning how to do it, frankly. We work as a mentor in [a] program with some smaller businesses. That's one thing that we try and get them through. Like, here don't be afraid of this, here's what you need to do and here's how you do it. For a lot of the trades, all you have to do is check the box and you're fine. There is no research, so to speak, but fill in your background. … The challenge I see with it is, my first hookup we had, the first protege that we worked with, he was a Vietnamese fellow that his specialty was high end welding. … We hardly were a good fit for him, but there was no other program to go to for him to get help. But the challenges were several. Language barrier. We really weren't doing the same business. So, it was very sad. I guess two other folks we dealt with, one was so small he had no real desire to get any bigger. Other than showing how we did things and offered them, when I say offer, an opportunity to bid a little bit of our subcontract work, et cetera. I don't know why they got in the program, frankly ... The challenges I think of the State program is, folks are looking for help and they go there. In the state, they're wanting to mix, get them with somebody. So, they just get them with folks in their region. We're happy to help, but of the half a dozen we pay, two of them ended up being real contractors. The other four were folks that really wanted to be in business, they just didn't fit in that highway world that ODOT were putting together. [There was] contractor in town, [a small, certified sub], but he came from really just doing asphalt driveway, little driveway jobs. We need him to do roadways. At first, so we just tell the owner, this guy he can't do it. He doesn't have the equipment, whatever. Once he was clear, we really, he needs to learn. We would frankly just put him in with our crew. We mix his crew with our crew and say, hey, here's our paver, your guys sit on the paver and watch our guys do it. So, we just would go hand in hand, step by step, how we would go about doing it, not just we, but how it would need to be done in our world. From there, then he ended up buying his own paver and his own stuff. Now just let him go and whatever. The group we're working with now, they're sticking with the program and they're getting better. But as they get more successful than they get full, because they're, to some degree, one of the handful of folks that really deliver what needs to be done, and my competitors are watching who I am using on my jobs. I see my guys are looking, who are they using on their jobs? We find out, here, this guy's qualified. He can do it, and we're reaching out to those folks." [#2]

- A representative of a Black American-owned professional services company stated, "I've had some extraordinary great mentors. Extraordinary great mentors. I still have extraordinary mentors in this business, and in business in general. And one of the things that I learned very early, doing the business is one thing, managing the business is another. And if you don't manage the business well, you will not do the business long. And I've lived by that for almost 30 years." [#3]
- The Black American woman owner of a professional services company stated, "To be able to have a mentor or coach, one-on-one would be awesome. For someone like me, it may take one session. I'm not going to have to take up much of your time. And in that one session, I would hope that you have some sort of advice that you're using to gather what skills I have. I don't know if you need a resume. And then there's other questions that you're going to ask outside of what my resume is, to see, I guess, what it is I like to do. And that

would help me put together, I hate to say it, but what NAICS codes I need to be focusing on." [#4]

- A representative of a majority-owned professional services company stated, "The Hamilton County business development center there on, I think it's on Mentor Avenue. When I first started my business, there was an organization score that I connected with and provided a mentor to help me out. And I talked to a gentleman and gave me some good advice on my business and all. I thought about renting space in that building, that incubator. And one of the things that struck me as funny is I had another competitor who I am personal friends with, and they started their firm. They went to the building on Mentor, and they got kicked out. I think it was like seven years because the program's whole purpose is to foster businesses to grow, but not to be an office building. And so, they kind of timed out and they were really bummed out because they really liked the location, but they had grown from three people to about 10. And so, it was time to move on. And I liked the fact... I told myself, 'Well, that's good because if you were allowed to stay, that means the program's not working like it's supposed to, they ought to be kicking you out. In fact, you should have already left on your own.' I mean, I think there are successful stories in that regard, it's not all bad. There certainly are successful examples of people being helped out by these programs. And like I said, SCORE was one that I got help from. So, I think there's a lot of positive examples like that too, it's not all bad." [#8]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I would say the mentor protege, the teaming, the opportunity to subcontract, to learn from someone who's been successful at submitting proposals. Because we submit. We're all in for the submitting, but it seems like marketing is an issue, is a barrier. And COVID has just added another dimension to that, to figure that part out. Like I can't attend a conference in person and know that that company or agency is going to be there, and I decide to fly in because they're there and that's going to give me my face-to-face time." [#33]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "[I had a] mentor through ODOT when they were doing mentorship programs, but I didn't receive any work through them, but they did give me a lot of insight." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I believe in that, give people a chance. I believe in the mentoring that would be the best way of doing it." [#41]

5. Joint venture relationships. Seven business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses or had successful experiences with joint ventures [#21, #23, #29, #32, #43, #FG1, #FG2]. For example:

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I've looked at those and tried to on a couple of things not related to the County. I haven't had much success." [#21]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "[The company I used to work for and a major construction company in the area] joined venture in [a project] as construction managers. And one of my

responsibilities, along with [the major construction company], was to develop an MBE/WBE program to make sure that MBEs and WBEs are involved in the project. And [the major construction company], not being the MBE, didn't have a clue... They kind of knew but they didn't know. The arguments we had at the conference tables as well. 'We can't have this company do this and that company do that because they're not qualified. This is big time construction,' yada, yada, yada. And then the same thing happened with [another project, where these two companies were] construction managers on that. … We developed, by virtue of doing interviews and working with the African American Chamber and other sources, 'Let's find out what we got out there. Let's see what the capacity is in terms of WBEs and MBEs.' And when we found out the capacities of these companies who were legitimate companies and licensed and bonded and all that stuff. And we made sure that we cut out packages for them on certain parts of the project. Certain parts we know we can get bids for. We wouldn't put out the bid for the seating for the [first project] ... because nobody Black did that. But we did force a joint venture with a major seating company there that was awarded with the contract … we forced the joint venture where the minority would unload and take the seating to the specific location that they're supposed to go to. And so, it's a manpower type thing." [#23]

- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "So teaming is again, those teaming [situations] there's [JVs]. My experiences is teaming is just to get somebody's past performance because there's nothing can stop me not giving any resources to my teaming partner. There are so many other ways that yeah, I can pass it on, but there are people who never get hired. So, people do play that dirty game. It's really not best practice, but everybody does it. I've been with a couple of, try to be a couple of teaming partners, but they will say a couple of resources, but time comes maybe don't even get a single. So that's how the game works. that's why I try to do as much as whatever I can do myself. That's like a prime based is the best place because you are the control of everything. And don't get me wrong, some teaming works amazingly. But few teaming teams I have seen; it's not working [like] what they say." [#43]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "My size and capacity's double when I make a quick phone call to [a friend who owns a business] and say, 'Hey, can you help me out today?' So does his. And if I know five companies that can help me that I help as well. It has to be a two-way relationship. It can't be them always just helping me. But most companies don't do everything themselves, but a lot of minority companies are sized up and people decide what type work we can do based off how many people we have coming through our doors every day as opposed to how far we can reach to get projects completed. So, my capacity is as large as my Rolodex and my experience with the people who I support, who support me." [#FG1]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "It was only then when I realized the ability to be able to facilitate these contracts because they have certain goals and then they have to give a good faith study as to, 'Did you go look for a minority company? Did you try and partner with the minority company?' and etc., etc. But the challenge was, when I partnered with those majority companies, they wanted me to be a pass-through. They were just perfectly fine with the fact that, 'Here we'll do what we need to do, and we'll use your credentials and then we'll pay you a little bit on the side for these contracts.' Me being who I am, starting my business from scratch, not

having anybody to help me in building it, building the infrastructure, building my employees, totally unacceptable. So, over the years I have, I say taught, I have taught my majority partners how to be able to facilitate and work with a minority company, allowing that company to stand alone as a viable company by itself, allowing it to be profitable so that it can continue to do what these minority contracts was intended to do, which is to grow the footprint, the minority footprint, within our City and within our state. So that has been my success over the years, as far as my pain with trying to get them on board with allowing me to be who we are without being a pass-through company. We have been able to do to keep ourselves as a viable company, but it was only until I was able to tap into that with a majority firm where I was able to be successful in doing so." [#FG2]

6. Financing assistance. Seven business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses [#1, #17, #19, #22, #23, #24, #42]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "I would say probably having financial partners that understand our business a little better [would help]." [#1]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "For instance, the loan amount that the state is willing to give this year, if you apply for it, a woman-owned loan is only a capped at 500,000, whereas a minority loan is 1.3 million. I'm trying to figure out, why would they differentiate the two? And if so, wouldn't they take the fact that that woman... Why should I have to fill out minority paperwork now, if she's a Hispanic woman, and you already know she's Hispanic? Well, why wouldn't it carry over as a minority cert [and] a woman-owned cert at the same time?" [#17]
- The owner of a majority-owned goods and services company stated, "We financed 50% of the building, the property through [our] bank, and they said, 'We can set you up with the SBA to finance 40%.' And then I had to come up with the remaining 10%. But [our] bank kind of steered us through the process of working with the SBA. And [our] Bank was very easy with the 50% of their portion of it. The SBA, honestly, it was a little bit challenging. It was a lot of dots the i's and crosses the t's. And it really took about a year for it to go through SBA was actually, a point lower than the interest rate from [our] Bank. … They save us a lot of money on the interest rate … the banks had this thing called a low doc loan. And so, the documentation is a lot less than their normal documentation needed to do other types of loans. And I just think it's whatever they could do to keep the amount of documents to a lesser amount, and to make it easier. That's a little bit too much red tape to go through the process." [#19]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I went out and looked for SBA banks … I would say that all printing companies that I know have struggle with getting cash because it's just equipment heavy, so it's a debt-heavy business." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "We could weather a storm if we're going to get paid in 30, 45, 60 days. Sometimes in 90 days. We can go to storm. But the smaller guys can't. Matter of fact, me and

[and a partner] put together a payment plan for the ... contractor who's a minority contractor had the advantage to work with a bank … where the same bank that's financing the project would pay the subcontractor would once the work is done, on a biweekly basis, which helped out the smaller contractor." [#23]

- A representative of a majority-owned professional services firm stated, "If you made that capital free or made that available to people, you'd have a bunch of people who really shouldn't be opening their own business, jumping on that bandwagon So what could you do? Well, you could have a vetting program that makes sure that this is the type of person who could lead. And then maybe get them the financing they need in order to start the business up. But they've got to have a lot of drive and a lot sleepless nights to start that up or you get somebody else to fund doing it somehow." [#24]
- The owner of a majority-owned construction company stated, "So SBA, small business administration has been working with some banks … Just by being small business, they automatically approve you with almost no down payment. This is very, very good system that's already working. If they will extend this towards, let's say, 'Hey, if you're a small business, can somehow government help you to sign up with these big guys that you can lease from?' So can government be what they're doing with [local banks] and SBA. Government is guaranteeing 25% of the loan, that way the bank says, 'You don't have to give me down payment, because I'm giving you loan, and 25% of the loan government is already guaranteeing it.' So that way [the local bank] is going to be like, 'Okay, sure, I'll give you a loan with no down payment.' That's helpful for me." [#42]

7. Bonding assistance. Three business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses [#2, #17, #22]. For example:

- The co-owner of a majority-owned construction company stated, "It's hard to speak to it because the bonding guys, they set the rules, and it's out of their money, so to speak, or their rules. I feel they're fairly enforced, I think, but I don't know how else to phrase that. I think it's fairly enforced across the board. Currently, because of our success, it's not currently a limitation. But when it was, we had to balance that quite a bit, like what jobs. We knew if we took any big job that would limit us to take anything else in the future. Conversely, we tried to play that balancing act and never quite got to where we had to turn away work. But certainly, was in our mind quite often as we put our bids together and limit opportunities, I'd say." [#2]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "When you're trying get a bid bond and stuff like that, guys need to know where to go get that, so that you can help out with the process. It really does help keep minorities and other people involved." [#17]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think bond support is important if you have to have bonding." [#22]

8. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Three owners agreed that start-up assistance is helpful [#17, #23, #43]. For example:

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "A person thinks because they're a minority, they think that once they own a business, that they're [qualified as an MBE] ... I have to explain to most of those people who say that, that did you go through a year process of waiting first? And they'll be like, 'No, I just started my business last month.' I'm like, 'Well, you're not minority-owned at all. You have to go through a year just [doing] anything before you do that.' A lot of times, I'm not going to lie, I've had people who said they were a business, and then they didn't have an EIN, or an LLC. I'll sit right there with them before we even do any business together, and I'll incorporate them myself. I'll go through, help them with the paperwork ... I did probably about five LLC's last year, just on people who were going to be contracting with us, so that they have the proper paperwork to go forward. One of our plumbers, he's a great plumber. In fact, I even did some work with him when he was a pipe player, when I was an iron worker downtown, and he wound up doing some work on our house and our office space. I had to put his LLC through and his EIN, and he's 45 years old. He was like, 'I can't figure out how to do it.' And I was like, 'Okay. Well, I'll just do it for you.' We did it in 15 minutes, and he's up and moving now." [#17]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "[They should] partner with an entity like Cincinnati State or maybe UC ... but in Cincinnati State, NKU, the smaller ones; to make sure there's programs out there to teach people these tools they need to have. And Cincinnati State is great with partnering with me. I call them, 'Hey, I need some co-ops and I want all of them to be minority or I want some to be female', whatever; they work with me. ... they work with you and the County need to have someone who they can work with to help develop more individuals who want to start their own business, and to help more individuals who can get into a company that is a small business to help that small business grow." [#23]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "I've been to part of the [PTAC] and that 7 (j) program, but again, they teach certain things, but now when you are a single person is very... That's what it makes difficult. I cannot just open a shop with 10 people and not getting any contract. It's all the overhead's for me, those 10 people. Now [PTAC] helps me or not. But what if I don't get a contract? It's like taking a chance. Now if you don't have that much of funding available or something in your pipeline that something is coming up, I cannot go and hire people just as my overhead. Because I, as a very, very, very, very small business owner, I want to probably also build my own wealth first then put it back into the business where there is no guarantee for me to expand. So that's the kind of a challenge, all these programs. Unless you don't have any contract, this program is probably not going to help to expand your business." [#43]

9. Information on public agency contracting procedures and bidding opportunities.

Nine business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities, noting its accessibility online. Others were unaware of how to access that information, and thought the information is helpful for small and disadvantaged businesses [#4, #13, #17, #36, #43, #44, #AV, #FG2]. For example:

- The Black American woman owner of a professional services company stated, "I do a lot in a day, I would say that a lot of business owners do a lot in a day in terms of reading contracts, reading and/or composing emails, sometimes... And I know this is our own problem.

Someone will say, 'Well, that's your problem,' but when it comes to stuff like the government contracts, and the websites, and how to navigate the website, and just how things work, could we break it down simpler? I can't even get that. … Having a video of someone actually talking about the steps, instead of me having to read it, because I'm reading all- But that would be awesome, especially for people who are new to the situation. And I don't know if there are any classes that teach you about procurement contracts, I don't know if that's offered. If it is, then to have that information more out there about when the classes are available, that would be awesome. But other than that, yeah, we could make things just a little simpler. Whoever designed the information that goes on there, they obviously work there and have been working there for a while. And so yeah, they're talking as if they're talking to a coworker, to me, and not to me. … I may need the A, B, C, D, E, F, G version of what you've got going on. I'm not asking anybody to slow down, and I should come in with some idea of what the situation's about, but yeah, if we could just use a little less jargon that points to the job that, again, someone who has been in that position for a while, if we use less jargon and more plain English" [#4]

- A representative of an woman-owned, DBE-certified construction company stated, "The PTAC you're talking about, it's terrible. I'm talking about you cannot get anybody on the phone. If there's a procurement opportunity pops up on my computer, then I click on it. Okay, I think that's something we can do, makes sense for us. But I've got to be able to talk to somebody to answer questions about this, so many variables that go into putting a bid together. What kind of safety requirements are there, okay, first foremost? Okay. Do we have to be in ISNetworld? Do we have to recognize that we're bidding on this with ISNetworld, so we don't get through this and then, well, we didn't do that, and all that time is wasted. There's so many variables that a government employee putting this out there, that they don't know, and they really don't care, a lot of them. We looked at a lot of stuff, but you get to a certain point and, 'Well, yeah. There's something I think we can do,' but we can't get anybody on the phone to answer questions. So, that takes going through that over and over and stuff. It takes time and resources, and then you bring in frustration, and it's frustrating. It really is, to say the least. We've got to be able to speak to somebody who can answer project-specific questions for us to limit our liability, so we know what we have to do, whether if it's technical, safety, timeframe. There's so many variables that go into bidding a job and then doing it and doing it safely. We don't want anybody to get hurt, but these are things that you can't get answered from, let's say, a government employee who's never been in that facility, putting something on the computer that, if you do get them to call you back or respond to an email, they can't answer your questions. And by the time that you get to somebody that can, if they find somebody in that particular facility, well, by the time that happens, then the bid's already due, and you're lost out. And then, how much time is spent on this email back and forth, trying to find this stuff, and it's a very frustrating process, the way that it is, because there's a lot of small businesses out there who would love to have these opportunities to bid on stuff. Well, you might have the opportunity. You might get the notification, but there's a process after that. It's not putting it on the internet, and then somebody waiting on a company like us to get in touch with them or submit a bid. There's so many questions that need to be answered to do a job correctly, safely, and you have to limit your liability, and it takes communication, and that is where the system is broke, I'm saying these would get more bang for their dollar, more bang for their buck, get better work out of contractors, people doing the jobs, if communication was better." [#13]

