2017 ATLANTA HOUSING AUTHORITY
DISPARITY STUDY

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The U.S. Department of Housing and Urban Development requires public housing authorities such as the Atlanta Housing Authority (AHA) to have a minority/women business outreach program. AHA employs a number of measures to promote contract opportunities for minority- and women-owned firms. This Disparity Study considers the effectiveness of AHA’s efforts, and presents information to AHA regarding the participation of minority- and women-owned firms on contracts awarded by the agency itself as well as by property managers (PMDs) and developers doing business with AHA.

AHA retained the law firm Holland & Knight LLP, which engaged Keen Independent Research LLC (Keen Independent), to conduct a disparity study that examines marketplace conditions and results of AHA efforts to promote opportunities for minority- and women-owned business enterprises (MBEs and WBEs). The study also incorporates results of in-depth interviews with local businesses conducted by study team member Griffin & Strong, an Atlanta-based law firm. This Executive Summary synthesizes the research and the full report and appendices provide detailed results.

Legal Framework

Section 281 of the National Affordable Housing Act, other federal laws and regulations, and HUD guidance to public housing authorities describe the minority/women business outreach efforts public housing authorities must make in order to receive federal funds. A 1989 U.S. Supreme Court decision and other federal and state court rulings also affect the legality, ability to adopt and implementation of minority and women business enterprise programs (see Appendix A of the full report).

Utilization, Availability and Disparity Results for AHA-related Contracts

The study compares the percentage of contract dollars going to MBE/WBEs (by racial, ethnic and gender group) with what might be expected given the relative availability of MBE/WBEs for AHA-related contracts. The study team counted participation of certified and non-certified MBE/WBEs.

Utilization analysis. Keen Independent reviewed AHA-related contracts over several years ending June 2015. Because of changes in AHA practices and data systems, the beginning point of the procurements examined differed slightly for each group of contracts. Keen Independent examined three groups of contracts related to AHA and its properties:

- Directly awarded by AHA for July 2012-June 2015 (44% MBE/WBE participation);
- Awarded by PMDs for AHA properties from July 2012 through June 2015 (35% MBE/WBE participation); and
- Awarded by developers associated with AHA properties from July 2011 through June 2015 (23% MBE/WBE participation).
Availability analysis. The study team collected data on the availability of firms for AHA-related work through a large telephone survey. Keen Independent determined the subindustries and geographic area for the data collection based on analysis of AHA, PMDs and developer contracts. Contract dollars primarily went to firms with locations in the Atlanta Metropolitan Area (90%) that performed specific types of construction, professional services, goods and other services work.

The study team then attempted to contact each Atlanta area company in each of those subindustries to identify whether they were qualified and interested in AHA-related work, the types and sizes of work they performed, and their ownership. Among the 1,395 firms expressing qualifications and interest in AHA-related work when surveyed, 47 percent were minority- or women-owned firms.

Keen Independent identified the number of MBEs, WBEs and majority-owned firms available for each AHA-related contract based on its type and size. The study team calculated percentage availability for each contract by dividing the number of available MBEs and WBEs by the total number of firms in the database meeting those criteria. After performing these analyses for each contract, Keen Independent dollar-weighted the results to prepare overall availability benchmarks. The availability benchmarks differed for AHA, PMD and developer work because of the different sizes and types of work involved in each set of contracts.

Overall availability benchmarks from this analysis are that:

- 32 percent of contract dollars awarded by AHA would go to MBE/WBEs;
- 59 percent of contract dollars awarded by PMDs would go to MBE/WBEs; and
- 54 percent of contract dollars awarded by developers would go to MBE/WBEs.

Disparity analysis. The following reports results for AHA, PMDs and developers.

Contracts awarded by AHA. The 44 percent of AHA-awarded contract dollars going to MBE/WBEs exceeded what might be expected from the availability analysis (32%). There was no disparity in the utilization of MBE/WBEs, overall, on contracts directly awarded by AHA.

- The 8.4 percent of contract dollars going to white women-owned firms exceeded what might be expected from the availability analysis for WBEs (6.9%).

- Utilization of minority-owned businesses on contracts awarded by AHA (36.1%) exceeded what might be expected for MBEs based on the availability analysis (24.7%), as shown in Figure ES-1 on the following page. Among minority-owned firms, the percentage of AHA-awarded contract dollars going to African American-owned businesses (32.8%) exceeded what might be expected from the availability analysis (18.3%). Utilization of Subcontinent Asian American-owned firms also exceeded the availability benchmark for this group. Utilization on AHA-awarded contracts was less than what might be expected from the availability analysis for Asian-Pacific American-, Hispanic American- and Native American-owned companies.

It appears that the MBE/WBE Outreach Program operated by AHA has been successful in expanding opportunities for MBE/WBEs, overall. However, AHA might consider more efforts to reach out to firms owned by Asian-Pacific Americans, Hispanic Americans and Native Americans.
Figure ES-1.
Percentage of AHA-awarded contract dollars going to MBEs and WBEs compared with what might be expected from the availability analysis, July 2012-June 2015

Source: Keen Independent utilization and availability analyses for contracts awarded by AHA (including management fees and staff costs for PMDs and developers selected by AHA).

**Contracts awarded by PMDs.** The 35 percent of contract dollars awarded to MBE/WBEs by PMDs was below what might be expected based on the availability analysis for those contracts (59%). Figure ES-2 examines results for WBEs (8% utilization) and MBEs (27% utilization). Comparisons of utilization and availability showed disparities for both groups.

Figure ES-2.
Percentage of PMD-awarded contract dollars going to MBEs and WBEs compared with what might be expected from the availability analysis, July 2012-June 2015

Source: Keen Independent utilization and availability analyses for contracts awarded by AHA (does not include management fees and staff costs for PMDs).
The study team also examined results for PMD-awarded contracts each racial and ethnic group of MBEs. About 25 percent of contract dollars went to African American-owned firms, somewhat less than the availability benchmark of 29 percent. Utilization was substantially below the availability benchmarks for all other MBE groups.

Although 35 percent MBE/WBE participation is relatively high in the study team’s experience, even for agencies within the Atlanta Metropolitan Area, it appears that PMDs could do more to encourage MBE/WBE participation in work involving AHA properties. AHA has not required PMDs to implement measures similar to its MBE/WBE Outreach Program. To address the disparities observed in PMD contracts, there may be a need for more efforts by PMDs combined with reporting of results to AHA and ongoing AHA monitoring.

**Contracts awarded by developers.** Figure ES-3 compares utilization of WBEs (1%) and MBEs (22%) with what would be anticipated from the availability analysis for contracts awarded by developers. Utilization was substantially below availability for both groups. (Note that the study period for developer contracts was longer than for AHA and PMDs to capture more of this activity.)

Disparities for each MBE group were also substantial. For example, 22 percent of developer-awarded contract dollars went to African American-owned firms compared with an availability benchmark of 37 percent for those contracts.