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Some of the language, like for instance, that the lawyer writes for understanding if you have somebody that works for Hamilton County, how you cannot bid on a project because they may influence that you get the project or not, had I not known like my aunt's been in procurement before for the government, or something like that, had I not had her look at it and she's like, 'Oh, this is what this means, honey,' I would be totally lost." [#17]
- A representative of a majority-owned professional services firm stated, "I guess the biggest thing for me, would be, I don't know, just some of the stuff you don't know that you don't know. Maybe when a new business is formed, they get a little letter in the mail that's like, 'Hey, if you're interested in working with the public sector, here's some information on where you can find projects to bid on.' Or 'Here's the government office that handles X, Y, and Z. You can get on their newsletter.' And that kind of stuff, that'd be fantastic, because some of the stuff that's taken me years to find, if I had known about it right out of the gate, then I might be doing a lot more business in the public sector if I knew how to." [#36]
- The Subcontinent Asian American owner of an 8(a)-certified professional services company stated, "If I have to do it, I just need that information, that good information, that precise information that what would be the requirements are. And if that suits my business practice, and if I'm confident enough that I can do that work, I think that should be pretty much good for anybody else." [#43]
- The woman owner of a goods and services company stated, "I didn't see anything on their website in the County bid section that even talks about how you do your awards, bids. So, I don't know how they actually take their bids. If they look at the bids like they do with the SBA or the Business Gateway, if the jackets are based on certain... Like the women-owned business would have first priority over maybe the men-owned businesses. I don't know, probably that, but I don't know if you guys do that." [#44]
- A representative from a Black American woman-owned professional services company stated, "Understanding process to be recognize and the opportunity. Not many in my field. Where is the information system?" [#AV263]
- A representative from a majority-owned professional services company stated, "I would not know how to go and submit bids, I don't know where those opportunities lay." [#AV220]
- The Hispanic American owner of a goods and services firm stated, "For us in the Hispanic community, it's knowing where to go to … I'm sure other counties published, there are, request for quotes somewhere. Knowing for me in the chamber, telling upcoming businesses where to go for that information, where to go look up those RFQ, where to see what the qualifications, the requirements are for the County. That's why I was focused early on the website because it's got to be tool that we use to tell people how to get to do business with the County." [#FG2]
- The Hispanic American owner of a professional services firm stated, "You know, at least from our experience, from the federal side, the sooner the better, right? So, if we can have like a forecast of what contracts are out there, who has them... All the stuff should be public record. I'm sure if you request it, who has it, what was it. Well, even the bid, the winning bid. You know, all that stuff should be public record. I mean, and the sooner the better, so

you can start doing research and then your resources are not drained. You can have a bid, no bid decision early on, and then your resources are not drained going after things that you have no chance of winning." [#FG2]

- The woman owner of a professional services firm stated, "If they were connected. And we don't have to fill out a lot and then get all these random emails about RFPs that have nothing to do with my NAICs code just look at the NAICs code. That would be great. If they were sincerely interested in using people that had, are given us at least a talk, or a meeting. And by looking at the codes, look at those codes, people would reach out and call us." [#FG2]

10. Directories of potential prime contractors, subcontractors, and plan-holders.

Eleven business owners and managers thought a hard copy or electronic directories of potential primes, subcontractors, and plan-holders would be helpful for small and disadvantaged businesses. Many firms knew how to access that information through the County's or MSDGC's websites, while others did not know how to access that information [#13, #24, #32, #35, #36, #37, #39, #40]. For example:

- A representative of an woman-owned, DBE-certified construction company stated, "Why can't the federal government send out an email with a list of all the prime contractors looking for small businesses, woman-owned, veteran, whatever it is, with the name of that prime, all these prime contractors who have a history doing government contracts, big ones, that use smaller companies like us, a list of all those companies with contact information to where we can reach out to them and say, 'Hey, listen. We're in this area, southwestern Ohio. We're a woman-owned business, 100% woman-owned business. This is what we do,' to where we can call them and have a conversation with them? I bet a lot of those prime companies would like for that to happen because it'd make their job easier. the system that's in place right now is not a good system. It's borderline broke, not user-friendly to a small, small business like us. Why can't PTAC send out an email to everybody that's registered in PTAC, small businesses, woman-owned, whatever it is, say, here's a list of, let's say, 400 prime contractors that do big government projects who look for small businesses … to where we can reach out to them, instead of going through all the hoops … [Now,] we click on this, and then we have to go through them, and then they don't even tell you who the prime is that's got it. Okay? This is not a good system." [#13]
- A representative of a majority-owned professional services firm stated, "We have some partner companies we work with, and we'll just go to them and say, hey, why don't you take [the] lead on this? And that really helps out." [#24]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "A lot of them reach out to us. And I have to be honest with you, they reach out, but I don't know if they just use us to get it [GFE] or what, because sometimes they'll put us on something, and we don't get any business, or we'll get one or two placements. So, we feel a little used sometimes." [#35]
- A representative of a majority-owned professional services firm stated, "Yeah, that's an area where I'm definitely weak. But I think that comes back to my network being weak. It's like, I know that I could be a sub for a lot of prime contractors out there, but I have no idea

how to go about finding those folks to talk to them and see if there could be a partnership made." [#36]

- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I haven't narrowed that portion of what we do as far as getting on the primes, how can I put it, getting in front of them. Due to COVID, we're not doing enough networking sessions or functions, so we're not getting our business in front of them as I probably should." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "The attitudes that many have when people like us show up is one, they feel like we're coming in for whatever reason and say, 'Put us on the team,' which is not our case. When we show up, we're showing up with our... we show up with our bat, our glove, our ball, and our cleats to compete for a position on the team. But you don't permit us to compete because you've assumed that someone has said, 'Put us on the team,' so you're going to treat us in a way that prevents us from getting on the team. … here's the fundamental problem that you face, is that you don't know how good I am. And as a result of not knowing how good I am, you may have lost the championship because you didn't give me an opportunity to contribute to the team. I could be that Jackie Robinson that you needed that changed the chemistry on your team that makes you so stronger and more robust team. I tied back to baseball and said that baseball, and I learned this from Reverend Jesse Jackson. He said, 'Baseball, it wasn't as good then as it is today, strictly because when you let the best play, it's a diverse group of people.' So that's the focus is give us an opportunity to legitimately compete to be on the team and you're going to have a more diverse feel. And that's the fundamental problems that I see at Municipalities and government work. It is more monolithic than it is diverse." [#40]

11. Other agency outreach. Nine business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. Many shared their experiences with the County's or MSDGC's outreach efforts [#21, #22, #23, #25, #27, #29, #32, #36, #PT2]. For example:

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "I haven't participated in too much of that. Again, I tried to look at my time, is this going to be a good use of my time? … At this point, I don't have enough information about the programs to really say whether or not they're effective or not." [#21]
- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "The thing that I would do is somehow get people in the same room where they can meet, because I think it's relationship-based. And so, if there are places where people that would bat and people that would sail, or people that would be subcontractors, under-contractors, the more that they can meet, the more likely they are to bat with one another, or work with one another. … [There are] educational series that are put on by different people. So, I've been to ones for DBEs, I've been to one for the City of Cincinnati. The education is nice, but when you're there, it's also a nice networking event." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Marketing is a hassle. I have couple people that go these job... Not job fairs, but these B2Bs, and the outreach things. ... I don't go to them anymore. It's just I've been doing

it for so long, I really don't even believe them half time, but they go to all these things, and promises are made, they smile in your faces, shaking your hand, 'I'll give you a call, here's my card,' and hell, you never hear from them. You call them, they act like they don't know who you are. It's the same old thing over and over." [#23]

- A representative of a WBE-certified construction company stated, "[The Ohio River Enterprise Women's Council] send[s] us emails all the time about conferences and stuff like that." [#25]
- The co-owner of a WBE-certified construction company stated, "I like to help people. I always feel like, 'Am I not good enough? Or do I not know enough to do this stuff?' So, when I said earlier about I can't get enough education, but then I sign up for something and it's like, 'I know this stuff.' I don't know why I doubt myself. And so, it's just gratifying, I guess, to have them ask me questions, or help them with a bid, or whatever the case may be." [#27]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Let me say, they're effective if when I go into them, we don't have the capacity to fill the need without some kind of help, which again goes back to capital or being able to provide the amount, quantities or different things that they may need. So they're effective, but they're not effective. … When we go to these matchmakers and they need certain things, if they're not in our sweet spot that brings us back to, we don't have the cash flow to provide to them what they need without getting paid in special terms. So, they're good, but they're not good." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I have gone to a number of those over the years and have not really found them helpful." [#32]
- A representative of a majority-owned professional services firm stated, "There's been some networking stuff that I was able to go to. But for whatever reason, I haven't had a lot of success there. But I know they do the networking stuff where you go meet, who knows, a bunch of people you might otherwise never cross paths with your entire life. And those things are pretty cool on paper. I haven't been able to make any major changes based on those. But you do meet people and it is fun. I mean, at least there's that, it's not all bad." [#36]

12. Streamlining/simplification of bidding procedures. Three business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses [#13, #17, #24]. For example:

- A representative of a woman-owned, DBE-certified construction company stated, "I don't really think it's the technology. It's the process, all the hoops you have to go through. And you go to a website, and then it directs you to something else. And then, you try to reach out to somebody on a procurement that's listed, and you don't get a response if you have questions. And then, when you do get somebody, the chances are they don't know what you're talking about on, because there's so many variables that go into getting a job, doing a job, covering the liability, but if you have get bonded or not, and especially on a federal level, because they haven't dealt with Hamilton County thus far. The people who're putting

these procurements together and putting them on the internet, for something to go out for bid, they have no idea what they're putting a procurement out for. They haven't been in that facility. They don't know what they're contracting, so if you do get somebody on the phone, it's of no help." [#13]

- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Some of the existing paperwork that they ask for... It's been a while since I've gone through their stuff, but it's a typical paperwork. It's the, make sure you have a bond here, make sure this is... It's pretty basic, but some of the language, like for instance, that the lawyer write for understanding if you have somebody that works for Hamilton County, how you cannot bid on a project because they may influence that you get the project or not … had I not known, like my aunt's been in procurement before for the government, or something like that, had I not had her look at it and she's like, 'Oh, this is what this means, honey,' I would be totally lost. Some of that stuff is not simple to understand all, straightforward, and you're trying to figure out what exactly is going on. Some of them want you to... If they know you're a minority contractor, why should you have to submit more minority contractor paperwork all over again? Even though that's a process. Some of that is unnecessary. It's unnecessary paperwork that they already have, and they already know that's there. That should be an automatic check or automatic no. So those things like that, sometimes I think that they're just a headache. I wouldn't say that they're necessarily a barrier to entry, but they're a headache to get through." [#17]
- A representative of a majority-owned professional services firm stated, "We go through it, a lot of it is just terms and conditions that don't really mean a lot, [it's] boiler plate, but you have to go through this whole thing just because, oh wait a minute. Here's something I have to cost for in this process." [#24]

13. Unbundling contracts. Three 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 the County and MSDGC [#21, #32, #PT2]. For example:

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "We just recently won opportunity with another government agency. And I would have to say, if they hadn't broken up, then I wouldn't have done any portions of it. But yes, that would be extremely helpful." [#21]
- The owner of a WBE-certified construction company stated, "They were making strides on … our minority women goals. But then soon thereafter, they changed the way they were doing things and their projects were much bigger. And so, for myself and other smaller MBE's and WBE's, the projects were too big for them to be able to get bonding … figuring out a way to break some of these projects down, to where you have multiple primes, rather than just some giant prime, and then they have goals underneath them. We need more prime opportunities." [#PT2]

14. Price or evaluation preferences for small businesses. Ten business owners and managers thought price or evaluation preferences for small and local businesses are helpful [#8, #22, #32, #33, #36, #38, #39, #41, #44, #FG2]. For example:

- A representative of a majority-owned professional services company stated, "A large firm here in town was the structural engineer of record on that project. They were bidding the job; their fee was going to be like $450,000. They found out that if they had a small business enterprise ranking, that that would get them an extra point or two in the calculus of how the bid was going to be awarded. So they found out that if they had a sub-consultant with at least 10% of the project that was small business, that would work. So, they approached us, we got the small business enterprise and got 10% of the project as a result, and then they won the bid. It's just kind of an oddity of how those projects tend to run. That the only reason we really were involved in that project is because [the prime] wanted to get a couple more points on their side when it came time to evaluate bids … it wasn't about our qualifications or our value to the project. It was about getting points on a scorecard to win a bid, which is, again, we're all entitled to our opinions. In my opinion, it's a horrible way to hire engineers, is by a point system based on size and proximity and those sorts of things. Qualifications are a much more reasonable way to make those determinations." [#8]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "If government entities are serious about giving opportunities to small business, that they would utilize and appreciate people who've gone through the process to get these certifications and give them some extra credit, basically when you're going up against firms that are not. And while you do get that extra credit with the City, and I believe you do with CMHA, you don't get anything with County. County doesn't at all look at that. They need to really change their scorecard … enact some policies that would give SBE/WBE/MBE companies some leg up in the bid process, adopting the City of Cincinnati's policy, where if you're within, I forgot if you have to be within 5% or 10% of the low bid, you have the opportunity to match the bid. I think that would be super helpful." [#32]
- A representative of a majority-owned professional services firm stated, "That would work. But for my line of work, I would encourage the folks that have control over that stuff, to go back to these OEMs and say, 'Hey, everybody gets the same price.' If you can control that at the OEM level, it'll just work itself out naturally when people are putting their bids in. And I would favor the small businesses more than a point system, because the small business doesn't have the overhead the large business does. I bid on a small project a while back. I was going up against CDW, I was $100,000, they were $290,000. For the exact same thing. If everybody's got the same price and those are the numbers, I'm pretty sure that the small business is going to win a few more bids than they do right now, right?" [#36]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "What are you telling me that telling the minority contractor, 'You're not good enough to compete so we are going to give you 5%, 10% [edge].' You just told them, 'Don't do that.' My children, I would not... When they grounded, the only time they got grounded was they got a B, because I know they were intelligent enough they had to get A. Don't lower your standards, because that is what is problem with this country. We keep lowering their standards and these people keep sinking to the lowest level. That is why this is not helping them. Keep the standard high. Those people the minority contractors, I don't care you are African, you are Asian, whatever the case may be, you have nothing less than any other person. You don't need to tell them, you're a lesser person therefore you need help. That's what the signal they'll give. That is what's the problem." [#41]

- The woman owner of a goods and services company stated, "I was talking about the Small Business Association through the Ohio Business Gateway. And I put in my bid, and I was the top three out of [all the bids], and I was not awarded the contract. And when I did see who won the contract, they were disabled. And so, I felt like that wasn't fair. On these jackets, they say... A lot of them are just for Indians. If you are a woman-owned Indian business and you're disabled, you will get the contract."[#44]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "They put up RFPs and quotes all the time and they have a score sheet, and they publish a score sheet. And they'll say, if your business has, if you have more than one contract with us, if you have more than say three contracts with us, you get zero points. If you have no contract, then you get 10 points. And what that says is, is that they want new blood, right? Or they may say, if you located close to us within 30 miles, you get two points. If you located within 100 miles, you get no points that says they want a local company, new blood, right? They set their score sheet up so that if I'm a minority firm or a large firm, I can decide whether I want to go after that deal. Because I can see based on how the scoring is, what they're really looking for." [#FG2]

15. Small business set-asides. Ten business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses [#22, #23, #29, #32, #33, #36, #38, #39, #FG2, #PT1]. For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I like that idea." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Within the MBE program, there should be goals and other work set aside. I'm for it, 100 percent for it. But don't set something aside that you know you don't have the capability of people bidding it. I mean you got to do your homework, make sure okay, I'm putting this set-aside here: What's involved in that set-aside? A, B, C, D. Do we have an organization that can do A, B, C, D? If we don't, we don't put it as set-aside. Don't embarrass yourself. Don't embarrass the community, because the first thing going to happen is nobody bids that project, or somebody bids who don't know what the hell they are doing. White boys going to say, 'See? I told you so.'." [#23]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Those are useless, and I'm just saying that because small businesses are not all 'small' businesses." [#29]
- The Black American woman owner of a SBE-certified professional services firm stated, "A set aside to me, you just can say, this is a black female owned business, let's go with it." [#FG2]
- The woman owner of an MBE-, SBE- , and EDGE-certified construction company stated, "if they wanted to really help and change some things … have smaller jobs for just set aside for just people with certifications. That way we don't have to deal with the generals and the primes." [#PT1]

16. Mandatory subcontracting minimums. Eleven business owners and managers shared their thoughts on mandatory subcontracting minimums. Many perceived mandatory subcontracting minimums as helpful for small and disadvantaged businesses, while others noted that industry specific requirements may be necessary [#22, #23, #29, #32, #33, #36, #38, #39, #41, #FG2]. For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I'm not a subcontractor, so mandatory sounds harsh to me. Encourage sounds good. Goals sound good. I think if you put it in mandatory, then they have one of two options, they either can use somebody that's really crappy, and then the result is crappy. Or they're going to lie, they're unethical. Or they're going to fail, and then they're not going to be able to perform, and maybe they just can't find anybody that can do that. So, mandates sound harsh to me. They sound like a KPI that's going to create a bad gaming situation." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Mandatory would be only if the organization or the government ... being the County ... only if they know for sure when they put it out there that they have some coverage for minorities, they have people that could work on that project or do that project or bid that project, so on and so forth. It doesn't make sense to have something that nobody there ... the mandate, you know? Like having a car with a steering wheel and a key and nobody to drive it." [#23]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "For the majorities? Yes, absolutely. A hundred percent agree. And that will get away from using your good old boy network, making sure that ... And again, and it's not okay. I met it with this one contractor that you've been using for a thousand years, but absolutely having minimums on subcontract. And again, identifying that where the goal is to be able to break up the good old boy network and allow for new minority women owned, small businesses to come in and be able to have a piece of the pie." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I think if there is any capacity that there should be some requirement to subcontract." [#32]
- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "They've had that [mandatory subcontracting minimums] for years on the federal side, with that said, they just now recently have started kind of monitoring that and making sure that that actually is happening. What was happening was the team would, the large company, would submit the proposal with these subs on it, and there would be no work. So, from a business side, you need to guarantee in the actual agreement, in the contract, that you get A, B, C, whatever work specifically, but the government is now monitoring that. I think they've, and I might be wrong about this, they're even starting to tie some of the federal employees, their pay or bonuses, to the success of meeting these numbers, and so forth." [#33]
- A representative of a majority-owned professional services firm stated, "I think that's a great idea. And I had that opinion before I was a business owner, so it's not in my own interest that I think so. It's something I tell people when I'm in sales meetings. It's like, 'I'm

a small business. Having you as a client matters.' It's like, 'I need you.' 'I'm not going to just screw around and half effort things, because you don't matter. You matter a lot. And you're going to see that in my quality of work.' But some of these companies that I've even worked for in the past, getting my experience and whatnot, you're just another number. They don't really care." [#36]