As with PMDs, AHA has not required developers to implement its MBE/WBE Outreach Program or similar efforts. AHA might consider new measures for developers as well as AHA monitoring.
**Conditions for Minorities and Women in the Local Marketplace**

The study team conducted telephone surveys, completed in-depth interviews, analyzed other multifamily construction, and examined other quantitative and qualitative information regarding marketplace conditions for minority- and women-owned firms in the Atlanta Metropolitan Area. This included review of the recent disparity studies conducted by the City of Atlanta, Clayton County and the Georgia Department of Transportation. Research indicated evidence that there is not a level playing field for minority- and women-owned firms in the Atlanta area. For example, some interviewees said there was a “good ol’ boy” network that limited bidding opportunities.

The telephone surveys and in-depth interviews included questions about barriers related to AHA and AHA-related properties. Feedback from business owners indicated that there was more AHA, PMDs, developers and associated prime contractors could do to inform MBE/WBEs of bid opportunities, explain the bidding process and encourage their participation.

**Conclusions**

In its own contracts, AHA has been successful in encouraging utilization of minority- and women-owned firms. Even so, AHA might consider additional efforts to inform MBE/WBEs about AHA opportunities and assist firms in bidding. AHA might focus certain additional outreach to firms owned by Asian-Pacific Americans, Hispanic Americans and Native Americans, which had little participation in AHA contracts. AHA should continue to track its MBE/WBE utilization.

Keen Independent identified disparities in the utilization of MBEs and WBEs for contracts awarded by PMDs and developers:

- Even though PMDs achieved 35 percent participation of MBE/WBEs in their contracts, this result falls short of what AHA might expect from PMDs.
- Developer utilization of minority- and women-owned firms on their contracts (23%) was well below what AHA might anticipate from those firms.

AHA might consider encouraging PMDs and developers on AHA-related properties to conduct outreach efforts, including those that have proven effective for AHA. AHA has not had such requirements in the past and would need to examine whether it could change certain policies to implement these measures. AHA would also need to put systems in place to monitor and track MBE/WBE participation in PMD- and developer-awarded contracts and subcontracts in the future, including related subcontracts.

Some large public housing authorities have implemented MBE/WBE contract goals or preference programs to encourage participation of minority- and women-owned firms in their contracts (Chicago, Philadelphia and New York City are examples). Some cities and counties in the Atlanta area have implemented similar MBE/WBE or small business contracts (SBE) goals programs.

AHA has been able to achieve substantial MBE/WBE participation on its own contracts without contract goals or preferences. If PMDs and developers implement outreach efforts and find that such programs are not effective in eliminating disparities in those contracts, AHA might evaluate whether other efforts, such as contract goals, are appropriate in light of state, local and federal laws. AHA might also consider immediately developing an SBE or similar economic-based program.
The Atlanta Housing Authority seeks to facilitate opportunities for minority- and women-owned firms to participate in contract opportunities related to AHA-related developments, properties and other operations. AHA has a number of measures currently in place to promote contract opportunities for minority- and women-owned firms. The U.S. Department of Housing and Urban Development requires public housing authorities such as AHA to have a minority/women business outreach program.

AHA retained the law firm Holland & Knight LLP, which engaged Keen Independent Research LLC (Keen Independent), to conduct a disparity study that examines marketplace conditions and results of AHA efforts to promote opportunities for minority- and women-owned business enterprises (MBEs and WBEs). This report outlines key results. Ten appendices provide supporting documentation. BBC Research & Consulting and Customer Research International (CRI) were part of the Keen Independent study team. The disparity study also incorporates results of in-depth interviews with Atlanta area businesses and other organizations that were conducted by study team member Griffin & Strong, P.C., an Atlanta-based law firm.

1. Organization of this Report

This report begins with a discussion of the legal framework for the study and then analyzes whether or not there are disparities between the utilization of minority- and women-owned firms on AHA-related contracts compared with what might be expected based on the relative availability of those firms to perform AHA-related work. The study team also examined conditions with the Atlanta marketplace and program options for AHA consideration.

Legal framework. A 1989 U.S. Supreme Court decision and other federal and state court rulings have established and applied the legal standard to determine whether there is a compelling interest justifying the need for and the narrowly tailored implementation of minority and women business enterprise programs. Holland & Knight prepared a review of key recent court decisions (Appendix A) and briefly explains legal standards for such programs in this report. The report also outlines provisions in Section 281 of the National Affordable Housing Act, other federal laws and regulations, and associated HUD guidance to public housing authorities regarding minority/women business outreach programs.

Utilization analysis. Keen Independent examined three groups of contracts related to the Atlanta Housing Authority and its properties:

- Directly awarded by AHA;
- Awarded by property managers (PMDs) for AHA properties; and
- Awarded by developers associated with AHA properties.
Keen Independent reviewed contracts over several years ending June 2015. Because of changes in AHA practices and data systems, the beginning point of the procurements examined differed slightly for each group of contracts. Appendix B describes contract data collection efforts.

The study team’s analysis of the participation of minority-owned businesses (MBEs) and white women-owned businesses (WBEs) went beyond AHA’s participation reports to HUD to include information about firms working directly for property managers (PMDs) and developers associated with AHA properties. Appendix B explains this further.

**Availability and disparity analyses.** Keen Independent developed benchmarks for the percentage of contract dollars that might go to MBEs and WBEs based on the relative availability of businesses for specific types and sizes of AHA-related prime contracts and subcontracts. The study team conducted telephone interviews with companies in the Atlanta Metropolitan Area to develop this availability information. Appendix C describes the approach and results of the availability analysis.

Keen Independent then examined whether there were any disparities between the utilization of MBE/WBEs in AHA-related contracts (by group) and the availability benchmarks developed in the study. Appendix D presents detailed results of this disparity analysis.

**Conditions for minorities and women in the local marketplace.** Based on the contract data collected, Keen Independent determined the study industries and relevant geographic market area — construction, professional services, goods and other services within the 29-county Atlanta Metropolitan Area. Therefore, analysis of marketplace conditions beyond AHA contracting focused on those four industries within the Atlanta Metropolitan Area. The study team examined both quantitative and qualitative information about local marketplace conditions.

**HUD requirements and AHA programs.** HUD requires that public housing authorities have an MBE/WBE Outreach Program. Keen Independent assesses these requirements and current AHA programs. The study team also examines AHA written policies concerning whether these requirements apply to property managers and developers.

Public housing authorities throughout the country employ different approaches to complying with HUD requirements. Keen Independent describes the range of programs among large housing authorities.

**Conclusions.** The study team summarizes overall results and steps for AHA consideration.

**2. Legal Issues Surrounding MBE/WBE Outreach Programs and Small Business Programs**

The standards of legal review that targeted business programs must meet depend in part on whether they consider the race, ethnicity or gender ownership of the business owner when determining program eligibility.