- A representative of a Black American-owned construction firm stated, "So when they're doing [this] stadium and they had a percentage of minorities, because they wanted minority business. Well, they only gave minorities a certain small percentage of the work. It wasn't just the percentage of they want contractors, they only offered a small percentage of the work. So when I calculated it, what they wanted, first of all, they were pitting all the minorities against each other to bid it on this small section of it. And in the end, the money I could have made or took a year to get it where I did my job on my own I made what they were talking about in two weeks. It just wasn't worth it. In that case, it was not good, but for them to have a requirement, I'm agreeing. I think that's good. There should be so much minority contractors on the job. In every job. I don't know why this shouldn't be. And it wouldn't have to be mandatory if they would do it all the time." [#38]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I don't believe in it, because again, that forces people to find ways to work around it … just like if you made a mandatory to me even though we are MBEs ourselves, but if you said, 'I have to give 20% of this project to somebody.' Hey, one project is that it has to be a union company. There are not too many union minority contractors out there. I don't know of even, there's only one that nobody would work with them. The second thing is if we give it to them, what about the quality of the work? Because at the end of the day I'm the one that my name on the line. I'm the one that has put out the bond for performance, but if the subcontractor is not qualified it causes a problem. So I don't believe in that." [#41]
- The Black American woman owner of a SBE-certified professional services firm stated, "It's to a point. Sometimes I think that being in those areas is a negative because we may get 1% or 2% of something, but just the 98% goes somewhere else. And sometimes I just want to be with them over there." [#FG2]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "I tell my majority partners that I could do more with the crumbs than you do with the whole look. And so even that 2% or whatever else, based upon the dollar amount of whatever that contract is, can be very large or very huge for my small business in context. Although yes, I would like to be a part of the 98% too, but it's helpful when I have at least something versus nothing because nothing, is the alternative. I figure, I've also learned that once I got the 2% and they were like, oh wow. You know, she... as if I didn't have the capabilities before, oh wow he did that really nice and she did a great job on that so maybe we'll give him 3% next time. And sometimes it's ridiculous how it has to happen, but sometimes you have to build it in scale. And it's very frustrating for me because I could take 100% and do just as well as I did with the 2%, but okay if that's how we have to do business together, then you know, what else am I going to do?" [#FG2]

17. Small business subcontracting goals. Twelve business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses [#22, #23, #29, #32, #33, #36, #38, #39, #41, #AV, #FG1]. For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I go to the UC Health meetings, and anything that they're doing, they have goals that they have to do minority spend. So I do a lot of construction signage, and so I know things that are under construction generally have a 10 to 15% spend with a WBE or MBE. From my perspective, I think they've been helpful. They're not necessarily super helpful to me. They have been some helpful, but I think that they're helpful because they force people to give other people a TRA, which is what I said at the beginning. It's hard to get into a client because they won't give you a TRA. So, if you're forced to step out, and you're somebody new, then you found out that they can do it well. I think having the spend component that we talked about, the 10 to 15% spend component, I think that's helped because it's forced them out of their box." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "I can say that more majority companies, construction companies, would use us if the end user recommend, or either the goals, or by requiring MBE, SBE participation. The same adage here is 'If we don't need them, don't hire.' And that's coming from the people we work with... They don't have requirements or goals or anything like that from the end user. They're not going to go out the way... But most contractors with CMs, if they don't need us, they don't ask us to bid. Within the MBE program, there should be goals and other work set aside. Put in goals. Now, you know as I know, a goal is nothing but a goal. Not a requirement. So, I would say goals and requirements. The goals will lend themselves to at least bringing out the people who are available, the companies who are available that can do the work. The requirements, which the white boys ain't going to like, but you are twisting their arm, saying, well, you got to have this. But making sure that this are individuals and companies that can do this. So again, to put out a goal or put out requirements, you got to make sure you have the capacity to back up that goal or requirement. Just don't put it out there. If I don't know anything about making glass, then why put out a goal for glass windows or glass tables? It doesn't make sense. It's got to make sense. It's got to make sense; it's got to work. So, in order to make it work you got to make sure you have the capacity there to make it work. When I say capacity, I mean MBEs, WBEs and all the other BEs are there that they can be responsible to make that work. Do your homework. Again, I keep on saying the word capacity because that's very important If you establish a goal, you got to make sure you have capacity to meet that goal. And within that goal you got to have the companies that are experienced with whatever you're putting in that goal." [#23]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Absolutely … I think any goals that you can say, and if you're talking about the majority has to use a small business as part of their goals, I think it would help with subcontracting. But small business needs to be redefined. There needs to be different segments of small business because small business is not small business. They're small business and then they are small businesses [emphasis added]." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "I want to add about contract specific goals, I think that the County, if they're going to look at their list of whether it's their BOLD list or just what kind of vendors are available in the City of Cincinnati that are certified in certain categories, they really should up their percentages of trying to get a company to fill. For example, I remember in

this last go around the bid with Hamilton County, I asked what the goal for the contract was. And the answer came back at first that there was a zero goal. And I said, 'Wait a minute. I'm on the Hamilton County BOLD list.' Why is the goal zero? And then they changed it to 5%. So, it makes no sense. If you have vendors that you're trying to help you should up your goals. And I don't know who's making those decisions about what the percentage goal should be and what they're looking at. It's very hard to get an answer from Hamilton County about how this works." [#32]

- A representative of a Black American-owned MBE-, WBE-, and EDGE-certified professional services company stated, "I prefer the mandate, and then I would say kind of look at what the federal government has done here recently to kind of more guarantee that it's going to happen." [#33]
- A representative of a majority-owned professional services firm stated, "I'd be in favor of that." [#36]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I think that definitely should be in place." [#39]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "What becomes restrictive is if they say that you have to have 15% WBE or so many percentages, sometimes we cannot find a single person to bid those kinds of things. And of course, us being an MBE, they don't count it. So therefore, sometimes they are forced to walk away from a project because we cannot meet those requirements. A small business subcontracting goal is good. I have no problem with that part because that's why you can help them. But again, as long as the subcontractor is qualified. I love the idea of a small business, but with the qualification that they must meet a certain criteria." [#41]
- A representative from a majority-owned construction company stated, "All the projects have so much minority and woman owned requirements, I have gone into different regions because they don't have those requirements. It has probably cut us in half from what it was at one point." [#AV33]
- A representative from a majority-owned professional services company stated, "Too hard to bid those projects and meet the minority participation requirements." [#AV38]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "I support them as well. I think they're good." [#FG1]
- The owner of a WBE- and SBE-certified professional services firm stated, "They're critical. I think it's the only way we're going to change the world. You have to help people that have been disadvantaged. It's not fair. They have to exist" [#FG1]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "I agree 100%. If it weren't for programs that require me to be there… There have been companies that were mad at me for working for them while we were there on a MBE or [inclusion] program. But after we did the project, they've been customers for 15 years. It makes the person that you are trying to get to like you mad. Because they're used to doing the same thing. They're used to calling the same people and here's this guy that I have to talk... They're thinking, 'Here's this guy I'm being forced to be talked to because he's black,' and there's really not a problem, but I have to talk to him. So, there's a period of time that I

have to go through in massaging this person to understand I'm just a regular guy that does fire alarm. I'm not trying to attack your position. I'm just here because somebody's making me be here too. And especially in construction because It's not a politically correct... the job site is not a politically correct place with hard hats and bullets and people that tell you how they really feel about you being there just because you black. And I've dealt with that for years." [#FG1]

18. Formal complaint/grievance procedures. One business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. Most firms stressed the need for confidentiality in these procedures [#32]. For example:

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "That's what I tried to do with this situation where they did not follow the proper procedure. And I complained to the person who was in charge. When she didn't respond, I complained to the head of the Hamilton County Commission. He basically blew me off. Who else am I, I would like to know, where do you go when you basically are ignored?" [#32]

K. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with the County and MSDGC's business programs and provided recommendations for making it more inclusive. For example:

1. Experience with the County's and MSDGC's programs; and

2. Recommendations about race- and gender-based programs.

1. Experience with the County's and MSDGC's programs. Fourteen business owners and representatives shared their experiences with the County's and MSDGC's programs [#22, #26, #29, #32, #35, #39, #FG1, #FG2] For example:

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I'm not really aware of it, so, I guess awareness." [#22]
- The Black American male owner of a construction company stated, "You don't always have to go and get a loan. I try to stay away from that because it's easier for me to just get the money from the person that I'm working for. So, if they want me to work for them that bad, which this is the benefit of the MBE and the EDGE program, if they need you, they're going to find a way to make sure you're there, even with the money side." [#26]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "I think Cincinnati has more than enough … They have enough in place to really covers everything. I can't think of anything that they're lacking." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "Let's just take Hamilton County since we're talking about Hamilton County. There are many, many departments in Hamilton County, and some of them, many of them do their own videos. But when those departments go out to seek vendors for video,

they don't consult the Hamilton County BOLD list. [The SBE representative] does not ever facilitate our companies who are on that list coming before these vendors. There's no opportunity. They just do what they've always done. And I think if you look at public records, you'll see that. I've said, 'I'm on the list, how does this help me as a business owner? What do I get?' He goes, 'Well, we always talk to everyone in the County, and we tell them to consult our list.' That's all I've ever gotten from him. Saying they tell people in the other departments, [that] they should look at the County's BOLD vendor list. That's it." [#32]

- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "They're unhelpful because to me they're mostly for startups, and I'm not a startup." [#35]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I think they try to do what the small business needs, but as far as it being monetarily beneficial, it doesn't come across that way sometimes." [#39]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "Their leadership, their leadership is horrible. The guy is not doing his job. [The department] is not reaching out. He is not helping me. They need leadership that is going to fight for me to be treated fairly. And I like him, but they need people that are going to fight for us. And I mean, black people. Because what they're doing is sneaky and it's underhanded and is wrong. I feel absolutely no support from them. I have tried and it seems like he's doing the best he can, but he does not have any power. [The Director of Economic Inclusion & Equity] can write whatever he wants to write. And the commissioners can tell him, 'We want this percentage all we want,' but [the Director of Economic Inclusion & Equity] can't call the guy that I'm dealing with on the fire alarm and say, 'Hey, give this guy a shot. Because he has...' He doesn't... And I'm not saying that to talk about him, but it's the truth. They put people in these positions and say, 'We want you to help people,' but then they don't give them the power to really affect policy. So [the Director] is trying to do his job and he's keeping track of stuff, but he has no power. I mean, they just want data. They don't want to change things. If you're going to put somebody in charge of your diversity or economic development department, you need to give that person some power to call Mr. 30-year employee if he need the credit card to buy the same company for the last 30 years because they go to the golf outing. You need to give that person some power. And they're not giving [the Director] his power." [#FG1]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "Initially when [the Director of Economic Inclusion & Equity] was continuing to pull together his list, if you will, of MBEs, SBEs, WBEs. I think it was a great process. And that was several years ago. I've been on that list for maybe five years, but that's the extent of the work. I've simply landed on that list. I will agree that his power is minimum. He does do a good job in vocalizing within the organization the importance and the need for economic conclusion, but I think that it's still in the theory phase rather than the actualization and the diversity spend phase. So, my experience is I'm shortlisted, but I don't even know if the buyers or purchase managers are even considering that list when they're making decisions in the professional services space. … It's a bucket of vendors or contractors, but I am very curious about the spend. And not that I can only speak for myself and my business. We

don't ask for any gifts. We love to compete and win and provide the service and the value by all means. So, we go through the process to be able to competitively bid and be a part of the party to be included. But at this point, we're invited. We're invited. But we're not dancing at all." [#FG1]

- The owner of a WBE- and SBE-certified professional services firm stated, "I mean, I'm in it and I do the interviews and they do the site visits and things like that, but that's... To be registered with them is my level of involvement." [#FG1]
- The Black American owner of a DBE-certified professional services firm stated, "We're listed but there's been no action."[#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "I've learned that government can leverage rules and they can make a rule be a problem and they can make a rule go away. … it really comes back to the wherewithal of that agency and how committed they are to making things happen. Hamilton County, I hadn't seen to be that committed. Remember for MSD, those organizations like that, the City runs that organization over there. So, the City runs an organization that the County owns. And so, City policy or City procedures run the organization. The County sets the policy, right? If the County says inclusion is not important to us, the City can have whatever process they want. They don't work at MSD, right? They don't work in an organization … I think since they have someone in that role now, I think there is more communication that comes out about what's going on there. I know I get emails on opportunities to pursue at Hamilton County now and I get it from [the inclusion office]. That's where I get them from. I see that, but beyond that, there's nothing else." [#FG2]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "Not very good. It's very difficult. And what I've realized is that they don't have the authority to make the decisions to facilitate order or contracts with us at all. We waste our time. We go and we visit with them. We talk to them. We give them the speech over and over again what our capabilities are. And at the end of the day, they don't have the teeth. They don't have the authority to say, okay, we can help you facilitate a contract whatsoever. So, I find it very difficult that if you don't have a procurement person that's facilitating that in the room, then you're just wasting your time. I find that in Hamilton County, the conversation is good. Being able to make you aware of the opportunities is good. But it's what I always say to them when I go there, I appreciate the conversation, but conversations don't pay the bill. I have to get from conversation to contracts. Contracts are what pays the bills." [#FG2]
- The Black American woman owner of a SBE-certified professional services firm stated, "It's been difficult for our firm. It's difficult. Sometimes it seem like they're gatekeepers and not supporters. … I don't feel that I personally benefited from any quote unquote help on getting any contract or anything like that or pointing away economic conclusion. What I did enjoy was the meetings … that they had there because you could meet different people, there was a way to network, but that's been eliminated due to COVID. I'm sure. I wish I would start this back up again, the contractors." [#FG2]
- The woman owner of a professional services firm stated, "I think it was a fast-track program. … We went through all the certifications, all of the meetings, all the everything, everything, everything. We were approved. That's great. Small business, fast track. Never

got one thing out of it, except a lot of time spent and money spent … So, if Hamilton County really wants to in its inclusion office, it needs to not so much focus on the fact that I'm just going to give you all of this information. I have information overload. What I need to do is to get directly to the opportunities and how I can facilitate a contract for the County." [#FG2]

2. Recommendations about race- and gender-based programs. Interviewees provided other suggestions to the County and MSDGC about how to improve their programs for certified firms [#1, #3, #4, #12, #13, #16, #17, #22, #23, #24, #29, #32, #34, #35, #36, #38, #39, #40, #41, #44, #AV, #FG1, #FG2, #PT2]. For example:

- A representative of a Black American-owned, MBE-, and DBE-certified professional services company stated, "In some healthcare institutions I think they've come a long way. I think you see health has done a great job [with regard to their goals]. I think Cincinnati Children's is doing a good job. So maybe there're some things that they can learn. I guess they focus on it continuously, they talk about it and so everybody's singing the same song, same chapter, same verse, same book. So, it becomes their standard operating procedure… They're so focused on the construction industry and the construction trades like are there some minority private law firms out there to get work? I don't know. Do you hear all of them? Accounting firms, do they get work minority accounting firms? You just don't hear of those. There's no emphasis placed on. I mean, I get it, everybody's going after the big dollar amount that's out there, but there's a whole lot of, even in construction with people don't understand if you have a $50 million project, they just focus on the construction value but somewhere between six to 10% of that is professional services, that's still a lot of money." [#1]
- A representative of a Black American-owned professional services company stated, "You're asking me about inventory. Professional services don't hold inventory. You're asking me about my banking relationship and loans and things I may have out. … I think in all fairness, but this is ... I've shared this with the Minority Supplier Development Council, as well as other entities. Professional services firms don't get the respect, and we don't get the level of emphasis for procurement opportunities that construction and manufacturing get, because those are higher dollar spends. When you have those support programs and initiatives, identify that you will have buyers, and you will have people who have successfully engaged with professional services folks. If I'm going to go to a networking session, or if I'm going to go into a relationship building session, have people there who buy professional services, and not folks who spend 90% of their time on construction deals. That doesn't do me any good, and it doesn't do them any good, because we can't have a conversation together. … I would say, as the County begins to think about how to explore this, think about it from the framework of, how do we increase the number of MBEs doing business with the County, versus how do we eliminate people who shouldn't? It's a mindset shift. The structure of applications are either going to be structured to entice you to work with me, or the structure of the applications and the procurement is going to be structured to disincentivize or to discourage you from working with me. The choice is the County's. How do you want to structure the procurement process? It's the difference between being invited and welcomed. So, if I'm invited, you're extending me an invitation. Being welcomed means yeah, you can come if you want to. You're welcome to come if you want to." [#3]

- The Black American woman owner of a professional services company stated, "I do a lot in a day, I would say that a lot of business owners do a lot in a day in terms of reading contracts, reading and/or composing emails, sometimes... but when it comes to stuff like the government contracts, and the websites, and how to navigate the website, and just how things work, could we break it down simpler? I can't even get that. Simplify. Have a video of someone actually talking about the steps, instead of me having to read it…" [#4]
- The owner of a majority-owned construction company stated, "Some kind of support for payroll. Just how would I do it? Who would I use? How much money do I need to have? You know, some kind of advice in that area? Sure, I can probably bid a million dollar contract and I could probably win it, but I don't know how I'm going to pay for it." [#12]
- A representative of an woman-owned, DBE-certified construction company stated, "Why can't the federal government send out an email with a list of all the prime contractors looking for small businesses, woman-owned, veteran, whatever it is, with the name of that prime, all these prime contractors who have a history doing government contracts, big ones, that use smaller companies like us, a list of all those companies with contact information to where we can reach out to them and say, 'Hey, listen. We're in this area, southwestern Ohio. We're a woman-owned business, 100% woman-owned business. This is what we do,' to where we can call them and have a conversation with them? I bet a lot of those prime companies would like for that to happen because it'd make their job easier. the system that's in place right now is not a good system. It's borderline broke, not user-friendly to a small, small business like us." [#13]
- The owner of a majority-owned goods and services company stated, "If the County had a resource that could help put a prospecting list together, say I'm a small African-American businessman or a guy that's been doing whatever and he or she thinks that, 'Yeah, I want to go into business and do this. How do I find potential customers?' And if the County could help them with... Say, 'Okay, you're looking to reach sign companies. Well, here's a list of sign companies with some contacts.' Or at least help point them in the right direction where they can find that information. And I know that's not actually doing business with the County, but that's the County helping people build their business or grow a business." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "For instance, we are looking... we do lead abatement on our construction line. Well, some of the guys don't read English very well, and we can't go to the... we can't send them to courses, because they need a translator to translate the course over, and there's nobody that teaches lead classes that speaks Spanish in Ohio, Kentucky, Indiana area. Or just vice versa, like just having... Right now, a Spanish class for some of my guys that don't speak any Spanish at all, a Spanish class for just teaching construction-based stuff to say... basic stuff on the other end, that would just help out. Because right now, nobody in the City of Cincinnati, downtown, as far as in procurement, they don't speak Spanish at all. They don't even write their policies or their solicitations in Spanish at all. It's not an option. They're all in English. That deters a whole 'nother ethnic group or a whole 'nother minority class right there. Because they're like, 'I got to go through all this paperwork, and I don't know what it says.' Some of the stuff... I have to even look up some of the terms, so I know they do. … If they had some free lawyers, that would be great. If they pay for some lawyers to go to court for you for... Because some guys have bigger pockets

than you, and you can't always be spending all your time in the courthouse and attorney fees. we spent $19,000 on trying to get it $10,000…" [#17]

- A representative of a WBE-, DBE-, and SBE-certified goods and services company stated, "I think they already have goals to be achieved. I think that's really helped our businesses, for people to have goals. And then I always just think the other component is education and exposure. The more they can be exposed to small business, WBEs and MBEs, the more likely they are to use them. Exposure. somewhere along the way, the small businesses have to be supported, because there's a frustration level on both sides." [#22]
- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "There're state programs that really don't lend themselves the MBEs. And I think it's terrible because it's taxpayer monies and we all pay taxes. And the biggest problem I have with any program in the state of Ohio is with the FCC. And they require a bid to be... The general contractor or the CM have to have a 5% minimum of EDGE participation. And the same thing about minority, but EDGE. You know about EDGE? We're not EDGE certified because my personal financial statement won't [meet the requirements]. I got too much money in my back in my bank. Which is crazy. It's totally crazy. I can't be used as an EDGE contractor or supplier because I do not fulfill requirements of EDGE. … I think you can't have a personal net worth of... I think it was 750,000. And for a person like me, who's been around for a long time... If I don't 750,000, something's wrong me… Within the MBE program, there should be goals and other work set aside. Making sure you understanding the profile of individual MBEs, WBEs, what have you. Understanding their profile. Understanding why they are there and also reaching out to them to make sure them being there does not jeopardize their company. Brute honesty. I don't mind somebody telling me 'Hey, you're not good as this.' It helps me out to better myself. So brute honesty would be a key thing. And making sure when you're trying to work with minorities, that you just don't know the company; you know the individual running the company." [#23]
- A representative of a majority-owned professional services firm stated, "Access to an updated list [of certified vendors] would be good. I don't know how many women, minority owned businesses there are in Hamilton County that would do my type of work. I couldn't tell you." [#24]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Those are useless, and I'm just saying that because small businesses are not all small businesses… I think any goals that you can say, and if you're talking about the majority has to use a small business as part of their goals, I think it would help with subcontracting. But small business needs to be redefined. There needs to be different segments of small business because small business is not small business. They are small businesses and then they are small [emphasis added] businesses." [#29]
- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "When you bid on something for the City, if you are not the low bidder, but you are on the City's certified SBE list, you have the opportunity to match the low bid. And if you can match the low bid, you will get the work. And that happened very recently on a contract I bid on for a film for the City. I was not the low bidder, but I was given the opportunity to match the low bid and get the work and I decided to do it. That would be very helpful if the County had the same policy, if they truly want to get certified SBE

companies doing more work. … Some of those matchmaking, or just visibility sessions that Hamilton County could be doing … All I know is I'm on a list and I never hear from them. And the list doesn't help me. And you've never heard of the list. … One of the things that it happened during the pandemic was Hamilton County got a bunch of money flowing from the federal government … there was an article in the paper about how they got this big pot of money and they were going to use it to help market the City and something else. I know I saw the article and I emailed and said, 'Hey, how can certified small business be involved in?' And once again, it was kind of the run around like, 'Oh, well, I don't know because we're not really handling it. That's the chamber.' And then the chambers saying, 'Oh, I'm sorry, we've already had our people for months. So, it's like when there is an opportunity and you have all this money, at the beginning is when you should be thinking about, okay, how can we include small businesses in this before, oh, it's already a done deal." [#32]

- A representative of a majority-owned professional services firm stated, "Very early on, [I] spent some time with some people through school, and was impressed with that program. I only used it for a very short amount of time for a very limited amount of information. But there's so much to wrap your head around when you first start into business. A business 101 class wouldn't be a bad thing. I don't know if anybody's doing that. But because I've been doing this so long, I haven't been looking for that anymore, but just the business basics, the basics of owning a business in Ohio and the things that you need to do to stay compliant, that would be a super [valuable] I'd think." [#34]
- The Hispanic American owner of an MBE-, WBE-, and SBE-certified professional services firm stated, "I think they need... I think it would help to put in measures of growth, how to grow. The MBE portfolio organization has some great tools to measure growth and to show you where you are and where you're lacking. It'd be great if they had some tools to help small businesses grow." [#35]
- A representative of a majority-owned professional services firm stated, "I guess the biggest thing for me, would be just some of the stuff you don't know that you don't know. Maybe when a new business is formed, they get a little letter in the mail that's like, 'Hey, if you're interested in working with the public sector, here's some information on where you can find projects to bid on.' Or 'Here's the government office that handles X, Y, and Z. You can get on their newsletter.' And that kind of stuff, that'd be fantastic, because some of the stuff that's taken me years to find, if I had known about it right out of the gate, then I might be doing a lot more business in the public sector if I knew how to." [#36]
- A representative of a Black American-owned construction firm stated, "One of my things with that is that pitting … we end up pitting minorities with minorities to get a job, and that is not a good process. I don't like that part of it." [#38]
- A representative of a Black American-owned, MBE- and EDGE-certified construction firm stated, "I think they should have some set aside projects for companies that get certified or go through the process, that we should have the opportunity to see the projects and bid on them before it goes out to the larger population." [#39]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Develop a supplier diversity program that is integrated into procurement that is focused on really bringing forth diverse suppliers to the City and the County for the

betterment of the City and the County. This is not a feel good, look good. This is an economic program that helps the County increase its return on the tax dollars that they have." [#40]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Unfortunately, a lot of people that they just want to hide behind the percentages and thus by that industry has not advanced ... [The winner of a project downtown] was bragging about 27, 28% of the project went to the minorities. And I said, 'Go out there at the job site and see how many minorities are on the job site.' So then three minority contractors got the job, but they turned around subcontracted it to other people. But that is why I think those kinds of people have hurt the cause, have caused the issue for so many truly people of minorities that are trying to make a legitimate business. My fault is again, I have always told people I'm a human being first and businessman second, and it breaks my heart to see MBEs, how they're suffering and are struggling and not being successful. But my problem is that as I said earlier, we signal to them that they're not qualified, they're not good enough, therefore they have to be handheld, that doesn't help. We need the people to stand on their feet and help them with the mentoring to deliver." [#41]
- The woman owner of a goods and services company stated, "I know I'm considered a women-owned business, but I just want to... My heart is, I just want to be open and honest. This is where I really would like to see a change in the whole process of U.S. business in general and awards with contracts and just dealing with counties and governments is, I wish they would just do away with that, because it's just not fair for a person to rely on the loop... Not the loopholes, but the... I always tell my husband, I said, 'I feel sorry for you. If you ever had to go into business, good luck, because at least, I'm a woman.' So that's what I really, I want... That's really what I wanted to talk to you or talk to anybody is, I think there shouldn't be any categories. You just get your business because you're you and how hard you work. They're not getting a fair shake, but then we're not getting a fair shake either. I just feel like everybody should just be fair." [#44]
- A representative from a majority-owned professional services company stated, "The system itself is bent in one direction and those who run it are very selective who they want to choose. Personnel in place are where the issues are. Integrity of delivering the services under the program could be substantially improved." [#AV57]
- A representative from a Black American-owned goods and services company stated, "I wish there were more resources available. I have had a tough time getting into government work. I would like better, more available, and more publicized instructions for veterans and small businesses." [#AV205]
- A representative from a majority-owned construction company stated, "They should include veteran owned business." [#AV284]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "I think that they need an outside company that is not an employee of the County or the agency that is not afraid to show what's going on. Because it seems like the people who do these programs actually work for the organization that the program is for. So, their health benefits, their retirement, their paycheck, their children's lives and their house payments are tied to them telling people that they work for that they're not doing a good job. So it kind of... And I'm not suggesting that somebody would lie or do something unethical, but when you hire somebody that already works, it's kind of like the police-

police. Why would you hire somebody that works for you to tell you when you're not doing a good job?" [#FG1]

- The owner of a WBE- and SBE-certified professional services firm stated, "Part of what we do is assist with inclusion programs. And I think the City of Louisville is doing a fantastic job right now with their supplier diversity program. Based on a disparity study, they've proven what the needs are in the City of Louisville to justly employ people. And there's a 15% goal that's strictly enforced on construction projects and engineering with MSD for African-American owned businesses. They enforce it. It's not even a goal. It absolutely has to happen. … I'm in Cincinnati and they hire me and every month we do a call. I have every list I can find of registered minority businesses, and we reach out if you're in the construction realm and try to increase participation and get you registered because they're not a certifying agency, but they do take registration in Louisville. It's upfront. It's before the project even starts and then we'll do matchmakers to connect the contractors with the minority businesses before the project is even on the street. And not only do they require that you're having that conversation, but then they have to commit to you in that bid. And it's written and it's in writing and it's absolutely enforced. And if they're not doing it, there's the problem. They're not going to get the work. So I mean, there's a lot the City can do and the County can do in Cincinnati, I'll say to force a program to work. You can force it and you can put dollars to it. And if you are a minority and they want you to get that work, they give you bid discounts. And it's written on certain projects over certain sides. There's a bid discount. So, you might not be the low bidder, but you will get the work if you are based on the bid discount. And you're allowed that because they know there's... It's been disparate for years and they're trying to change that. So, I think it's a good model someone should look at." [#FG1]
- The Black American owner of an MBE- and SBE-certified professional services firm stated, "[First] matchmaking efforts when it's intentional with contractors, vendors, and decision makers to set the expectation that in this matchmaking event, in person or virtual, that a decision will be made for the partnership. And it's not just a dog and pony show wasted time dressing and all that good stuff. It's actually intentional that the purchaser is meeting with contractors who provide the service that they need. The second is around the policy. Again, [Louisville] MSD with the mandate of spend. It is not only for prime contractors or majority contractors. It's also with minority and women owned businesses that they too have to have the same spend. So, it's great. It's basically raising the tie for all ships to provide the service. At the same time, it's driving down the cost and expense for the entity, the agency. And then third and finally, I think that a program around from a business perspective, holistic education from bonding, to capital, to staffing, to simply managing a quarterly kind of expenses or needs, I think that that's important on a regular basis that the contractors, vendors are involved in as well as the buyers and decision makers that they can learn and witness what businesses are challenged with regards to running their business and providing the services that they're asking. Because sometimes the ask of the company's municipalities it's unrealistic. It's unrealistic. The timeframes are unrealistic, the price points are unrealistic, as well as the kind of the... sometimes the partnerships … These forced marriages sometimes don't work. They're unrealistic. And so having that education to help all parties understand and build partnerships I think is something that will work." [#FG1]

- The Black American owner of an MBE-certified construction firm stated, "Get some diversity training. Include [diversity] training. Because I do feel that sometimes they really don't know. Some people really don't get it. They just got a job. Until you're really over here, you don't really understand that I could wire a building. Why can't I go wire it? Just looking at me and looking at my team, but no, we are able. We are capable. We've done it before. So, I think that just understanding that we are very capable to do whatever we... For the most part, we're capable. We are able. And I think that sometime these agencies need to know that as well as. … [The agency's] got to have authority because I've been to some of those, a lot of those too. Diversity person without authority is just the person that you just... we may well go to lunch and keep it moving. Because it's too for a waste of time at the end of the day." [#FG1]
- The Black American owner of an MBE- and SBE-certified construction firm stated, "To be successful in this community, I think there have to be opportunities that are focused on us [MBEs]. That is, it creates opportunities for small minority women businesses to be able to compete. So, it clears, it makes competition where you're not competing against the global companies. … Hamilton County is harder. I think, it's harder because the message I always hear is, 'Hey, the County's 11% African American. It's 11%. We are doing better than, so we're doing 12, right? So we doing better than, the County's doing better than... the County is performing better than the City, relative to the percent of African Americans in the community. So we're fine. So we don't really need to do anything more. We don't need to build anything more. We don't need better relationship. We don't need anything more because we're fine. County's on 11% African American.'" [#FG2]
- The Black American woman owner of a SBE-certified professional services firm stated, "This about leadership, you just do what you really want to do. If the City wanted to, if the County wanted to, they would easily have every minority business qualified, working. We have more work than we need. They don't want to. … Just be intentional, let's just do it and then show the matrix. I like to see people say they're going to do something and then show the real matrix and not hide that and when you say minority who is that, what does that look like. … One thing I notice too about professional services, we're left out the conversations a lot. The focus is usually on construction and supplies and things like that. The professional part is left to the bigger firms. They get all of the work and they're not required to partner." [#FG2]
- The woman owner of a professional services firm stated, "Having more networking [and] more matchmaker sessions on a smaller scale. What if we had a source that we could go to that would be helpful to help us navigate through some of this? Because I think there's certain criteria, and certain steps that may be some of us don't know, me included, to basically navigate through all this. … I think if leadership could just decide right then and there to include us at the table... And there might be a group together that we put together, like our owner, they got a billion dollar round table, we can put our own little round table together of MBEs or whatever. And then somebody is always representative on those particular contracts and negotiations so we can bring that feedback back to the group, I think that would be awesome." [#FG2]
- The Black American male co-owner of a WBE- and MBE-certified goods and services firm stated, "Put a focus group together that just like we're doing now, that we're where we can

sit and talk about these issues and discuss them because there's nowhere to take the issues or concerns that we have. Who's going to listen to you on a daily basis? But I figure if you have somebody who's focused on what those issues are and how they can best help us, then I think we can do something with that." [#FG2]

- A representative from a public meeting stated, "I'm not one that believes in re-inventing the wheel. There is a substantial amount of information across this country via organizations that are designed and committed to the development of minority businesses and women as well as gays and lesbians. That talks about the path to success, be it procurement. What are the barriers and how do you remove the barriers as well as how it benefits the organization. I would encourage the County to really employ those best practices. You can go to any of those organizations and those best practices are available. There's also the billion dollar round table, which is made up of corporations that have done a minimum of a billion dollars with minority businesses. That has a booklet as well as it's digitally available that talks about best practices. If indeed the County wants to make the difference or the City for that matter wants to improve their program. Those best practices are out there and all they need to do is incorporate them into their processes and procedures and we'll see them work difference. But it's also going to require more than likely personnel changes because there's been people who have positioned themselves to create these barriers and to maintain these barriers. You just can't put in processes and procedures without changing personnel. So I think it's incumbent to make that happen and if you do those best practices. … What they find in is when you have a more diverse group of suppliers. You get more innovation and you become more competitive, and it brings more value. So again, I end with it is in the County's best interest to employ those best practices." [#PT2]

L. Other Insights and Recommendations.

Other recommendations for the County, MSDGC, or other public agencies in the Hamilton County area to enhance the availability and participation of small businesses. Interviewees shared other insights or recommendations [#4, #9, #10, #11, #12, #13, #14, #16, #17, #18, #21, #23, #29, #32, #34, #40, #AV, #FG1, #FG2]. For example:

- The Black American woman owner of a professional services company stated, "I know that they may want to have some sort of stipulations on that, in terms of guys that are felons, to be sure that [they] not only are legit and can do the work, but they've been in business for a while. I just definitely wanted to have those Black business but wanted to be sure that those Black business owners would be included and not excluded because of their past. They've already paid their debt to society, they are legitimate businessmen, and they do excellent work." [#4]
- A representative of a Black American-owned, MBE-, and EDGE-certified professional services firm stated, "It's easier and more convenient for us and more beneficial to our vision to do stuff in the City of Cincinnati. Because I'm going to hire and train people that look like me and folks in Cincinnati. So for me, personally, I prefer to do that because I have control and I'd be able to improve lives. And give them careers besides just giving them a job. Because I train them in skill sets that will be lifelong for them. So that's the benefit for me. That's why I kept trying to get in, to see how I can share my experience and develop people that can do what we do, make a career out of professional engineering service. Not too many—I've been to the stuff at the City—not many people are in engineering service. [Not many] people like me, for this service." [#9]
- The woman owner of a construction firm stated, "I don't know how much good it would do for me to say, 'Hey. I don't think this is a good practice.' Who do I go to with something like that? To you? To somebody like you? And say, 'Hey, why don't you guys think about changing this? It would be more fair to everybody.'" [#10]
- The male co-owner of a WBE- and WOSB-certified construction firm stated, "Some kind of a notification system as to when jobs are coming open, that aren't in the millions and millions of dollars range, because I'm not at most. I never want to be more than like a 10 guy shop. I just don't want to deal with the headaches. And so I won't be bidding on millions of dollar plus jobs but some of the other larger contractors will be on a job that requires a certain percentage of smaller business participation and things like that. So it would be nice if the City would mandate that more often. That would give an opportunity for some of us smaller guys to do some of the components of the job. Maybe not the whole job, right? You know, but some smaller pieces and parts would be nice. I know there's a little bit more headache to doing that but it gives some of the smaller guys the opportunity to be a part of larger projects. I'm sure that if we knew more about small business organizations in a kind of networking setting, we would go or she would go to attend something like that. You know, because just like here where we try to support other local, small businesses, because everyone else around here like said the roofing guys and the HVAC guys they're all small, probably 10 man and under organizations, we would also network with those groups as well. So that would be helpful if we knew like those kind of things were going on. A lot of us, I would imagine, owners, we listened to NPR a lot. So I would imagine if that kind of stuff was going on if there was an advertisement or two on NPR, I would at least hear about it.