Appendix A discusses how courts have applied different standards when evaluating the legality of race-conscious programs, gender-based programs and other targeted business programs. The legal framework explained in considerable detail in Appendix A is briefly summarized in the next pages.
Minority Business Enterprise and Women Business Enterprise programs. Many state and local governments throughout the country adopted minority and women business programs for public contracting in the 1970s and 1980s. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to have MBE programs or any other programs benefitting a group based on race. Legal restrictions also apply to gender-conscious programs.

The Croson decision. The 1989 U.S. Supreme Court decision in City of Richmond v. J.A. Croson Company held there are only certain limited permissible reasons for a local government to have a race-conscious program, and set specific conditions for such programs:

1. A state or local government must establish and thoroughly examine evidence to determine whether there is a compelling governmental interest in remedying specific past identified discrimination or its present effects; and
2. A state or local government must also ensure that any program adopted is narrowly tailored to achieve the goal of remedying the identified discrimination.

These two requirements must both be satisfied to meet the U.S. Supreme Court’s strict scrutiny standard of review for race-conscious programs. Many state and local governments discontinued MBE programs after the Croson decision. Some entities then conducted disparity studies to determine if there was evidence supporting an MBE program that met this standard.

- Compelling governmental interest. Disparity studies examine whether there is a disparity between the utilization and availability of minority- and women-owned firms in a jurisdiction’s contracts, which is key information in determining whether there is evidence that race or gender discrimination affects a jurisdiction’s procurement. Because the U.S. Supreme Court held that a jurisdiction could take action if it had become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, local marketplace conditions are also examined.

- Narrow tailoring. There are a number of factors used to determine whether a program is narrowly tailored, including consideration of whether workable “race-neutral measures,” such as small business programs and outreach efforts, are sufficient or effective to remedy the identified discrimination.

Intermediate scrutiny for gender-based programs. As discussed in Appendix A, some federal courts of appeal, including the Eleventh Circuit, have held gender-conscious programs for women-owned businesses are subject to an intermediate scrutiny standard of legal review. This standard has similar elements as the strict scrutiny standard, but the intermediate scrutiny legal standard is different and more easily met.

Small business programs. Even if a targeted business program does not consider race or gender, it can still be subject to legal challenge. However, such programs are more easily defended by the enacting jurisdiction. The jurisdiction need only show that it has a “rational basis” for the program.

As implementation of a small business program might be part of a broader AHA MBE/WBE outreach program, Appendix A includes a discussion of the rational basis standard pertaining to economic-based small business programs in government procurement.

**Existing Georgia law.** At present, the provisions governing procurement in the AHA policy may not expressly permit the consideration of a bidder’s small business enterprise status in the award of government contracts. Based on precedent in Georgia case law holding invalid procurement programs that provide for consideration of factors other than those expressly permitted by legislation, AHA may need to enact specific legislation in its policy and possibly obtain state legislation permitting the consideration of small business preferences or a bidder’s or proposer’s small business status in the award of AHA contracts.

There do not appear to be recent reported decisions in Georgia specifically involving challenges to the validity of local or state small business programs. Appendix A discusses small business programs and the rational basis legal standard. Two points below are noteworthy for small business programs:

- It is important that any AHA small business program and the criteria for participation be based upon economic research and market data such as provided in this report. This information is helpful to AHA to assist it in determining whether there is a rational basis to support implementation of such a program. The small business program would need to bear a rational relationship to a legitimate governmental purpose.

- There are legal issues raised if a durational residency requirement is utilized when determining eligibility for a small business program, and thus it is recommended such requirement be avoided to minimize risk of a legal issues that may arise for such a program. For example, it creates legal risks if AHA requires that a business be a resident within a certain area for at least a year before becoming eligible for a program, which might be an impermissible durational residency requirement.

**Georgia Small Business Assistance Act.** Georgia adopted the Small Business Assistance Act in 1975, which has been amended most recently in 2015 and 2016, to promote use of small businesses in state procurement. As discussed in Appendix A, the codified legislative intent for the Small Business Assistance Act is an indication that the State recognizes the importance of small business participation in the award of government contracts. Further, the declared legislative policy of the Small Business Assistance Act provides support that the state appears to recognize a rational basis for the implementation of economic programs that promote and strengthen small business participation in government procurement. In the Georgia Small Business Assistance Act, the State indicates that the utilization of small businesses for purchases and contracts or subcontracts in a “fair proportion” is a legitimate government policy and objective. The Georgia Small Business Assistance Act of 2015 eliminated a Georgia residency requirement for defining a small business.

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3 *Id.*
3. Utilization of Minority- and Women-owned Firms in AHA-related Contracts

Keen Independent collected information about contracts and the race, ethnicity and gender ownership of those firms receiving work to determine the percentage of contract dollars going to minority-, women- and majority-owned firms for AHA-related contracts during the study period. (Because of differences in the scope of the contracts examined, reporting periods and other factors, study results somewhat differ from AHA utilization reports submitted to HUD.) The study team examined the same racial and ethnic groups included under the definition of minority-owned firms in HUD regulations. Appendix B discusses data collection and methods of analysis.

a. Utilization of minority- and women-owned firms in contracts awarded by AHA, PMDs and developers. Keen Independent examined three sets of AHA-related procurements as part of the disparity study:

- Direct purchases by AHA from July 2012 through June 2015, including the contracts AHA awarded to property managers (PMDs) and to developers;
- Contracts awarded by PMDs from July 2012 through June 2015; and
- Contracts awarded by developers from July 2011 through June 2015.

Each set of contracts included associated subcontracts (for example, subcontractors working for a construction prime contractor that was retained by a developer). The time frames for each study period were chosen based on contracting systems in place and availability of data in those years. The study period for developers was extended to July 2011 to capture more development activity.

Keen Independent examined 1,456 AHA-related prime contracts and subcontracts during the study period totaling $63 million. These contracts encompassed construction, professional services, goods and other services procurements. As shown in Figure 1, Keen Independent examined $32 million in contracts directly awarded by AHA, including the value of the PMD and developer portion of those AHA-awarded contracts. The study team also collected contract data from PMDs and developers amounting to $15 million for PMDs and $16 million for developers.

Figure 1. Collection of contract data for AHA-related contracts

Source: Keen Independent analysis of contracts awarded by AHA, PMDs and developers.
Keen Independent developed information about the ownership of companies involved in AHA, PMD, and developer contracts through a number of certification directories, phone calls to those firms and other research. Utilization results count both certified and non-certified minority- and women-owned firms in the results.

Based on this analysis, Keen Independent estimated that minority- and women-owned firms obtained 44 percent of the contract dollars for contracts awarded by AHA and 35 percent of contract dollars for contracts awarded by PMDs. About 23 percent of the dollars of developer-awarded contracts went to MBE/WBEs. Figure 2 shows these results.