Trying to figure out a way that, that County or City would let groups or businesses like me know that's even a thing. And I don't know too many other avenues really, because I don't really do much in the way of Facebooking other than just to, as a business promotional tool maybe on LinkedIn or something like that. Yeah, I don't—I guess if those organizations exist—I don't know how they would let us know that they exist. So really some sort of a notification system or some way of communicating that they are looking for participation from small businesses for X, Y, and Z category, would be very helpful. I just am not sure how that would be communicated to small businesses on the regular, even if there was like some kind of —as silly as it is—if there was kind of Telegram group or something right? A LinkedIn group or something that we could all participate in, specifically for Hamilton County, small businesses or, small businesses that do work in Hamilton County, or they could even break it down by trades group or something. I don't know. Not real sure how that would get communicated out effectively to a wide band. That's why I think the City of Middletown does a good job at it. Because they just broadcast everything out, whether it's a grass mowing, or curb replacement, or sewer liner installation. Right? I see that in the email heading and if that's something I don't want to look at, I just delete the email. Right? But everyone gets that notification. So I don't know if something like that would work. I don't know." [#11]

- The owner of a majority-owned construction company stated, "Yeah. I think it would be easy for them to set up their website such that, okay, if you're a small businessman, you go here and from there you can, if you know about this, you don't have to do this or this, you know, just [lay out the steps]. And say, okay, if you really want some help, we offer this. I thought the SBA was supposed to help me. I've talked to a couple of different guys and they're like, well, you know, I don't know. I can't do anything for you. I'm like, well, I don't know. My story is, I was working for a guy. I got fired. I had a brother who had enough money that he could help me buy a truck and help me buy the tools. And I went into business for myself. And I just started. I went to the customers that I had with the previous guy and said, 'Hey, I'm on my own now. If you still want to use me,'—because they always ask for me whenever they called him—'if you still want to use me, I'll work for you. I'm happy to do that.' So, that's what kept me going to begin with. I had the Sonics in the area, but the regional manager was paying me... The regional manager was doing something screwy with the books where he would take money out and then put money back in. Because he called me all the time and he was the only guy that called me, I was guilty by association, even though I never got any money." [#12]
- A representative of a woman-owned, DBE-certified construction company stated, "Maybe, instead of getting an email notification, if somebody would actually call that knows… is asking that can answer questions instead of it just always being on the computer, a conversation rather than the IT world. You find out and learn so much more in a conversation. You develop a relationship, some sort of history if you will. You can't get that from the computer screen. Even in the email going back and forth, there's so much that can get lost in translation, and somebody can't ask every question that's on their mind in an email. It's so much better with a phone call or a face-to-face… I mean, there's no resistance, or like I said, I think the government wants to help, whether if it's a woman-owned business or a minority-owned business or veteran-owned business. Whatever designation you have, I think the government legitimately wants to help those companies, but I think the process

could be made more efficient or easier to have these opportunities to bid and to get the information you need. When you do find out about a project that you want to bid on that might be in your wheelhouse, so to speak, okay, getting somebody on the phone that's qualified to answer these industry-specific questions, that has had hands-on, that's knowledgeable of it, instead of somebody sitting at a desk, putting this on the internet, that has no idea what they're putting out there for bid, who has never been in a certain manufacturing facility, that doesn't know whether, if it needs to be a TIG or MIG weld. What kind of pipe are we using? Is it stainless or is it black pipe, stuff like that. And I know there's a lot of projects out there, and the government tries to do its best, but the people, whether if it's federal [or] state. Local is a little bit better because somebody who's done this is now putting it out there, but especially at the federal level, the people that's putting these RFPs, RFQs, whatever you want to call it, request for quote, that's putting this stuff out there, they have no idea what they're talking about or putting out there…They might not even [know] what this particular facility makes. So, if you have a question, you call them, you can't get any answers. So, a business who is worried about liability and wants to do a job right, you need a lot of information on some of these projects. And if you can't get those questions answered by somebody that's knowledgeable, that's been in that place, that's worked there for a while, whatever, a business that wants to do things right legitimately cannot bid on that with a good conscience because, if you don't fulfill that contract, it could cost you money. It could cost you your reputation. Somebody might get hurt. Bring safety into it. There's a lot of variables that an email conversation with somebody and even a conversation with somebody doesn't know. That hurts a business, a small business, in a bad way." [#13]

- A representative of a WBE-certified construction firm stated, "HUD rules are ridiculous. So right now, if say that you've got a unit and on a Sunday at 6:00, her light bulb... or his light bulb, whoever, light bulb burns out in the living room and he makes a phone call on a Sunday to have that light bulb replaced [the] clock starts. Now, if me and you was at our house and our light bulb burns out, we don't call electrician on a Sunday to do that. I mean, we're going to wait till Monday or we're going to wait till we can get electrician because it's a light bulb. And I don't want to pay all this extra money to call electrician out on a Sunday to fix one light bulb. But HUD regulations require that be addressed in so many hours. So I look at it like, 'My gosh, we're wasting a lot of money man, to change a light bulb.' But it's just, it's red tape. It's just the way that the paperwork's written. It's just, it's the little things like that when it comes with the government work that I see that's like, 'Man, that's hurting everybody.' I think that there's very few contractors doing it for whatever reason or another. I have very little competition in public housing work. It just seems like people do not pursue it. And I do not know the reason why they're not. And I think that if I had to guess, it would be about the paperwork that's involved." [#14]
- The owner of a majority-owned goods and services company stated, "I think that may be an area where the public sector can help some smaller businesses, is get better visibility to us that don't know, that are generally going to be working with just referrals and those sorts of things, to get names out there." [#16]
- The male co-owner of a Hispanic and Native American WBE-, and Section 3-certified construction firm stated, "Thought that was such a flawed characteristic in the study, that if anybody doesn't speak up, then you just count them out. Because the only people they

counted as minorities in the City of Cincinnati were Black people and Chinese people. No, they said specifically Chinese people. They didn't say Japanese, they didn't say Koreans, they didn't say nobody else. They didn't say Arabs or anything like that. These are the only people considered to be minorities in the City of Cincinnati. I thought that was a flaw [in the] system, because there's tons of minorities here, especially Hispanic Americans. They just don't know where to go to even start to report this. Because half of our crew right now, we got about 15 guys, they speak nothing but Spanish. Half of them speak nothing but Spanish. I think that's a big flaw within this program, because they don't even know where to go. They didn't even know that there was a chamber... There's a Hispanic chamber of commerce, and they've been working here for 20, 30 years, and all they do is carpentry. So, yeah. A lot of those communities, they're not even reached out to, they don't get a chance to speak up." [#17]

- The Black American owner of an MBE-, DBE-, and EDGE-certified goods and services company stated, "Just react to it when they are made aware of things, I think the information. Well, someone told me many years ago, the answers are there, if you ask the right questions. And I think a lot of people refuse to ask the right questions or start to even dig down or drill a little deeper. I think once one question is asked, and…that person said, no, that's it. And let's just move forward. So again, drilling down a little bit farther, and asking the tough questions, I think that could help the entire situation. A lot of people like to gloss over things and leave it at that and move forward. Again, most people just don't have enough time to attend all these programs and I know they're helpful. And I know that they're needed. It's just a matter of, do people have time to go to everything. So I guess how do you make sure these programs are flexible enough... I just don't know about it have programs and things on the Saturday morning or Saturdays for people to attend as opposed to during the work day, as people are still trying to do what they need to do to survive. So how do you put together some flexible programming in terms of time slots for people to participate…does some things with the Greater Cincinnati Chamber in regards to the CMBC, I think it is. They do some things. It's a wealth of things that are out there. It's just how do you attend all this stuff. I mean, I know they're needed, very worthwhile. But it's just a lot. It pulls you away from your day to day business. And people just don't have time to attend everything. I just got something from Northern Kentucky, probably a couple of weeks ago, and I just saw that my time came available to attend. But that time, it was time to register for it, it was over. But also, too, you start to look at it, you go there to these things and I know nothing's guaranteed, but you go expect them to network and hopefully get something out of it. And you walk away with nothing. And you ask yourself the question, why did I go? And so how do you allocate your time and to be put in a situation where things are very useful for you. I don't mind and I love to network, but you start to think, okay, if I follow up, what will happen and you follow up and nothing happens. People don't even respond back but you're there to network with them. And they don't have the courtesy of responding. And so, is this a real program or just something to say, we check this box and let's move on. So again, having meaningful programs and at a time that people can really do to utilize the time in a very productive way. Just the transparency of opportunities with Hamilton County. Again, at least I sort of feel I got to go and chase down and find out what's going on over there. Again, you just don't have enough time to start to really look for that. I don't have a salesperson. So I have to do all that myself…bid opportunities. How do you make those easily available and transparent to the... Well, just say the general public,

because again, you feel like you're to find what RFPs really look like? Hamilton County is kind of a quiet animal. And it's so large, you really don't... Unless you're really sophisticated in regards to your search, you really don't know what you're looking for, and what Hamilton County really does. Like, for example, at least for me, [did you know] that the library as part of Hamilton County, a lot of people really don't know that that's part of Hamilton County. And again, for me, which I'm getting ready to explore is how can we provide toilet tissue for the libraries in Hamilton County. But I'll be honest with you, I've never seen a bid come out about that. So, at least I hope they're submitting, releasing RFPs for those types of opportunities, but how do you find things out like that? So how do they make things more available, more transparent in regards to what opportunities really look like." [#21]

- A representative of a Black American-owned, MBE-, SBE-, and DBE-certified construction firm stated, "Well, it seemed to me, and I'm just a layman at this, but the City of Cincinnati did disparity study years ago, and they found out there was a disparity. Then, hell, the City's in the County. The County had the same disparity, or even more so. So to me, it's wasting taxpayers money to do it over again. And I guess the reason for that is the upper echelon, not so much the commissioners and all that, but somebody's pulled a chain that we need one. I think just trying to divert, delay working with minorities, period." [#23]
- A representative of a Black American-owned MBE-, WBE-, 8(a)-, Section 3-, and WOBC-certified construction company stated, "Yes. By holding everybody accountable, by not hiding behind the guys of, 'Hey, they tried, they did this.' No. Getting to the nitty gritty, recognizing that there are minority women owned, small owned businesses that can do the same work that the majority contractors can. And bringing them to the table, face to face. Not taking the majority's word for it and finding out how can we make this? And basically, giving opportunity to do the work. So holding people accountable and making that part of the contract. And have a list and say, 'These are the contractors that we've vetted, that we know that are out there that are legitimate, that can do the work.' You need to use one of these. And then them themselves, MSD, Hamilton County, or whatever, stop looking at ... And I'm not saying, 'Hey, spend more money,' because that's another stereotype. We can't use minority women because it costs more money. Well, it costs more money because we're not getting the same prices and the same opportunities and blah, blah, blah. But if it's reasonable, and that word, negotiate, whatever the case may be, this is the budget. You're within budget, you need to be able to use them or give me a good reason why. But holding them accountable, putting more stringent accountability in place and making sure that it's adhered to and stop taking their word for it that there's nobody out there or they didn't bid it or whatever the case may be. The biggest thing that I think [is], and I'm going to say missing, which again the ones that I've been through and everything like that, is having a viable option of a mentor. Working on that side to get here's somebody that's in your space that can help you, that is really going to help you and not just say they're going to help you. But having that connection that says, this is the space you want to get in, this company or this person or this entity is already in that space. And now they're going to be assigned to you, so it's working it both two-fold. You're helping the minority, but you're also pushing the City, the organization, the County, or whatever, to say, how is change going to happen? How are we going to bring these companies and individuals up to speed without recognizing that they need help? And you're already in this space, so you need to do it. I

think that would be, and if they hold to it, I know some have tried, that in order for you to be awarded this contract, if you have small businesses that you're utilizing, you get extra points. I think that's absolutely a need." [#29]

- A representative of a majority-owned SLBE-, SBE-, and WBE-certified professional services company stated, "When given specific examples with Hamilton County that you received through this process, have County officials who were involved answer what happened and see where the breakdown occurred and how they can prevent that from happening again. My concern, I guess, as a taxpayer is, I think the County has this policy. I've seen it. It's in writing. Even when there's an emergency contract, you still must get three quotes. If they're not doing it and no one holds them accountable, then the whole thing is like, why should we believe anything? Why should we believe the disparity study's going to change anything?" [#32]
- A representative of a majority-owned professional services firm stated, "What you're doing is important to do. Somebody actually asking the people who are engaged in the work, who are pursuing the contracts, rather than somebody sitting in an office high above, trying to figure it out. You're asking the people who are really there doing that. And I think that's the first time anybody's ever done that. And I'm grateful that you're doing that. And I wish you well, I hope things go wonderfully and that you're able to provide some good direction for people." [#34]
- A representative of a Black American-owned MBE- and EDGE-certified professional services company stated, "Seek advice and counsel from those who are in this space, but come from a different place than the current leadership is. This study, in my opinion, is not going to provide any new information about discrimination among, I'll just be frank, African Americans doing business with Hamilton County. I don't see anything new coming out of this that we don't already know. So the data is present and the data is produced every day. If the study is going to be honest about the data is going to clearly demonstrate discrimination has occurred. And that in many cases, African Americans have been locked out of doing business with Hamilton County. Now the question then is what are the actions for that to change, right? And of those actions, how committed is the leadership in Hamilton County committed to making change? Because what I have seen historically is that when there are goals, one, will you set a goal and will that goal really represent anything of any significance. And what I mean by that is since we know the City of Cincinnati is 50% African American or has been. Hamilton County is of course less than that, but it is not significantly less because Cincinnati makes up much of Hamilton County. Are you going to put a goal that is more representative of the population? Now, likely not. Typically what happens is when there's discrimination proven, they will come up with a number that is low. Let's do, let's say 10% minority and 5% women, because we really don't have that much business that we can expect that they can acquire, opposed to having a BHAG of a goal, right. That says, okay, our overall goal is to get to, let's say 45%, but let's have our initial goal of 25%. And we're going to be a 25% in three years. Now you have a more diversified and you will also find that it is a more economic stimulus to the County and it has been because of the diversification. So if we had, and let's just say some economists from Xavier, UC, Central State, Northern Kentucky, do a study on that economic impact of having a 25 or 35% change in the County, you will see that the return on the tax dollars are going to be significantly better than they are today. That's my expectation. But if we really want to see a difference,

that's where you go make that difference, right? Because again, studies have shown that the more diverse anything is, the better it is. Some of the most diverse communities in America are the most thriving communities in America." [#40]

- A representative from a majority-owned construction company stated, "It would be nice to have the Hamilton County government give homeowners a roster of small to medium sized companies who work within Hamilton County." [#AV320]
- The Black American male co-owner of a WBE-, MBE-, and SBE-certified construction firm stated, "I mean, very similar to what I'm doing now. I'm on this conversation and I haven't heard [the focus group leader]'s name from the very beginning. And here we are at the end, and I'm hearing [the focus group leader] call me saying, 'Hey, I'm trying to get this thing done.' Why wasn't [the focus group leader] involved in this from the very beginning? If she would've been involved from the beginning, I would have took the first call. And I'd go to the website of the company that's doing it. There's no black people on that BBC website as the employees. That makes me feel like how would you know how I feel? And can you relate to me? But Hamilton County comes in and they do this study that's going to take 90 minutes of my time and nobody that I know that looks like me calls me or anything. We get called last and we're an afterthought instead of doing... A research company that didn't do the research company that finally called somebody black to call me that they know I'm going to answer the call. We got forgotten when the planning of this thing was going on. We weren't important enough to be considered when the planning started. But now at the end, since nobody's been doing it... Well, I don't know if anybody been doing it, but that's a barrier. That is a challenge that Hamilton County doesn't get, obviously. Because they hired a company. You don't have no black people on your page. What are you thinking about?" [#FG1]
- The Black American woman owner of a SBE-certified professional services firm stated, "I've been part of focus groups, and round tables, and networking to death. I've been in business since 2007… I would like them to just really do it. Just do it…If we get certified, just give us some work. Don't make me certify every year and pay all that money and all that time and throw all my information out there, the whole world to see." [#FG2]
- The Hispanic American owner of a goods and services firm stated, "Just support the efforts of the African American chamber of commerce, the Hispanic chamber of commerce, do that. We have your interest in mind to when we do that, so support their efforts. We are trying out there every day to get this playing field leveled out." [#FG2]

APPENDIX E.
Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of Hamilton County-area businesses for construction, professional services, and goods and other services prime contracts and subcontracts Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) award.[1] Appendix E expands on the information presented in Chapter 6 to further describe:

A. Availability Data;

B. Representative Businesses;

C. Availability 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 business establishments throughout the *relevant geographic market area* (RGMA). BBC identified the RGMA for the County and MSDGC as Hamilton, Butler, Warren, and Clermont Counties in Ohio and Boone, Campbell, and Kenton Counties in Kentucky. Business establishments Davis Research surveyed were businesses with locations in the RGMA that BBC identified as doing work in fields closely related to the types of contracts and procurements the County and MSDGC awarded between January 1, 2016 and June 30, 2021 (i.e., *the study period*). BBC began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. We then compiled information about local business establishments D&B listed as having their primary lines of business within those work specializations.

As part of the survey effort, the study team attempted to contact 7,300 local business establishments that perform work relevant to the County's and MSDGC's contracting and procurement. The study team was able to successfully contact 1,526 of those business establishments, 932 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, but rather to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by minority women are included along with their corresponding racial/ethnic groups.

approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically valid manner. In addition, BBC did not design the survey effort so the study team would contact every local business possibly performing construction, professional services, and goods and other services work. Instead, BBC determined the types of work most relevant to County and MSDGC 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, professional services, and goods and other services most related to the relevant contract dollars the County and MSDGC awarded during the study period, which BBC included as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from relevant business establishments located in the RGMA. As an example, the survey instrument the study team used with construction establishments is presented at the end of Appendix E. BBC modified the construction survey instrument slightly for use with establishments 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 establishments.)

1. Survey structure. The availability survey included 13 sections, and Davis Research attempted to cover all sections with each business establishment the firm successfully contacted.

a. Identification of purpose. The surveys began by identifying the County and MSDGC as the survey sponsors and describing the purpose of the study. (e.g., "The County and MSD are conducting a survey to develop a list of companies potentially interested in providing construction-related services to government organizations or that have provided such services in the past.")

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 only with those businesses that responded "yes" to that question.

[2] BBC also developed e-mail versions of the survey instruments for business establishments that preferred to complete the survey online.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description
Construction	
Building construction	
15420101	Commercial and office building, new construction
15420103	Commercial and office buildings, renovation and repairs
15410000	Industrial buildings and warehouses
15419900	Industrial buildings and warehouses, not elsewhere classified
15419905	Industrial buildings, new construction, not elsewhere classified
16290504	Waste disposal plant construction
16290505	Waste water and sewage treatment plant construction
Concrete work	
17710000	Concrete work
Concrete, asphalt, and related products	
50329901	Aggregate
29510201	Asphalt and asphaltic paving mixtures
50320101	Asphalt mixture
29510000	Asphalt paving mixtures and blocks
35310401	Asphalt plant, including gravel-mix type
50320504	Concrete mixtures
14420000	Construction sand and gravel
50329905	Gravel
29510100	Paving blocks
32730000	Ready-mixed concrete
52110506	Sand and gravel
Electrical equipment and supplies	
36130201	Control panels, electric
50630000	Electrical apparatus and equipment
50630205	Electrical construction materials
36990000	Electrical equipment and supplies, nec
50630200	Electrical fittings and construction materials
50630206	Electrical supplies, not elsewhere classified
50630400	Lighting fixtures
36480100	Outdoor lighting equipment
36480110	Street lighting fixtures
36690206	Traffic signals, electric
Electrical work	
17310000	Electrical work
17319903	General electrical contractor
17319904	Lighting contractor
Excavation, wrecking, and land preparation	
17959902	Demolition, buildings and other structures
17949901	Excavation and grading, building construction
17940000	Excavation work
16299903	Land clearing contractor
Highway, street, and bridge construction	
17710301	Blacktop (asphalt) work
16229901	Bridge construction
16220000	Bridge, tunnel, and elevated highway construction
16229900	Bridge, tunnel, and elevated highway, not elsewhere classified
16110202	Concrete construction: roads, highways, sidewalks,
16119901	General contractor, highway and street construction
16110000	Highway and street construction
16119902	Highway and street maintenance
16110204	Highway and street paving contractor
16110205	Resurfacing contractor
17910000	Structural steel erection
16110200	Surfacing and paving
Other construction materials	
50820300	General construction machinery and equipment
16110100	Highway signs and guardrails
36690203	Pedestrian traffic control equipment
32310302	Reflector glass beads, for highway signs
Other construction services	
17999902	Artificial turf installation
16110101	Guardrail construction, highways
50990304	Reflective road markers

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Painting, striping, marking, and weatherproofing		**Roofing, siding, and flooring contractors (continued)**	
17210200	Commercial painting	17520000	Floor laying and floor work, not elsewhere classified
17210201	Exterior commercial painting contractor	17719903	Flooring contractor
17210300	Industrial painting	17610102	Roof repair
17210202	Interior commercial painting contractor	17610100	Roofing and gutter work
		17610000	Roofing, siding, and sheetmetal work
Plumbing and HVAC		17619900	Roofing, siding, and sheetmetal work, not elsewhere classified
17110400	Heating and air conditioning contractors		
17110401	Mechanical contractor	**Water, sewer, and utility lines**	
17110200	Plumbing contractors	16239902	Manhole construction
17119900	Plumbing, heating, air-conditioning, not elsewhere classified	16239903	Pipe laying construction
		16239904	Pipeline construction, nsk
Remediation and cleaning		17999941	Protective lining installation, underground (sewage)
17990801	Asbestos removal and encapsulation	76990402	Septic tank cleaning service
17990800	Decontamination services	76990403	Sewer cleaning and rodding
49590302	Environmental cleanup services	16230302	Sewer line construction
87449904	Environmental remediation	16239906	Underground utilities contractor
17990500	Exterior cleaning, including sandblasting	16230300	Water and sewer line construction
		16230303	Water main construction
Roofing, siding, and flooring contractors		16230000	Water, sewer, and utility lines
17619901	Architectural sheet metal work	16239900	Water, sewer, and utility lines, not elsewhere classified
Professional services			
Advertising, marketing and public relations		**Business services and consulting**	
87439902	Promotion service	87480302	Telecommunications consultant
87439903	Public relations and publicity	73899953	Translation services
87430000	Public relations services		
79410202	Sports field or stadium operator, promoting sports	**Construction management**	
		87419902	Construction management
Appraisal services		87420402	Construction project management consultant
65319901	Appraiser, real estate		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description
Professional services (continued)	
Engineering	
87120101	Architectural engineering
87110402	Civil engineering
87110400	Construction and civil engineering
87119903	Consulting engineer
87119909	Professional engineer
87110404	Structural engineering
Environmental services	
87119906	Energy conservation engineering
87489905	Environmental consultant
87310302	Environmental research
87340301	Hazardous waste testing
89990703	Natural resource preservation service
87310300	Natural resource research
73890209	Pipeline and power line inspection service
87110101	Pollution control engineering
87340300	Pollution testing
87420405	Public utilities consultant
73890211	Sewer inspection service
87349911	Water testing laboratory
Finance and accounting	
87210000	Accounting, auditing, and bookkeeping
87210100	Auditing services
Human resources and job training services	
87489903	Employee programs administration
87420200	Human resource consulting services
73610102	Labor contractors (employment agency)
73610100	Placement agencies
73630103	Temporary help service
IT and data services	
73730000	Computer integrated systems design
73790100	Computer related maintenance services
73710101	Computer software systems analysis and design, custom
73730101	Computer systems analysis and design
73790203	Online services technology consultants
87480401	Systems analysis or design
87480402	Systems engineering consultant
73730102	Systems engineering, computer related
73730200	Systems integration services
Legal services	
81110201	Administrative and government law
81110208	Environmental law
81110210	Labor and employment law
81110214	Real estate law
81110200	Specialized law offices, attorneys
Goods and other services	
Automobiles	
55310100	Auto and truck equipment and parts
50120000	Automobiles and other motor vehicles
35370000	Industrial trucks and tractors
37140000	Motor vehicle parts and accessories
50880000	Transportation equipment and supplies
55310107	Truck equipment and parts
50120208	Trucks, commercial
55119903	Trucks, tractors, and trailers: new and used
Cleaning and janitorial services	
73490101	Building cleaning service
73499902	Cleaning service, industrial or commercial
50870304	Janitors' supplies
Computers and peripherals	
50450000	Computers, peripherals, and software
57349901	Personal computers
73730302	Value-added resellers, computer systems
Facilities management	
87440000	Facilities support services
87449900	Facilities support services, not elsewhere classified
Industrial equipment and machinery	
50639903	Generators
35670000	Industrial furnaces and ovens
50850000	Industrial supplies

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description
Goods and other services (continued)	
Landscape services	
07829903	Landscape contractors
07820200	Lawn services
07830105	Tree trimming services for public utility lines
Office equipment and supplies	
73590500	Business machine and electronic equipment rental
59991401	Business machines and equipment
50440200	Copying equipment
50440203	Duplicating machines
50440000	Office equipment
50449900	Office equipment, not elsewhere classified
59439902	Office forms and supplies
57129904	Office furniture
73590505	Office machine rental, except computers
51129907	Office supplies, not elsewhere classified
50440207	Photocopy machines
38610505	Photocopy machines
59991402	Photocopy machines
35790108	Postage meters
51120000	Stationery and office supplies
Other goods	
51699904	Chemicals, industrial and heavy
28999912	Deicing or defrosting fluid
51699907	Industrial chemicals
28999943	Salt
28190400	Sodium & potassium compounds
73599912	Work zone traffic equipment (flags, cones, barrels, etc)
Other services	
76992501	Elevators: inspection, service, and repair
17110301	Fire sprinkler system installation
73810100	Guard services
73810105	Security guard service
Parking services	
75210000	Automobile parking
75210200	Indoor parking services
75210100	Outdoor parking services
75210202	Parking garage
75210101	Parking lots
75210203	Parking structure
Petroleum and petroleum products	
51729902	Fuel oil
59830000	Fuel oil dealers
Printing, copying, and mailing	
73319904	Mailing service
27520101	Offset printing
Transit services	
41110100	Bus transportation
47299901	Carpool/vanpool arrangement
41110000	Local and suburban transit
41199900	Local passenger transportation, not elsewhere classified
41190000	Local passenger transportation, not elsewhere classified
41199906	Vanpool operation
Uniforms and apparel	
72180203	Industrial uniform supply
23110300	Men's and boys' uniforms
72130204	Uniform supply
56990102	Uniforms
56990100	Uniforms and work clothing
23379901	Uniforms, except athletic: women's and misses'
51360603	Uniforms, men's and boys'
56990103	Work clothing
51360604	Work clothing, men's and boys'
23260100	Work uniforms
Waste and recycling services	
49530202	Liquid waste, collection and disposal
49539905	Recycling, waste materials
49530200	Refuse collection and disposal services
76990400	Waste cleaning services
Water and sewer treatment machinery	
35610100	Industrial pumps and parts
35610000	Pumps and pumping equipment
50840805	Pumps and pumping equipment, not elsewhere classified
35890300	Sewage and water treatment equipment
35890301	Sewage treatment equipment
50840807	Water pumps (industrial)

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 subsequently coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4) and if their businesses were subsidiaries or affiliates of other businesses (Questions A5 through A8).

f. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past contracts and procurements in connection with both prime contracts and subcontracts (Questions B1 and B2).

g. Interest in future work. The surveyor asked businesses about their interest in future prime contract and subcontract work with the County, MSDGC, and other government agencies (Questions B3 and B4).

h. Geographic area. The surveyor asked businesses whether they could serve customers in various regions of Ohio, including the Hamilton County area specifically (Questions C1 through C1f).

i. Year of establishment. The surveyor asked businesses to indicate the year in which they were established (Question D1).

j. Capacity. The surveyor asked businesses about the values of the largest prime contracts and subcontracts they have the ability to perform (Question D2).

k. 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' owner (Question E3). The study team confirmed that information through several other data sources, including:

- County and MSDGC vendor data;
- City of Cincinnati Department of Economic Inclusion Business Certification Directory;
- Ohio Unified DBE Directory; and
- Information from other available certification directories and business lists.

l. Business revenue. The surveyor asked questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also included questions about their revenues and number of employees across all locations (Questions F1 through F3).

m. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working with the County, MSDGC, and other local government agencies as well as general insights about conditions in the local marketplace (Question G1). In addition, the survey

included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

n. Contact information. The survey concluded with questions about the participant's name, position, and contact information with the organization (Questions H1 through H3).

D. Survey Execution

Davis Research conducted all availability surveys in 2021 and 2022. The firm made multiple attempts during different times of the day and on different days of the week to successfully reach each business establishment. The firm attempted to survey the owner, manager, or other officer of each business establishment who could provide accurate responses to survey questions.

1. Establishments the study team successfully contacted. Figure E-2 presents the disposition of the 7,300 business establishments the study team attempted to contact for availability surveys and how that number resulted in the 1,526 establishments the study team was able to successfully contact.

Figure E-2.
Disposition of attempts to contact business establishments

Source:
BBC Research & Consulting availability analysis.

	Number of Establishments
Beginning list	7,300
Less duplicate phone numbers	58
Less non-working phone numbers	1,287
Less wrong number/business	519
Unique business listings with working phone numbers	5,436
Less no answer	3,405
Less could not reach responsible staff member	501
Less language barrier	4
Establishments successfully contacted	**1,526**

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B and Davis Research attempted to contact were:

- Duplicate phone numbers (58 listings);
- Non-working phone numbers (1,287 listings); or
- Wrong numbers for the desired businesses (519 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 number of duplicate phone numbers, non-working numbers, and wrong numbers reflect those efforts.

b. Working phone numbers. As shown in Figure E-2, there were 5,436 business establishments 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 3,405 establishments.
- The firm could not reach a responsible staff member after multiple attempts for 501 establishments.
- The firm could not conduct the availability survey due to language barriers for four businesses.

Thus, Davis Research was able to successfully contact 1,526 business establishments.

2. Establishments included in the availability database. Figure E-3 presents the disposition of the 1,526 business establishments Davis Research successfully contacted and how that number resulted in the businesses BBC included in the availability database and considered potentially available for County and MSDGC work.

Figure E-3. Disposition of successfully contacted business establishments

Source:
BBC Research & Consulting availability analysis.

	Number of Establishments
Establishments successfully contacted	1,526
Less establishments not interested in discussing availability for work	547
Less unreturned fax/online surveys	47
Establishments that completed surveys	932
Less not a for-profit business	12
Less line of work outside of study scope	22
Less no interest in future work	185
Less multiple establishments	32
Establishments potentially available for entity work	**681**

a. Establishments not interested in discussing availability for County and MSDGC work. Of the 1,526 business establishments the study team successfully contacted, 547 establishments were not interested in discussing their availability for County and MSDGC work. In addition, BBC sent e-mail availability surveys upon request but did not receive completed surveys from 47 establishments. In total, 932 successfully contacted business establishments completed availability surveys.

b. Establishments available for County and MSDGC work. BBC deemed only a portion of the business establishments that completed availability surveys as potentially available for the prime contracts and subcontracts the County and MSDGC awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 12 establishments that indicated they were not-for-profit businesses.
- BBC excluded 22 establishments that reported their main lines of business were outside of the study scope.

- BBC excluded 185 establishments that reported they were not interested in contracting opportunities with the County, MSDGC, or other government organizations.
- Thirty-two establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record according to several rules:
  - If any of the establishments 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) establishments of the same business reported into a single response. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts.
  - BBC considered the largest contract any establishments of the same business reported being able to perform as the business' capacity (i.e., the largest contract for which the business could be considered available).

After those exclusions, BBC compiled a database of 681 businesses we considered potentially available for County and MSDGC work.

E. Additional Considerations

BBC made additional considerations related to its approach to measuring availability to ensure estimates of the availability of businesses for County and MSDGC work were accurate and appropriate.

1. Providing representative estimates of business availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of County and MSDGC contracting dollars for which 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 County and MSDGC 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 County and MSDGC work, because dividing a simple count of certified businesses by the total number of businesses does not account for business characteristics crucial to estimating availability accurately. The methodology BBC used in this study takes a *custom census* approach to measuring availability and 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 County or MSDGC work for each business, which allowed BBC to take a more detailed 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 more accurately classify businesses 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, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and 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 the study team collected from the County and MSDGC. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses.
- BBC examined County and MSDGC contract 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 are able to perform with actual contract data.
- The County and MSDGC reviewed contract and vendor data the study team collected and compiled as part of study analyses and provided feedback regarding its accuracy.

DRAFT Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the Hamilton County, Ohio government and the Metropolitan Sewer District, or MSD. This is not a sales call. The County and MSD are conducting a survey to develop a list of companies potentially interested in providing construction-related services to government organizations or that have provided such services in the past. 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 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 INTERESTED IN WORKING WITH GOVERNMENT ORGANIZATIONS OR THAT HAVE DONE SO IN THE PAST]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm 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 company?

1=VERBATIM

Y2. Is [new firm name] associated with [old firm name] in any way?

1=Yes, same owner doing business under a different name – SKIP TO Y4

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – TERMINATE

99=Refused to give information – TERMINATE

Y3. Can you give me the new address for [*new firm name*]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

Y4. Do you work for [*new firm name*]?

1=YES

2=NO – TERMINATE

A2. Let me confirm [*firm name*/*new firm name*] is a for-profit business, as opposed to a non-profit organization, a foundation, or government office. Is that correct?

1=Yes, a for-profit business

2=No, other – TERMINATE

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates 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 FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT MORE INFORMATION.]

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 this location the headquarters for your business, or is your business headquartered at another location?

1=Headquartered here – SKIP TO A7

2=Headquartered at another location

98=(DON'T KNOW)

99=(REFUSED)

A6. What is the city and state of your business' headquarters?

(ENTER VERBATIM CITY, ST)

1=VERBATIM

A7. 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

A8. 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]

1=Yes

2=No – SKIP TO B3

98=(DON'T KNOW) – SKIP TO B3

99=(REFUSED) – SKIP TO B3

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 government organizations in Ohio as a <u>prime contractor</u>?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B4. Is your company *interested* in working with government organizations in Ohio as a <u>subcontractor, trucker/hauler, or supplier</u>?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1. Now I want to ask you about the geographic areas your company serves within Ohio. Is your company able to do work or serve customers throughout all of Ohio or only certain parts of the state?

1=All of the state – SKIP TO D1

2=Only parts of the state

98=(DON'T KNOW)

99=(REFUSED)

C1a. Is your company able to do work or serve customers in Hamilton County, specifically?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1b. Is your company able to do work or serve customers in the remainder of Southwestern Ohio, extending south from the Dayton-Springfield-Sidney area through the Cincinnati-Wilmington area and east through the city of Chillicothe and Jackson and Lawrence counties?

(NOTE TO INTERVIEWER – IF ASKED, SOUTHWESTERN OHIO INCLUDES MERCER, AUGLAIZE, LOGAN, SHELBY, DRAKE, MIAMI, CHAMPAIGN, CLARK, MONTGOMERAY, PREBLE, GREENE, BUTLER, WARREN, CLINTON, HAMILTON, CLERMONT, ROSS, HIGHLAND, PIKE, JACKSON, BROWN, ADAMS, SCIOTO, AND LAWRENCE COUNTIES.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1c. Is your company able to do work or serve customers in any part of Northwestern Ohio, extending southeast from the Michigan and Indiana borders through the city of Lima and Wyandot and Hardin counties?