Figure 2.
Percentage of dollars going to minority- and women-owned firms on contracts awarded by AHA, PMDs and developers, July 2012-June 2015

Note: July 2011-June 2015 for developers.
Source: Keen Independent analysis of contracts awarded by AHA, PMDs and developers.

b. Utilization of MBE/WBEs by group on contracts awarded by AHA. Figure 3 presents detailed information for minority- and women-owned firms on contracts awarded by AHA during the study period. For each race, ethnic and gender group, Figure 3 shows:

- Total number of prime contracts and subcontracts awarded to the group (e.g., 41 prime contracts and subcontracts to African American-owned firms);
- Combined dollars of prime contracts and subcontracts going to the group (e.g., $10,345,000 to African American-owned firms); and
- The percentage of combined contract dollars for the group (e.g., African American-owned firms received 32.8 percent of AHA-awarded contract dollars).

As indicated in Figure 3, African American-owned firms and white women-owned firms accounted for most of the utilization of MBE/WBEs on AHA-awarded contracts.
Figure 3.
MBE/WBE share of AHA-awarded contracts, by group, July 2012-June 2015

<table>
<thead>
<tr>
<th></th>
<th>Number of contracts*</th>
<th>$1,000s</th>
<th>Percent of dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MBE/WBEs</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American-owned</td>
<td>41</td>
<td>$10,345</td>
<td>32.8 %</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
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<td>842</td>
<td>2.7</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>5</td>
<td>184</td>
<td>0.6</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Total MBE</td>
<td>47</td>
<td>$11,371</td>
<td>36.1 %</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>28</td>
<td>2,651</td>
<td>8.4</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>75</td>
<td>$14,022</td>
<td>44.5 %</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>156</td>
<td>17,499</td>
<td>55.5</td>
</tr>
<tr>
<td>Total</td>
<td>231</td>
<td>$31,521</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Note: *Number of prime contracts and subcontracts.
Dollars include prime contracts (retained amount) and subcontracts.
Numbers rounded to nearest tenth of 1 percent. Dollars and percentages may not add to totals due to rounding.
Source: Keen Independent analysis of contracts awarded by AHA (including management fees and staff costs for PMDs and developers selected by AHA).

c. Utilization of MBE/WBEs by group on contracts awarded by PMDs. Figure 4 provides similar information for contracts awarded by PMDs. One-quarter of the dollars went to African American-owned firms, 8 percent went to WBEs and 2 percent went to other minority-owned firms.

Figure 4.
MBE/WBE share of PMD-awarded contracts, by group, July 2012-June 2015

<table>
<thead>
<tr>
<th></th>
<th>Number of contracts*</th>
<th>$1,000s</th>
<th>Percent of dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MBE/WBEs</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American-owned</td>
<td>123</td>
<td>$3,822</td>
<td>25.2 %</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>2</td>
<td>4</td>
<td>0.1</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>1</td>
<td>1</td>
<td>0.1</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>6</td>
<td>284</td>
<td>1.9</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Total MBE</td>
<td>132</td>
<td>$4,111</td>
<td>27.3 %</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>101</td>
<td>1,154</td>
<td>7.6</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>233</td>
<td>$5,265</td>
<td>34.9 %</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>719</td>
<td>9,896</td>
<td>65.2</td>
</tr>
<tr>
<td>Total</td>
<td>952</td>
<td>$15,161</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Note: *Number of prime contracts and subcontracts.
Dollars include prime contracts (retained amount) and subcontracts.
Numbers rounded to nearest tenth of 1 percent. Dollars and percentages may not add to totals due to rounding.
Source: Keen Independent analysis of contracts awarded by PMDs (does not include PMD management fees and staff costs).
d. Utilization by MBE/WBEs by group on contracts awarded by developers. Figure 5 shows utilization for contracts awarded by developers. African American-owned firms received 22 percent of contract dollars and all other MBE/WBE groups combined received 1 percent of contract dollars.

Figure 5.
MBE/WBE share of developer-awarded contracts, by group, July 2011-June 2015

<table>
<thead>
<tr>
<th>MBE/WBE</th>
<th>Number of contracts*</th>
<th>$1,000s</th>
<th>Percent of dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>45</td>
<td>$3,558</td>
<td>22.0 %</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>1</td>
<td>$13</td>
<td>0.1</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>1</td>
<td>$12</td>
<td>0.1</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>2</td>
<td>$10</td>
<td>0.1</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0</td>
<td>$0</td>
<td>0.0</td>
</tr>
<tr>
<td>Total MBE</td>
<td>49</td>
<td>$3,593</td>
<td>22.3 %</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>9</td>
<td>$116</td>
<td>0.7</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>58</td>
<td>$3,709</td>
<td>23.0 %</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>215</td>
<td>$12,533</td>
<td>77.0</td>
</tr>
<tr>
<td>Total</td>
<td>273</td>
<td>$16,242</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Note: *Number of prime contracts and subcontracts.

Dollars include prime contracts (retained amount) and subcontracts.
Numbers rounded to nearest tenth of 1 percent. Dollars and percentages may not add to totals due to rounding.
Source: Keen Independent analysis of contracts awarded by developers (does not include development fees for developers).

4. Availability and Disparity Analyses for AHA-related Contracts

The following discussion summarizes availability and disparity analyses for AHA-related contracts. Appendix C further reviews the data sources and methods for analyzing availability.

a. Headcount availability of minority-, women- and majority-owned firms for AHA-related contracts. The study team reached out to each company in the Atlanta Metropolitan Area identified by Dun & Bradstreet (D&B) that had a primary type of work matching the types of construction, professional services, goods and other services involved in AHA, PMD and developer contracts. The D&B database is the most comprehensive listing of business establishments available for this research. Through telephone calls with firms on the D&B list and other means, the study team successfully contacted 9,707 business establishments from this list, of which 1,395 firms indicated qualifications and interest in AHA-related work and provided the information about their companies.

As shown in Figure 6, 47 percent of those firms were minority- or women-owned. African American-owned firms accounted for 26 percent of available firms and white women-owned firms were about 11 percent of available firms. Figure 6 results are labeled as “headcount” as they simply portray an overall count of firms in the availability database indicating qualifications and interest in AHA-related work.
Figure 6.
Total MBE/WBE availability – “headcount”

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Number of firms</th>
<th>Percent of firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>364</td>
<td>26.1 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>50</td>
<td>3.6 %</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>43</td>
<td>3.2 %</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>17</td>
<td>1.2 %</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>35</td>
<td>2.5 %</td>
</tr>
<tr>
<td>Total MBE</td>
<td>509</td>
<td>36.5 %</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>149</td>
<td>10.7 %</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>658</td>
<td>47.2 %</td>
</tr>
<tr>
<td>Total majority-owned firms</td>
<td>737</td>
<td>52.8 %</td>
</tr>
<tr>
<td>Total firms</td>
<td>1,395</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Source: Keen Independent from 2017 AHA Availability Survey.

The level of overall “headcount” availability of MBE/WBEs in Figure 6 is similar to the headcount availability Keen Independent identified in recent studies for two other local governments in the Atlanta Metropolitan Area: 43 percent for the City of Atlanta and 42 percent for Fulton County.4

Keen Independent performed the disparity analysis based on benchmarks of the percentage of dollars that might go to MBE/WBEs. The study team calculated the benchmarks based on the relative availability of MBEs and WBEs for specific contracts and subcontracts, with those results then aggregated on a dollar-weighted basis.

- Keen Independent conducted individual availability analyses for each of the 1,456 contracts and subcontracts; and
- Weighted availability results for each contract based on the size of those contracts.

This analysis provided benchmarks for the percentage of AHA-related contract dollars one might expect to go to MBE/WBEs given the current availability of firms to perform specific types and sizes of those prime contracts and subcontracts. The availability analysis considered bid capacity of firms, only counting a company as available for sizes of contracts it had been awarded or had bid on in the local marketplace in the previous five years. (See Appendix C for additional information.)

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Figure 7 shows the availability benchmarks for contracts awarded by AHA, PMDs and developers. As shown, minority- and women-owned firms might be expected to receive close to one-third of AHA-awarded contract dollars during the study period after considering the specific types and sizes of prime contracts and subcontracts involved. Dollar-weighted availability was higher for contracts awarded by PMDs and by developers: more than 50 percent of the total dollars for both of those groups of contracts.

Figure 7.
Percentage of dollars that might be expected to go to MBE/WBEs based on availability analysis

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Contracts awarded by AHA</th>
<th>Contracts awarded by PMDs</th>
<th>Contracts awarded by developers</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>18.3 %</td>
<td>29.0 %</td>
<td>36.8 %</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>1.9</td>
<td>1.8</td>
<td>1.3</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>1.8</td>
<td>2.1</td>
<td>0.5</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>1.5</td>
<td>5.5</td>
<td>6.0</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>1.2</td>
<td>1.4</td>
<td>1.1</td>
</tr>
<tr>
<td>Total MBE</td>
<td>24.7 %</td>
<td>39.8 %</td>
<td>45.7 %</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>6.9</td>
<td>18.9</td>
<td>7.9</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>31.6 %</td>
<td>58.7 %</td>
<td>53.6 %</td>
</tr>
</tbody>
</table>

Note: AHA results pertain to contracts awarded by AHA (including AHA contracts with PMDs and developers). PMD results pertain to contracts awarded by PMDs. Developer results pertain to contracts awarded by developers. Source: Keen Independent 2017 availability analysis using AHA-, PMD- and developer-awarded contracts and 2017 availability data.
b. Disparity analysis for MBEs and WBEs for contracts awarded by AHA. Keen Independent’s disparity analysis compares the dollars of AHA-related contracts going to an MBE/WBE group with what might be expected from the availability analysis.

For contracts awarded by AHA, the 8.4 percent of contract dollars going to white women-owned firms exceeded what might be expected from the availability analysis for WBEs (6.9%).

Utilization of minority-owned businesses on contracts awarded by AHA (36.1%) exceeded what might be expected for MBEs based on the availability analysis (24.7%). Overall, there was no evidence of disparities in the utilization of MBE/WBEs on contracts directly awarded by AHA.

Figure 8. Percentage of AHA-awarded contract dollars going to MBEs and WBEs compared with what might be expected from the availability analysis, July 2012-June 2015

Among minority-owned firms, the percentage of AHA-awarded contract dollars going to African American-owned businesses (32.8%) exceeded what might be expected from the availability analysis (18.3%). Utilization of Subcontinent Asian American-owned firms also exceed the availability benchmark for those firms. Utilization on AHA-awarded contracts was less than what might be expected from the availability analysis for Asian-Pacific American-, Hispanic American- and Native American-owned companies (see Appendix D).
c. Disparity analysis for MBEs and WBEs for contracts awarded by PMDs. For contracts awarded by PMDs, the 7.6 percent of contract dollars going to white women-owned firms was below the 18.9 percent that might be expected from the availability analysis. About 27.1 percent of PMD-awarded contract dollars went to MBEs, which was less than the 39.8 percent of contract dollars that might be expected based on the availability analysis for those contracts. Figure 9 presents these results.

Figure 9.
Percentage of PMD-awarded contract dollars going to MBEs and WBEs compared with what might be expected from the availability analysis, July 2012-June 2015

Keen Independent further explored the relative size of the observed disparities through “disparity indices.” A disparity index is calculated by dividing the percentage utilization (7.6% for WBEs in Figure 9, for example) by the availability benchmark (18.9% for WBEs in Figure 9), and then multiplying the result by 100. The resulting disparity index for the above example is “40,” as \((\frac{7.6}{18.9}) \times 100 = 40\). A value of 100 represents “parity.” Courts have held that a disparity index of 80 or less is “substantial” and may indicate an inference of discrimination (see Appendix A). For PMD-awarded contracts, both the disparities for WBEs and for MBEs were substantial (disparity index of 69 for MBEs).

Keen Independent also calculated disparity indices for each racial and ethnic group of MBEs. About 25 percent of contract dollars went to African American-owned firms, somewhat less than the availability benchmark of 29 percent shown in Figure 7. The disparity index was 87, not a substantial disparity. Utilization was substantially below the availability benchmarks for all other MBE groups (see Appendix D).
d. Disparity analysis for MBEs and WBEs for contracts awarded by developers. Figure 10 compares utilization of WBEs and MBEs with what would be anticipated from the availability analysis for contracts awarded by developers from July 2011 through June 2015. As shown, utilization was substantially below availability for both groups (disparity indices of 9 for WBEs and 49 for MBEs).

Figure 10. Percentage of developer-awarded contract dollars going to MBEs and WBEs compared with what might be expected from the availability analysis, July 2011-June 2015

Disparities for each MBE group were also substantial. For example, 22 percent of developer-awarded contract dollars went to African American-owned firms compared with an availability benchmark of 36.8 percent for those contracts. The disparity index was 60. (See Appendix D for detailed results.)

5. Conditions for Minorities and Women in the Local Marketplace

The study team examined information regarding local marketplace conditions for minorities and women, and minority- and women-owned firms. This analysis focuses on four industries:

- Construction;
- Professional services;
- Goods; and
- Other services.

These four categories describe the key areas of AHA-related contracting. Because more than 90 percent of AHA-related contract dollars went to firms with locations in the 29-county Atlanta Metropolitan Area, Keen Independent examined recent conditions within that area.
The study team examined U.S. Census data and other information about the local marketplace, and analyzed the database of 1,395 local businesses that provided information about their availability for AHA-related work. Data collected for these businesses included revenue, bid capacity, perceptions of barriers within the local marketplace, and race, ethnicity and gender ownership. Key results are summarized below.

a. Certain minority groups and women are underrepresented as employees in the construction, professional services, goods and other services industries. Analysis of U.S. Census data indicates evidence of limited entry and advancement of women, African Americans and certain other minority groups in some Atlanta area industries, particularly construction. Appendix E presents this information.5

Any disparities in opportunities to enter and advance within these industries can affect the number and success of minority- and women-owned businesses in the Atlanta Metropolitan Area.

b. There were disparities in business ownership in the Atlanta Metropolitan Area for minorities and women in many of the industries examined in the study. Disparities in business ownership rates may indicate that there is not a level playing field for minorities and women to start and sustain businesses in certain industries in the Atlanta Metropolitan Area. Results may also indicate that the current availability of minority- and women-owned firms is lower than what might be expected if there were a non-discriminatory environment in which those firms were started and operated.