(NOTE TO INTERVIEWER – IF ASKED, NORTHWEST OHIO INCLUDES WILLIAMS, FULTON, LUCAS, OTTAWA, HENRY, WOOD, SANDUSKY, SENECA, DEFIANCE, PAULDING, PUTNAM, HANCOCK, WYANDOT, VAN WERT, ALLEN, AND HARDIN COUNTIES.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1d. Is your company able to do work or serve customers in any part of North Central Ohio, extending south from Ohio's northern border through the Mansfield-Ashland-Bucyrus area and including the Cleveland-Elyria area?

(NOTE TO INTERVIEWER – IF ASKED, NORTH CENTRAL OHIO INCLUDES ERIE, LORAIN, HURON, MEDINA, CRAWFORD, RICHLAND, ASHLAND, WAYNE, CUYAHOGA, LAKE, AND GEAUGA COUNTIES.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1e. Is your company able to do work or serve customers in any part of Eastern Ohio, extending west from the Pennsylvania border between Ashtabula and Belmont counties through the New Philadelphia-Dover and Akron areas?

(NOTE TO INTERVIEWER – IF ASKED, EASTERN OHIO INCLUDES ASHTABULA, TRUMBULL, SUMMIT, PORTAGE, MAHONING, STARK, COLUMBIANA, HOLMES, TUSCARAWAS, CARROLL, HARRISON, JEFFERSON, AND BELMONT COUNTIES.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1f. Is your company able to do work or serve customers in any part of Southeastern or Central Ohio, extending northwest from the West Virginia boarder between Gallia and Monroe counties through the Columbus-Marion area?

(NOTE TO INTERVIEWER – IF ASKED, SOUTHEASTERN AND CENTRAL OHIO INCLUDES MARION, MORROW, KNOX, COSHOCTON, GUERNSEY, MUSKINGUM, LICKING, FAIRFIELD, PERRY, UNION, DELAWARE, FRANKLIN, MADISON, FAYETTE, PICKAWAY, MONROE, NOBLE, MORGAN, WASHINGTON, ATHENS, HOCKING, VINTON, MEIGS, AND GALLIA COUNTIES.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. In what year was your firm established?

1=NUMERIC (1600-2021)

9998 = (DON'T KNOW)

9999 = (REFUSED)

D2. What is the largest <u>prime contract or subcontract</u> your company is able to perform? This includes contracts in either the public sector or private sector.

[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 company. A company 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 company is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by Asian, Black, Hispanic, or Native American individuals. By this definition, is [*firm name / new 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, Subcontinent Asian American, Hispanic American, or Native American?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern 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)

DRAFT

F1. Dun & Bradstreet indicates that your company has about [number] employees working in your company across all locations. Is that an accurate estimate of your company's average employees, both full-time and part-time, over the last three years?

(NOTE TO INTERVIEWER - INCLUDES FULL- AND PART-TIME EMPLOYEES WHO WORK ACROSS ALL THEIR LOCATIONS)

1=Yes – SKIP TO F3

2=No

98=(DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

F2. 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

F3. 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 G1a

2=No

98=(DON'T KNOW) – SKIP TO G1a

99=(REFUSED) – SKIP TO G1a

DRAFT

F4. 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)

G1a. We're interested in whether your company has experienced barriers or difficulties related to working with, or attempting to work with Hamilton County government, the Metropolitan Sewer District, 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 Hamilton County, 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)

DRAFT

H1. Just a few last questions. What is your name?

1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. 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 Robert Bell, Director of Economic Inclusion and Equity for Hamilton County, at 513-946-4428.

APPENDIX F.
Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority- and woman-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts Hamilton County (the County) and the Metropolitan Sewer District of Greater Cincinnati (MSDGC) awarded between January 1, 2016 and June 30, 2021 (i.e., the *study period*) with the percent of contract dollars one might expect the County and MSDGC 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 the County and MSDGC awarded during the study period.

A. Format and Information

Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure F-2 presents disparity analysis results for all County and MSDGC 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 small business enterprises (i.e., SBEs).
- Row (3) presents results for all white woman-owned businesses, regardless of whether they were certified as SBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as MBEs or SBEs.
- Rows (5) through (10) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as SBEs.
- Rows (11) through (19) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as SBEs.

1. Utilization analysis results. Each results table includes the same columns of information:

- Row (1) of column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the contract set. As shown in row (1) of column

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

(a) of Figure F-2, BBC analyzed 12,319 contract elements the County and MSDGC awarded during the study period. The rest of the values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (5) of column (a), Asian American-owned businesses participated in 261 prime contracts and subcontracts the County and MSDGC 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 $1.3 billion associated with the relevant contract elements the County and MSDGC awarded during the study period. The value presented in column (b) for each individual business group represents the dollars the County and MSDGC awarded to businesses of that particular group on the set of contract elements. For example, as shown in row (5) of column (b), the County and MSDGC awarded $17 million worth of prime contracts and subcontracts to Asian American-owned businesses during the study period.
- Column (c) presents the dollars (in thousands) associated with the set of contract elements after adjusting those dollars for businesses BBC identified as minority-owned but for which specific race/ethnicity information was not available. Unknown minority-owned businesses were allocated to racial/ethnic groups proportional to the known total dollars the County and MSDGC awarded to those groups. As shown in row (9) of column (b), the County and MSDGC awarded $126,000 worth of prime contracts and subcontracts to minority-owned businesses with unknown race/ethnicity during the study period, which we reallocated proportionally to each group.
- Column (d) 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 (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Asian American-owned businesses, the study team divided $17 million by $1.3 billion and multiplied by 100 for a result of 1.3 percent, as shown in row (5) of column (d).

2. Availability results. Column (e) of Figure F-2 presents the availability of each relevant group for all contract elements BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contract elements, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (5) of column (e), the availability of Asian American-owned businesses for all County and MSDGC work considered together is 7 percent. That is, one might expect the County and MSDGC to award 7 percent of their contract and procurement dollars to Asian American-owned businesses based on their availability for that work.

3. Differences between participation and availability. Column (f) of Figure F-2 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for County and MSDGC work. For example, as presented in row (5) of column (f) of Figure F-2, the participation of Asian American-owned businesses in relevant County and MSDGC contracts and procurements was less than their availability for that work by 5.7 percentage points.

4. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure F-2 presents the disparity index for each group. For example, as reported in row (5) of column (g), the disparity index for Asian American-owned businesses was 18.8, indicating that the County and MSDGC actually awarded approximately $0.19 for every dollar one might expect them to award to Asian 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. In addition, the heading of each table in Appendix F provides a description of the subset of contracts or procurements BBC analyzed for that particular table.

Figure F-1.

		Characteristics							
Table	Organization	Time period	Contract area	Contract role	Contract size	Banks project	SBE goals	City contract	DBE goals
F-2	County and MSDGC	01/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-3	Hamilton County	01/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-4	Hamilton County	**01/01/16 - 06/30/20**	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-5	Hamilton County	**07/01/20 - 06/30/21**	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-6	Hamilton County	07/01/16 - 06/30/21	**Construction**	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-7	Hamilton County	07/01/16 - 06/30/21	**Professional services**	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-8	Hamilton County	07/01/16 - 06/30/21	**Other goods and services**	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-9	Hamilton County	07/01/16 - 06/30/21	All industries	**Prime contracts**	N/A	N/A	N/A	N/A	N/A
F-10	Hamilton County	07/01/16 - 06/30/21	All industries	**Subcontracts**	N/A	N/A	N/A	N/A	N/A
F-11	Hamilton County	07/01/16 - 06/30/21	All industries	**Prime contracts**	**Large**	N/A	N/A	N/A	N/A
F-12	Hamilton County	07/01/16 - 06/30/21	All industries	**Prime contracts**	**Small**	N/A	N/A	N/A	N/A
F-13	Hamilton County	01/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	**Yes**	N/A	N/A	N/A
F-14	Hamilton County	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	**No**	N/A	N/A	N/A
F-15	MSDGC	01/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-16	MSDGC	07/01/16 - 06/30/21	**Construction**	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-17	MSDGC	07/01/16 - 06/30/21	**Professional services**	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-18	MSDGC	07/01/16 - 06/30/21	**Other goods and services**	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	N/A
F-19	MSDGC	07/01/16 - 06/30/21	All industries	**Prime contracts**	N/A	N/A	N/A	N/A	N/A
F-20	MSDGC	07/01/16 - 06/30/21	All industries	**Subcontracts**	N/A	N/A	N/A	N/A	N/A
F-21	MSDGC	07/01/16 - 06/30/21	All industries	**Prime contracts**	**Large**	N/A	N/A	N/A	N/A
F-22	MSDGC	07/01/16 - 06/30/21	All industries	**Prime contracts**	**Small**	N/A	N/A	N/A	N/A
F-23	MSDGC	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	**Yes**	N/A	N/A
F-24	MSDGC	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	**No**	N/A	N/A
F-25	MSDGC	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	**Yes**	N/A
F-26	MSDGC	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	**No**	N/A
F-27	MSDGC	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	**Yes**
F-28	MSDGC	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A	N/A	N/A	**No**

Figure F-2.
Organization: County and MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	12,319	$1,301,495	$1,301,495				
(2) Minority- and woman-owned businesses	1,338	$105,536	$105,536	8.1	26.0	-17.9	31.2
(3) White woman-owned	845	$66,647	$66,647	5.1	8.8	-3.7	57.9
(4) Minority-owned	493	$38,889	$38,889	3.0	17.1	-14.2	17.4
(5) Asian American-owned	261	$16,973	$17,028	1.3	7.0	-5.7	18.8
(6) Black American-owned	193	$19,639	$19,703	1.5	7.2	-5.7	21.1
(7) Hispanic American-owned	10	$1,824	$1,830	0.1	1.8	-1.7	7.8
(8) Native American-owned	18	$327	$328	0.0	1.2	-1.2	2.1
(9) Unknown minority-owned	11	$126					
(10) Minority- and woman-owned SBE	384	$42,676	$42,676	3.3			
(11) White woman-owned SBE	253	$19,667	$19,667	1.5			
(12) Minority-owned SBE	131	$23,009	$23,009	1.8			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	87	$13,399	$22,867	1.8			
(15) Hispanic American-owned SBE	2	$84	$143	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	42	$9,527					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	10,179	$492,794	$492,794				
(2) Minority- and woman-owned businesses	1,051	$72,127	$72,127	14.6	28.4	-13.8	51.6
(3) White woman-owned	706	$53,888	$53,888	10.9	12.7	-1.7	86.4
(4) Minority-owned	345	$18,239	$18,239	3.7	15.7	-12.0	23.5
(5) Asian American-owned	228	$12,613	$12,654	2.6	6.6	-4.0	39.1
(6) Black American-owned	88	$3,996	$4,009	0.8	7.9	-7.1	10.3
(7) Hispanic American-owned	8	$1,386	$1,390	0.3	0.9	-0.6	31.6
(8) Native American-owned	16	$185	$186	0.0	0.4	-0.3	10.4
(9) Unknown minority-owned	5	$59					
(10) Minority- and woman-owned SBE	195	$15,867	$15,867	3.2			
(11) White woman-owned SBE	158	$8,844	$8,844	1.8			
(12) Minority-owned SBE	37	$7,023	$7,023	1.4			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	24	$804	$6,417	1.3			
(15) Hispanic American-owned SBE	1	$76	$607	0.1			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	12	$6,143					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2020
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	8,332	$418,294	$418,294				
(2) Minority- and woman-owned businesses	860	$63,580	$63,580	15.2	28.2	-13.0	53.9
(3) White woman-owned	588	$48,251	$48,251	11.5	12.3	-0.7	94.0
(4) Minority-owned	272	$15,329	$15,329	3.7	15.9	-12.3	23.0
(5) Asian American-owned	174	$10,539	$10,568	2.5	6.6	-4.1	38.0
(6) Black American-owned	74	$3,360	$3,369	0.8	8.1	-7.3	10.0
(7) Hispanic American-owned	6	$1,211	$1,214	0.3	0.9	-0.6	31.5
(8) Native American-owned	14	$177	$178	0.0	0.3	-0.3	14.4
(9) Unknown minority-owned	4	$42					
(10) Minority- and woman-owned SBE	162	$15,419	$15,419	3.7			
(11) White woman-owned SBE	125	$8,396	$8,396	2.0			
(12) Minority-owned SBE	37	$7,023	$7,023	1.7			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	24	$804	$6,417	1.5			
(15) Hispanic American-owned SBE	1	$76	$607	0.1			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	12	$6,143					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Organization: Hamilton County
Time period: 07/01/2020 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,847	$74,500	$74,500				
(2) Minority- and woman-owned businesses	191	$8,547	$8,547	11.5	29.4	-17.9	39.0
(3) White woman-owned	118	$5,637	$5,637	7.6	14.8	-7.3	51.1
(4) Minority-owned	73	$2,911	$2,911	3.9	14.6	-10.7	26.8
(5) Asian American-owned	54	$2,074	$2,087	2.8	6.2	-3.4	45.4
(6) Black American-owned	14	$636	$640	0.9	6.9	-6.1	12.4
(7) Hispanic American-owned	2	$175	$176	0.2	0.7	-0.5	32.9
(8) Native American-owned	2	$8	$8	0.0	0.8	-0.7	1.5
(9) Unknown minority-owned	1	$17					
(10) Minority- and woman-owned SBE	33	$448	$448	0.6			
(11) White woman-owned SBE	33	$448	$448	0.6			
(12) Minority-owned SBE	0	$0	$0	0.0			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	0	$0	$0	0.0			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	0	$0					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: Construction
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,146	$251,622	$251,622				
(2) Minority- and woman-owned businesses	392	$24,243	$24,243	9.6	27.1	-17.5	35.5
(3) White woman-owned	272	$10,741	$10,741	4.3	14.5	-10.2	29.4
(4) Minority-owned	120	$13,502	$13,502	5.4	12.6	-7.2	42.5
(5) Asian American-owned	80	$10,471	$10,475	4.2	6.5	-2.4	63.6
(6) Black American-owned	19	$1,681	$1,682	0.7	4.4	-3.8	15.1
(7) Hispanic American-owned	7	$1,310	$1,310	0.5	1.1	-0.5	49.5
(8) Native American-owned	13	$34	$34	0.0	0.6	-0.6	2.4
(9) Unknown minority-owned	1	$6					
(10) Minority- and woman-owned SBE	63	$13,285	$13,285	5.3			
(11) White woman-owned SBE	45	$7,052	$7,052	2.8			
(12) Minority-owned SBE	18	$6,233	$6,233	2.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	13	$520	$6,233	2.5			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	5	$5,713					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: Professional services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,988	$94,242	$94,242				
(2) Minority- and woman-owned businesses	322	$7,593	$7,593	8.1	32.7	-24.7	24.6
(3) White woman-owned	157	$4,807	$4,807	5.1	5.6	-0.5	91.8
(4) Minority-owned	165	$2,786	$2,786	3.0	27.2	-24.2	10.9
(5) Asian American-owned	134	$1,544	$1,544	1.6	12.3	-10.6	13.3
(6) Black American-owned	27	$1,015	$1,015	1.1	13.0	-11.9	8.3
(7) Hispanic American-owned	1	$76	$76	0.1	1.8	-1.8	4.4
(8) Native American-owned	3	$151	$151	0.2	0.1	0.1	180.6
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	73	$1,451	$1,451	1.5			
(11) White woman-owned SBE	63	$893	$893	0.9			
(12) Minority-owned SBE	10	$558	$558	0.6			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	2	$52	$227	0.2			
(15) Hispanic American-owned SBE	1	$76	$332	0.4			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	7	$430					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: Goods and other services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	5,045	$146,931	$146,931				
(2) Minority- and woman-owned businesses	337	$40,292	$40,292	27.4	27.8	-0.4	98.7
(3) White woman-owned	277	$38,340	$38,340	26.1	14.0	12.1	185.9
(4) Minority-owned	60	$1,952	$1,952	1.3	13.7	-12.4	9.7
(5) Asian American-owned	14	$599	$616	0.4	2.9	-2.5	14.2
(6) Black American-owned	42	$1,300	$1,336	0.9	10.6	-9.7	8.6
(7) Hispanic American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(8) Native American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	4	$53					
(10) Minority- and woman-owned SBE	59	$1,131	$1,131	0.8			
(11) White woman-owned SBE	50	$899	$899	0.6			
(12) Minority-owned SBE	9	$232	$232	0.2			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	9	$232	$232	0.2			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	0	$0					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,534	$424,697	$424,697				
(2) Minority- and woman-owned businesses	985	$62,954	$62,954	14.8	27.8	-13.0	53.3
(3) White woman-owned	667	$47,300	$47,300	11.1	11.1	0.0	100.0
(4) Minority-owned	318	$15,653	$15,653	3.7	16.7	-13.0	22.1
(5) Asian American-owned	222	$11,938	$11,978	2.8	7.0	-4.2	40.4
(6) Black American-owned	73	$2,422	$2,430	0.6	8.5	-7.9	6.8
(7) Hispanic American-owned	6	$1,207	$1,211	0.3	0.9	-0.6	31.7
(8) Native American-owned	13	$34	$34	0.0	0.3	-0.3	2.4
(9) Unknown minority-owned	4	$53					
(10) Minority- and woman-owned SBE	159	$11,211	$11,211	2.6			
(11) White woman-owned SBE	138	$5,443	$5,443	1.3			
(12) Minority-owned SBE	21	$5,768	$5,768	1.4			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	13	$291	$5,768	1.4			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	8	$5,476					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	645	$68,097	$68,097				
(2) Minority- and woman-owned businesses	66	$9,173	$9,173	13.5	31.9	-18.5	42.2
(3) White woman-owned	39	$6,587	$6,587	9.7	22.1	-12.5	43.7
(4) Minority-owned	27	$2,586	$2,586	3.8	9.8	-6.0	38.8
(5) Asian American-owned	6	$676	$677	1.0	4.0	-3.0	24.7
(6) Black American-owned	15	$1,574	$1,578	2.3	4.4	-2.1	53.0
(7) Hispanic American-owned	2	$179	$179	0.3	0.8	-0.6	31.3
(8) Native American-owned	3	$151	$152	0.2	0.6	-0.3	40.3
(9) Unknown minority-owned	1	$6					
(10) Minority- and woman-owned SBE	36	$4,656	$4,656	6.8			
(11) White woman-owned SBE	20	$3,401	$3,401	5.0			
(12) Minority-owned SBE	16	$1,255	$1,255	1.8			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	11	$513	$1,093	1.6			
(15) Hispanic American-owned SBE	1	$76	$162	0.2			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	4	$667					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	458	$325,749	$325,749				
(2) Minority- and woman-owned businesses	57	$52,640	$52,640	16.2	27.2	-11.0	59.4
(3) White woman-owned	31	$40,703	$40,703	12.5	9.1	3.4	137.0
(4) Minority-owned	26	$11,938	$11,938	3.7	18.1	-14.4	20.3
(5) Asian American-owned	15	$9,682	$9,682	3.0	7.6	-4.6	39.0
(6) Black American-owned	8	$1,060	$1,060	0.3	9.1	-8.7	3.6
(7) Hispanic American-owned	3	$1,196	$1,196	0.4	1.1	-0.7	34.1
(8) Native American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	12	$9,233	$9,233	2.8			
(11) White woman-owned SBE	7	$3,768	$3,768	1.2			
(12) Minority-owned SBE	5	$5,466	$5,466	1.7			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	1	$147	$5,466	1.7			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	4	$5,319					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,076	$98,948	$98,948				
(2) Minority- and woman-owned businesses	928	$10,313	$10,313	10.4	29.9	-19.4	34.9
(3) White woman-owned	636	$6,598	$6,598	6.7	17.8	-11.1	37.5
(4) Minority-owned	292	$3,716	$3,716	3.8	12.1	-8.3	31.1
(5) Asian American-owned	207	$2,256	$2,289	2.3	4.9	-2.6	47.2
(6) Black American-owned	65	$1,362	$1,382	1.4	6.5	-5.2	21.3
(7) Hispanic American-owned	3	$11	$11	0.0	0.3	-0.3	3.5
(8) Native American-owned	13	$34	$34	0.0	0.3	-0.3	11.5
(9) Unknown minority-owned	4	$53					
(10) Minority- and woman-owned SBE	147	$1,978	$1,978	2.0			
(11) White woman-owned SBE	131	$1,676	$1,676	1.7			
(12) Minority-owned SBE	16	$302	$302	0.3			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	12	$145	$302	0.3			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	4	$157					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Banks project