- There were substantial disparities in business ownership rates for women working in the local construction, professional services and other services industries.
- There were disparities in business ownership rates for African Americans, Hispanic Americans and Subcontinent Asian Americans working in the other services industry.

In sum, for some groups and industries, the business ownership analysis indicates race-, ethnicity- and gender-based disparities in business ownership in the Atlanta Metropolitan Area in recent years. But for these disparities, minority- and women-owned firms might comprise a greater share of businesses available for AHA contracts. Appendix F provides detailed results.

c. There is evidence that minorities and women face certain disadvantages in accessing capital that is necessary to start, operate and expand businesses. Home equity and home mortgages are also an important source of capital to start and expand businesses. Focusing just on data that recently became available, there were disparities between minorities and non-minorities in the Atlanta Metropolitan Area in home ownership and receiving home mortgages.

These results indicate that certain minority groups do not have the same access to capital necessary for business formation and success as non-minorities in the Atlanta Metropolitan Area. Appendix G provides supporting analyses.

5 These results are based on U.S. Bureau of the Census 2008 through 2012 American Community Survey data for the Atlanta Metropolitan Area, as discussed in Appendices E and J of this report.
d. There is evidence that firms owned by minorities in Georgia are more likely to close than non-minority-owned firms. A 2010 Small Business Administration study of minority business dynamics examined rates of business closures, expansions and contractions between 2002 and 2006 throughout the country. Results for Georgia showed higher closure rates for African American-, Asian American- and Hispanic American-owned businesses.

Disparities in the rates of closure for African American-, Asian American- and Hispanic American-owned businesses may be further evidence that the playing field is not level for these groups within the local marketplace (see Appendix H).

e. Data show disparities in business revenue in the overall local marketplace. The study team examined several different datasets to analyze business receipts and earnings for minority- and female-owned businesses in the Atlanta Metropolitan Area, as discussed in Appendix H. Revenue of minority- and women-owned firms was lower, on average, than majority-owned firms in the construction, professional services, goods and other services industries. Although most businesses in these industries in the Atlanta Metropolitan Area would qualify as “small businesses” under federal standards, minority- and women-owned firms are somewhat more likely to be small businesses than majority-owned firms.

f. There were disparities in the utilization of minority- and women-owned firms in other multifamily projects in the Atlanta area. Keen Independent examined participation of minority- and women-owned firms in non-AHA multifamily construction in the Atlanta area from 2011 through 2015.

The study team collected building permit data issued for general contracting, electrical work and plumbing and sprinkler work within Atlanta city limits, and determined ownership for companies obtaining those permits (8,937 permits in total). Firms that Keen Independent identified as minority-owned were listed on 6 percent of the permits, substantially less than what might be expected from the availability analysis. Firms the study team identified as white women-owned obtained 5 percent of the permits, again substantially below availability of those firms.

Keen Independent acquired Dodge Reports data for multifamily projects within the Atlanta Metropolitan Area for the same time period. These data identified general contractors and design firms for each project. Results were similar to those reported above, with substantial disparities for MBE and WBE contractors and design firms.

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Recent disparity studies for the City of Atlanta, Clayton County and for the Georgia Department of Transportation identified disparities for minority- and women-owned firms in certain public sector contracts. The City of Atlanta, Clayton County and the Georgia Department of Transportation (“GDOT”) completed disparity studies in recent years. These studies are instructive in general to the extent they may involve certain types of contracts and available firms similar to AHA. The City of Atlanta and Clayton County are located within the same Atlanta Metropolitan Area marketplace, and GDOT contracting includes the Atlanta Metropolitan Area.

2015 City of Atlanta Disparity Study. Keen Independent conducted the City of Atlanta 2015 Disparity Study. The City’s Equal Business Opportunity or Small Business Opportunity programs applied to most of the City’s contract dollars over the July 2009 through December 2012 study period, and both programs appeared to be effective in creating procurement opportunities for MBE/WBEs. Examining contracts awarded outside those programs, however, Keen Independent identified substantial disparities between the utilization of minority- and women-owned firms and what might be expected based on the availability analysis.

Although data for the City’s Small Business Enterprise (SBE) goals contracts program were limited during the study period, results suggested that the SBE contract goals program encouraged utilization of at least African American-owned firms and white women-owned businesses on City-funded contracts.

One-half of the SBEs certified as of 2015 were also certified as M/FBEs, slightly more than the share of small businesses in the availability database that were minority- and women-owned. Analysis of the minority- and women-owned firms receiving the most dollars of City-funded contracts showed that most would qualify as small businesses under the City’s size standards for SBE certification. Such results suggested that greater use of SBE contract goals by the City of Atlanta could still include many of the MBE/WBEs that had been most successful in obtaining City work.

The study also identified evidence that there was not a level playing field for minorities and women, and minority- and women-owned firms, in the Atlanta Metropolitan Area marketplace. In particular, there were substantial disparities for each minority group and for white women-owned firms when examining the types of commercial and public sector construction work requiring City of Atlanta building permits (general contracting and electrical, plumbing and HVAC work). MBE/WBE programs typically did not apply to these contracts.

Further, analyzing Dodge Reports data for other public sector construction contracts within Atlanta city limits showed a substantial disparity for MBE/WBEs.

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2011 Clayton County Disparity Study. Examining prime contracts under $500,000 awarded in fiscal years 2004 to 2009, the Clayton County study indicated substantial disparities for:

- African American-, Hispanic American- and women-owned firms in County construction contracts;
- African American-, Asian American- and Hispanic American-owned firms in County professional services contracts; and
- African American-, Asian American- and women-owned firms in County goods and other services contracts.

There were disparities in the use of subcontractors on Clayton County contracts from FY 2004 to FY 2009 for:

- African American-, Asian American- and Hispanic American-owned firms on construction contracts; and
- African American-owned firms in professional services contracts.

Community meetings and in-depth interviews with local companies identified practices reported to negatively affect new and small companies as well as firms that were owned by minorities and women. The qualitative evidence from the Clayton County study included existence of a “good ol’ boy” network within the local marketplace that negatively affected minority- and women-owned firms. Some interviewees reported difficulty obtaining financing and bonding.

2012 Georgia Department of Transportation Disparity Study. The 2012 GDOT Disparity Study was directed by David Keen of Keen Independent Research, and included analyses relevant to the Atlanta area construction and engineering industries. That study identified substantial disparities in GDOT contracting for each minority group and for women-owned businesses when DBE contract goals did not apply.

- When examining GDOT state-funded contracts (no DBE contract goals applied), MBE/WBE utilization was 5.5 percent of contract dollars. There was about 22 cents of actual participation for every dollar that might be expected to go to minority- and women-owned firms from the availability analysis. There were substantial disparities in the utilization of each racial, ethnic and gender group included in the Federal DBE Program (firms owned by African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans and white women).

- For GDOT contracts where DBE contract goals applied, there were still substantial disparities in the utilization of African American-, Asian-Pacific American- and Subcontinent Asian American-owned firms.

- There were disparities overall for construction contacts and for engineering contracts.
GDOT utilization of MBE/WBEs was lower in the Atlanta Metropolitan Area (8.2%) than the state as a whole (12.4%), even though overall MBE/WBE availability was similar. The overall disparity for MBE/WBEs for GDOT contracts was more severe in the Atlanta Metropolitan Area (disparity index of 37) than for the state (disparity index of 56). African American-owned businesses, for example, obtained just 2.6 percent of contract dollars on Atlanta Metropolitan Area projects, even with DBE contract goals in place for some of these contracts.

GDOT also collected public comments as part of the disparity study, including at a public meeting held in Atlanta. Some comments indicated that DBEs were not given opportunities to perform the work. Others suggested that barriers businesses faced in entering the market were based on pre-existing networks, or a culture of “good old boys.” Certain comments pertained to bonding, and how bonding worked as a barrier to MBEs and WBEs to do business with GDOT and certain prime contractors. One group indicated that DBE capacity may be affected by barriers that minority-owned firms face when starting a business such as bank lending, bonding and packaging of contracts. Some comments directly pertained to GDOT, including allegations that GDOT has discriminated against small firms.

**2016 Georgia Department of Transportation Disparity Study.** GDOT updated its information with a 2016 disparity study conducted by Griffin & Strong, a subconsultant on the present AHA Disparity Study.\(^8\) The 2016 study also compared utilization of minority- and women-owned firms with what might be anticipated based on relative availability for that work. Griffin & Strong’s conclusions included the following:

- On prime contracts, all MBE groups and WBEs were underutilized as prime contractors, except for Subcontinent Asian American-owned firms for GDOT construction contracts.
- On subcontracts, there was underutilization of each MBE group and of WBEs for each industry examined.
- For state-funded contracts, for which no DBE contract goals applied, each MBE group and WBEs were underutilized in both prime contracts and subcontracts.
- There was evidence of racial and gender disparities in securing financing, public contracting and subcontracting opportunities in the Georgia marketplace.
- Information from meetings, focus groups, interviews, surveys and comments indicated barriers for minority- and women-owned firms. There was some perception of favoritism in the GDOT procurement process that worked to the disadvantage of minority- and women-owned firms, and a lack of buy-in to the DBE Program by majority-owned companies.

\(^8\) Griffin & Strong P.C., 2016 Georgia Department of Transportation Disparity Study, August 2016.
h. Quantitative analysis of perceived barriers in the local marketplace. Keen Independent asked respondents in the 2017 availability interviews whether they had experienced certain types of barriers to doing business.

- Minority-owned firms were much more likely than majority-owned firms to report difficulties obtaining lines of credit or loans and learning about bid opportunities. For example, about one-third of MBEs and up to one-quarter of WBEs indicated difficulty learning about AHA work, much higher than majority-owned firms (10-12%, depending on industry).

- Relative to majority-owned firms, more MBEs indicated that the large size of projects presented a barrier to bidding.

- A similar pattern was evident for WBEs.

- In general, the pattern described above persisted across industries.

i. Qualitative information about marketplace conditions for minority-, women- and majority-owned firms. Griffin & Strong completed 31 in-depth interviews with business owners and managers in the Atlanta Metropolitan Area. Keen Independent also obtained 455 responses to an open-ended question about marketplace barriers in the availability telephone survey. Appendix J provides a detailed analysis of these discussions. Key results include the following:

- Many business owners worked in the industry before launching a business. Any inequities in employment and advancement for minorities and women appear to affect the creation of minority- and women-owned firms in the Atlanta marketplace.

- Financing and capital were reported to be a large barrier to successful start-up and growth. Especially firms working in multifamily housing development and construction, a number of minority- and women-owned firms said that they were at a disadvantage because of unequal access to capital.

- Some minority and female business owners reported that it was difficult to find out about potential work early enough to compete for that work. Their competitors might be involved in crafting the request for bid, or have otherwise established themselves as a favored bidder or proposer by the time the MBE or WBE learns of the opportunity.

Others said that they were frustrated by the lack of responsiveness of potential customers when they pursue work. Statements such as “We never get a call back” were made by many of the minority and female business owners interviewed.

- Some interviewees specifically mentioned AHA when discussing barriers to finding out about work or being able to compete for work. They indicated difficulty identifying opportunities, understanding the bidding process and being able to talk with AHA staff. Excessive paperwork was another complaint. A few contractors said that AHA is difficult to work for, and some commented about slow pay. Some interviewees were
complimentary, however, particularly those with regular business related to AHA. They said that AHA gave them a chance to pursue work.

- Small businesses, as well as minority- and women-owned firms, often face the challenge of being too small to go after work. Some owners described the disadvantages small businesses face when work is awarded based on price alone. Others said that insurance or bonding requirements and other specifications make it difficult for small companies to bid or be competitive. There were some comments that AHA preferred to award work to larger companies.

- Most firms interviewed reported that the playing field in the Atlanta area “was not level.” Some minority and female business owners reported experiencing discrimination in the local marketplace.

- Many interviewees had experience with closed networks and reported that they exist in Atlanta. According to many interviewees, closed networks made finding work opportunities challenging. A number of interviewees said that it was very difficult to get a chance to show one’s work, or “to get your foot in the door.” As an example, some interviewees reported that property managers would bring along firms they already know for work on those properties. As another example, one interviewee said that some majority-owned subcontractors have worked for the same prime contractor “for generations.”

- Some interviewees specifically reported a “good ol’ boy” network in Atlanta that negatively affects minorities and women.

- Many interviewees had recommendations for improvement for AHA, from making it easier to learn about and bid on AHA work, to more transparency in contract awards, to more supervision of property managers that would open those firms’ procurement opportunities to new firms.

Appendix J further explains these results.

6. HUD Requirements and AHA Programs

HUD requirements, current AHA outreach efforts and examples of other public housing authority programs are discussed below.

HUD requirements concerning MBE/WBE Outreach. Section 281 of the National Affordable Housing Act and HUD Guidance on MBE/WBE outreach require agencies such as AHA to have a minority outreach program. Each agency must:

- Include MBE/WBEs in all contracting activities entered into by the participating jurisdiction to facilitate the provision of affordable housing authorized under this Act or any other federal housing law applicable to such jurisdiction.