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	94	$26,295	$26,295				
(2) Minority- and woman-owned businesses	12	$2,026	$2,026	7.7	27.1	-19.4	28.5
(3) White woman-owned	8	$1,625	$1,625	6.2	8.8	-2.6	70.2
(4) Minority-owned	4	$402	$402	1.5	18.3	-16.7	8.4
(5) Asian American-owned	1	$37	$37	0.1	6.4	-6.2	2.2
(6) Black American-owned	3	$365	$365	1.4	8.3	-7.0	16.7
(7) Hispanic American-owned	0	$0	$0	0.0	3.4	-3.4	0.0
(8) Native American-owned	0	$0	$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	5	$1,103	$1,103	4.2			
(11) White woman-owned SBE	2	$1,009	$1,009	3.8			
(12) Minority-owned SBE	3	$94	$94	0.4			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	2	$57	$94	0.4			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	1	$37					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.
Organization: Hamilton County
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

No Banks project

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	10,085	$466,499	$466,499				
(2) Minority- and woman-owned businesses	1,039	$70,101	$70,101	15.0	28.5	-13.4	52.8
(3) White woman-owned	698	$52,263	$52,263	11.2	12.9	-1.7	87.0
(4) Minority-owned	341	$17,838	$17,838	3.8	15.6	-11.8	24.5
(5) Asian American-owned	227	$12,577	$12,618	2.7	6.6	-3.9	41.1
(6) Black American-owned	85	$3,631	$3,643	0.8	7.9	-7.1	9.9
(7) Hispanic American-owned	8	$1,386	$1,390	0.3	0.8	-0.5	39.7
(8) Native American-owned	16	$185	$186	0.0	0.4	-0.3	10.6
(9) Unknown minority-owned	5	$59					
(10) Minority- and woman-owned SBE	190	$14,764	$14,764	3.2			
(11) White woman-owned SBE	156	$7,835	$7,835	1.7			
(12) Minority-owned SBE	34	$6,929	$6,929	1.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	22	$747	$6,289	1.3			
(15) Hispanic American-owned SBE	1	$76	$640	0.1			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	11	$6,107					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,140	$808,701	$808,701				
(2) Minority- and woman-owned businesses	287	$33,409	$33,409	4.1	24.5	-20.4	16.9
(3) White woman-owned	139	$12,760	$12,760	1.6	6.5	-4.9	24.2
(4) Minority-owned	148	$20,649	$20,649	2.6	18.0	-15.5	14.2
(5) Asian American-owned	33	$4,359	$4,373	0.5	7.2	-6.7	7.5
(6) Black American-owned	105	$15,642	$15,694	1.9	6.7	-4.8	28.9
(7) Hispanic American-owned	2	$439	$440	0.1	2.3	-2.3	2.3
(8) Native American-owned	2	$142	$142	0.0	1.7	-1.7	1.0
(9) Unknown minority-owned	6	$68					
(10) Minority- and woman-owned SBE	189	$26,809	$26,809	3.3			
(11) White woman-owned SBE	95	$10,823	$10,823	1.3			
(12) Minority-owned SBE	94	$15,986	$15,986	2.0			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	63	$12,595	$15,977	2.0			
(15) Hispanic American-owned SBE	1	$8	$10	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	30	$3,383					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: Construction
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	849	$363,039	$363,039				
(2) Minority- and woman-owned businesses	113	$8,171	$8,171	2.3	20.8	-18.6	10.8
(3) White woman-owned	58	$4,266	$4,266	1.2	9.9	-8.7	11.9
(4) Minority-owned	55	$3,905	$3,905	1.1	10.9	-9.8	9.9
(5) Asian American-owned	4	$1,041	$1,043	0.3	6.9	-6.6	4.1
(6) Black American-owned	46	$2,279	$2,281	0.6	2.1	-1.4	30.5
(7) Hispanic American-owned	2	$439	$439	0.1	0.7	-0.6	16.7
(8) Native American-owned	2	$142	$142	0.0	1.2	-1.2	3.3
(9) Unknown minority-owned	1	$5					
(10) Minority- and woman-owned SBE	46	$5,070	$5,070	1.4			
(11) White woman-owned SBE	27	$3,130	$3,130	0.9			
(12) Minority-owned SBE	19	$1,939	$1,939	0.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	16	$1,444	$1,929	0.5			
(15) Hispanic American-owned SBE	1	$8	$10	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	2	$488					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: Professional services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	630	$340,074	$340,074				
(2) Minority- and woman-owned businesses	131	$18,115	$18,115	5.3	29.7	-24.4	17.9
(3) White woman-owned	53	$7,155	$7,155	2.1	1.5	0.6	136.0
(4) Minority-owned	78	$10,960	$10,960	3.2	28.2	-25.0	11.4
(5) Asian American-owned	29	$3,318	$3,337	1.0	8.9	-7.9	11.0
(6) Black American-owned	44	$7,580	$7,624	2.2	11.7	-9.4	19.2
(7) Hispanic American-owned	0	$0	$0	0.0	4.8	-4.8	0.0
(8) Native American-owned	0	$0	$0	0.0	2.8	-2.8	0.0
(9) Unknown minority-owned	5	$63					
(10) Minority- and woman-owned SBE	108	$16,262	$16,262	4.8			
(11) White woman-owned SBE	41	$6,355	$6,355	1.9			
(12) Minority-owned SBE	67	$9,907	$9,907	2.9			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	39	$7,012	$9,907	2.9			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	28	$2,896					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: Goods and other services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	661	$105,588	$105,588				
(2) Minority- and woman-owned businesses	43	$7,122	$7,122	6.7	20.5	-13.7	32.9
(3) White woman-owned	28	$1,338	$1,338	1.3	10.8	-9.6	11.7
(4) Minority-owned	15	$5,784	$5,784	5.5	9.7	-4.2	56.7
(5) Asian American-owned	0	$0	$0	0.0	2.7	-2.7	0.0
(6) Black American-owned	15	$5,784	$5,784	5.5	6.9	-1.4	79.7
(7) Hispanic American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(8) Native American-owned	0	$0	$0	0.0	0.0	0.0	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	35	$5,477	$5,477	5.2			
(11) White woman-owned SBE	27	$1,337	$1,337	1.3			
(12) Minority-owned SBE	8	$4,140	$4,140	3.9			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	8	$4,140	$4,140	3.9			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	0	$0					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,735	$771,951	$771,951				
(2) Minority- and woman-owned businesses	175	$25,924	$25,924	3.4	24.5	-21.1	13.7
(3) White woman-owned	88	$9,864	$9,864	1.3	6.2	-4.9	20.6
(4) Minority-owned	87	$16,060	$16,060	2.1	18.3	-16.2	11.4
(5) Asian American-owned	14	$2,119	$2,127	0.3	7.3	-7.0	3.8
(6) Black American-owned	64	$13,409	$13,466	1.7	6.8	-5.0	25.7
(7) Hispanic American-owned	2	$439	$441	0.1	2.4	-2.3	2.4
(8) Native American-owned	1	$27	$27	0.0	1.8	-1.8	0.2
(9) Unknown minority-owned	6	$68					
(10) Minority- and woman-owned SBE	104	$20,230	$20,230	2.6			
(11) White woman-owned SBE	63	$8,589	$8,589	1.1			
(12) Minority-owned SBE	41	$11,641	$11,641	1.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	28	$10,470	$11,632	1.5			
(15) Hispanic American-owned SBE	1	$8	$9	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	12	$1,163					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	405	$36,750	$36,750				
(2) Minority- and woman-owned businesses	112	$7,485	$7,485	20.4	25.8	-5.4	78.9
(3) White woman-owned	51	$2,896	$2,896	7.9	13.1	-5.2	60.3
(4) Minority-owned	61	$4,589	$4,589	12.5	12.7	-0.3	98.0
(5) Asian American-owned	19	$2,241	$2,241	6.1	5.0	1.0	120.8
(6) Black American-owned	41	$2,234	$2,234	6.1	5.6	0.5	109.4
(7) Hispanic American-owned	0	$0	$0	0.0	1.3	-1.3	0.0
(8) Native American-owned	1	$115	$115	0.3	0.8	-0.5	39.0
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	85	$6,579	$6,579	17.9			
(11) White woman-owned SBE	32	$2,234	$2,234	6.1			
(12) Minority-owned SBE	53	$4,346	$4,346	11.8			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	35	$2,125	$4,346	11.8			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	18	$2,221					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	570	$753,003	$753,003				
(2) Minority- and woman-owned businesses	44	$23,850	$23,850	3.2	24.4	-21.3	13.0
(3) White woman-owned	14	$8,615	$8,615	1.1	6.0	-4.9	19.0
(4) Minority-owned	30	$15,235	$15,235	2.0	18.4	-16.4	11.0
(5) Asian American-owned	4	$1,932	$1,932	0.3	7.4	-7.1	3.5
(6) Black American-owned	25	$12,871	$12,871	1.7	6.8	-5.1	25.1
(7) Hispanic American-owned	1	$431	$431	0.1	2.4	-2.4	2.3
(8) Native American-owned	0	$0	$0	0.0	1.8	-1.8	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	30	$19,297	$19,297	2.6			
(11) White woman-owned SBE	12	$8,015	$8,015	1.1			
(12) Minority-owned SBE	18	$11,282	$11,282	1.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	16	$10,203	$11,282	1.5			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	2	$1,079					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-22.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,165	$18,948	$18,948				
(2) Minority- and woman-owned businesses	131	$2,074	$2,074	10.9	25.7	-14.7	42.6
(3) White woman-owned	74	$1,248	$1,248	6.6	13.6	-7.1	48.3
(4) Minority-owned	57	$826	$826	4.4	12.0	-7.7	36.2
(5) Asian American-owned	10	$186	$203	1.1	5.2	-4.1	20.5
(6) Black American-owned	39	$538	$585	3.1	5.7	-2.6	54.5
(7) Hispanic American-owned	1	$8	$8	0.0	0.6	-0.6	7.3
(8) Native American-owned	1	$27	$29	0.2	0.5	-0.4	28.3
(9) Unknown minority-owned	6	$68					
(10) Minority- and woman-owned SBE	74	$933	$933	4.9			
(11) White woman-owned SBE	51	$574	$574	3.0			
(12) Minority-owned SBE	23	$359	$359	1.9			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	12	$268	$349	1.8			
(15) Hispanic American-owned SBE	1	$8	$10	0.1			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	10	$84					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-23.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

SBE goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	432	$321,767	$321,767				
(2) Minority- and woman-owned businesses	87	$6,418	$6,418	2.0	25.9	-23.9	7.7
(3) White woman-owned	37	$1,975	$1,975	0.6	4.7	-4.1	13.0
(4) Minority-owned	50	$4,443	$4,443	1.4	21.2	-19.8	6.5
(5) Asian American-owned	18	$1,963	$1,963	0.6	7.7	-7.1	7.9
(6) Black American-owned	31	$2,365	$2,365	0.7	7.2	-6.5	10.2
(7) Hispanic American-owned	0	$0	$0	0.0	3.9	-3.9	0.0
(8) Native American-owned	1	$115	$115	0.0	2.4	-2.3	1.5
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	67	$5,360	$5,360	1.7			
(11) White woman-owned SBE	24	$1,585	$1,585	0.5			
(12) Minority-owned SBE	43	$3,775	$3,775	1.2			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	26	$1,832	$3,775	1.2			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	17	$1,943					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-24.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

No SBE goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,708	$486,934	$486,934				
(2) Minority- and woman-owned businesses	200	$26,991	$26,991	5.5	23.6	-18.1	23.5
(3) White woman-owned	102	$10,785	$10,785	2.2	7.7	-5.5	28.7
(4) Minority-owned	98	$16,207	$16,207	3.3	15.9	-12.6	20.9
(5) Asian American-owned	15	$2,396	$2,406	0.5	6.9	-6.4	7.2
(6) Black American-owned	74	$13,278	$13,333	2.7	6.4	-3.6	42.9
(7) Hispanic American-owned	2	$439	$441	0.1	1.3	-1.2	6.8
(8) Native American-owned	1	$27	$27	0.0	1.3	-1.3	0.4
(9) Unknown minority-owned	6	$68					
(10) Minority- and woman-owned SBE	122	$21,449	$21,449	4.4			
(11) White woman-owned SBE	71	$9,238	$9,238	1.9			
(12) Minority-owned SBE	51	$12,211	$12,211	2.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	37	$10,763	$12,202	2.5			
(15) Hispanic American-owned SBE	1	$8	$9	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	13	$1,440					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-25.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

City Contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	192	$42,642	$42,642				
(2) Minority- and woman-owned businesses	33	$5,901	$5,901	13.8	23.4	-9.6	59.0
(3) White woman-owned	23	$1,291	$1,291	3.0	14.4	-11.3	21.1
(4) Minority-owned	10	$4,609	$4,609	10.8	9.1	1.7	119.1
(5) Asian American-owned	0	$0	$0	0.0	3.6	-3.6	0.0
(6) Black American-owned	10	$4,609	$4,609	10.8	4.9	5.9	200+
(7) Hispanic American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(8) Native American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority- and woman-owned SBE	27	$5,500	$5,500	12.9			
(11) White woman-owned SBE	19	$1,199	$1,199	2.8			
(12) Minority-owned SBE	8	$4,301	$4,301	10.1			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	8	$4,301	$4,301	10.1			
(15) Hispanic American-owned SBE	0	$0	$0	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	0	$0					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-26.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

No City Contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,948	$766,059	$766,059				
(2) Minority- and woman-owned businesses	254	$27,508	$27,508	3.6	24.6	-21.0	14.6
(3) White woman-owned	116	$11,468	$11,468	1.5	6.1	-4.6	24.6
(4) Minority-owned	138	$16,040	$16,040	2.1	18.5	-16.4	11.3
(5) Asian American-owned	33	$4,359	$4,378	0.6	7.4	-6.8	7.7
(6) Black American-owned	95	$11,033	$11,080	1.4	6.8	-5.4	21.2
(7) Hispanic American-owned	2	$439	$441	0.1	2.5	-2.4	2.3
(8) Native American-owned	2	$142	$142	0.0	1.8	-1.8	1.0
(9) Unknown minority-owned	6	$68					
(10) Minority- and woman-owned SBE	162	$21,309	$21,309	2.8			
(11) White woman-owned SBE	76	$9,624	$9,624	1.3			
(12) Minority-owned SBE	86	$11,685	$11,685	1.5			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	55	$8,294	$11,674	1.5			
(15) Hispanic American-owned SBE	1	$8	$11	0.0			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	30	$3,383					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-27.
Organization: MSDGC
Time period: 01/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

DBE goals

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	378	$248,945	$248,945				
(2) Minority- and woman-owned businesses	51	$7,755	$7,755	3.1	16.1	-13.0	19.3
(3) White woman-owned	21	$3,237	$3,237	1.3	6.8	-5.5	19.1
(4) Minority-owned	30	$4,518	$4,518	1.8	9.3	-7.5	19.4
(5) Asian American-owned	3	$240	$249	0.1	2.9	-2.8	3.4
(6) Black American-owned	17	$2,562	$2,654	1.1	1.4	-0.4	74.2
(7) Hispanic American-owned	7	$1,559	$1,615	0.6	0.3	0.4	200+
(8) Native American-owned	0	$0	$0	0.0	4.7	-4.7	0.0
(9) Unknown minority-owned	3	$156					
(10) Minority- and woman-owned SBE	21	$2,858	$2,858	1.1			
(11) White woman-owned SBE	6	$773	$773	0.3			
(12) Minority-owned SBE	15	$2,085	$2,085	0.8			
(13) Asian American-owned SBE	0	$0	$0	0.0			
(14) Black American-owned SBE	10	$1,176	$1,268	0.5			
(15) Hispanic American-owned SBE	2	$759	$817	0.3			
(16) Native American-owned SBE	0	$0	$0	0.0			
(17) Unknown minority-owned SBE	3	$150					
	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.