- Have a program to ensure inclusion of entities owned by minorities and women.
Further, regulations in 2 CFR Section 200.321 provide that agencies take all necessary affirmative steps to assure that MBEs and WBEs are used when possible. Affirmative steps must include:

1. Placing qualified small and minority businesses and women’s business enterprises on solicitation lists;

2. Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources;

3. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women’s business enterprises;

4. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women’s business enterprises;

5. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

6. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

HUD regulations in 24 CFR Part 85 were in effect during the July 2012 through June 2015 study period, and had similar provisions. Those regulations were amended and removed by 2 CFR 200 and 2 CFR Section 200.321 for federal procurements awarded after December 2014.

HUD Guidance on MBE/WBE Outreach states that the above items represent basic activities and are not all-inclusive of the actions a jurisdiction may undertake.

**Examples of program elements from HUD Procurement Handbook.** Chapter 15 of the HUD Procurement Handbook 7460.8 Rev. 2 identifies required assistance to small and other disadvantaged businesses (see 15.5 of chapter). It includes:

- PHAs shall make every feasible effort to ensure that small businesses, MBEs, WBEs and labor surplus area businesses participate in PHA contracting.

- PHAs are encouraged to establish goals by which they can measure the effectiveness of their efforts (set-asides, quotas and geographic limitations are discouraged, however).

- Required to report contract and subcontract activity.

- PHAs are encouraged to:
  - Study the existing barriers facing disadvantaged businesses;
  - Examine PHA policies and procedures that may contribute to barriers and determine how to improve them;
Communicate directly with disadvantaged firms about contracting opportunities and how to succeed in bidding for PHA work;

Maintain a list of disadvantaged firms and notify them of planned procurement activities; and

Consider partnering with other PHAs, other local governments and other groups.

In addition, HUD’s example procurement policy for a PHA provided in Appendix q of the Handbook includes a section titled Assistance to Small and Other Businesses. It lists activities identified above, plus that, “Goals shall be established periodically for participation by small businesses, minority-owned businesses, women-owned business enterprises, labor surplus area businesses, and Section 3 business concerns in prime contracts and subcontracting opportunities.”

The example procurement policy defines small businesses using U.S. Small Business Administration size standards. It also provides the following definitions of minority- and women-owned firms:

- Minority-owned businesses, including but not limited to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Asian Indian Americans and Hasidic Jewish Americans; and

- Women’s business enterprises.

The example includes a Disadvantaged Business Enterprise Resource List, including SBDCs, WBCs, MBDCs, Native American BDCs and use of federal Central Contractor Registration for lists of small businesses.

**AHA outreach efforts.** MBE/WBE outreach efforts related to contracts with AHA include:

- Vendor list/vendor outreach;
- Advertisement in MBE/WBE-focused media;
- Participation in MBE/WBE supplier events (20+ in FY 2016);
- Solicitation of bids from MBE/WBEs; and
- Reports on MBE participation as primes/subs on AHA-awarded contracts.

Those efforts are not extended to contracts awarded by PMDs or developers. At the time of this report, AHA written policies in its Administrative Operational Manual concerning property managers included the following:

- Property managers are not subject to HUD rules under 24 CFR 85.36(c) and (d);

- They must maintain written procurement process that ensures open and competitive process, applicable provisions of 24 CFR Section 85.36 and other applicable regulations; and

- They must submit written procurement process to AHA for review and approval.
Additionally, AHA’s Administrative Operational Manual provides that “AHA shall monitor at least annually outside contractors’ compliance with MBE and WBE requirements.”

The AHA Manual (in 4.10.A and 13.1.C) also states that developers are not subject to AHA Procurement Policy or 24 CFR Section 85.36 except where AHA “exercises significant functions within the owner entity with respect to managing the development of the proposed units.” At the time of this report, however, there was a solicitation for developers that referred to a small business program element.

**Examples of programs from other large public housing authorities and from Atlanta area local governments.** Keen Independent reviewed MBE/WBE outreach programs and related efforts from large public housing authorities across the country. The study team also examined programs implemented by local governments in the Atlanta area.

**Public housing authority programs.** Many public housing authorities make efforts to communicate bidding opportunities, unbundle opportunities into smaller contracts (see Philadelphia Housing Authority efforts as an example), and perform other steps to encourage MBE/WBE interest in their procurements. Many housing authorities have adopted overall MBE and WBE goals (often 20% and 10%, which mirrors historic HUD goals). In addition, some large public housing authorities have implemented MBE/WBE contract goals programs to encourage participation of minority- and women-owned firms in their contracts (Baltimore, Chicago, New York City and Philadelphia as well as the Cuyahoga Metropolitan Housing Authority are examples).

**Programs operated by local governments in the Atlanta area.** Some cities and counties in the Atlanta area have implemented similar MBE/WBE or small business contracts (SBE) goals programs. Such agencies include the City of Atlanta and Clayton County.

State and local transportation agencies receiving U.S. Department of Transportation funds operate the Federal Disadvantaged Business Enterprise (DBE) Program for contracts using USDOT funds. This program has elements similar to a local government MBE/WBE contract goals program.

**Elements of an SBE or MBE/WBE contract goals program.** To operate a contract goals program, the public agency sets a goal for SBE or MBE/WBE participation in a contract in terms of the percentage of total contract dollars to go to SBEs or MBE/WBEs. The agency requires prime contractors bidding or proposing on that contract to meet the goal or show good faith efforts to do so. To meet a goal, the bidder typically must specify the SBEs or the MBE/WBEs it commits to using as subcontractors or suppliers on the contract if awarded the work. The agency must then monitor SBE or MBE/WBE participation over the life of the contract to ensure that the prime contractor fulfills the goal. These programs have flexibility and waivers if for some reason a company cannot meet the goal with the subcontractors identified at time of bid.

Typically, the SBE or MBE/WBEs meeting the contract goals must be certified as such by the state or local government operating the program, but some public agencies use certifications from other state or local governments within the same marketplace.

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9 In 13.2.1 of AMS Administrative Operational Manual.
When setting a contract goal, a jurisdiction first considers whether an upcoming contract is suitable for a goal and, if so, it determines the level of SBE or MBE/WBE participation achievable for the contract. Goals might be higher on contracts with substantial subcontracting opportunities and lower on contracts that have less subcontracting potential.

The City of Atlanta, for example, operates both an SBE contract goals program and an MBE/FBE (female-owned business) program, setting either an SBE contract goal or an MBE and an FBE goal (one goal for MBEs and a separate goal for FBEs) on a particular contract. Firms submitting bids or proposals for such a contract need to meet the contract goal(s) or show good faith efforts to do so.

Some jurisdictions count the prime contractor’s SBE or MBE/WBE status toward meeting the goal (Chicago Housing Authority is one example).

**Bid preference or preference points.** Bid preference and preference point programs encourage SBE or MBE/WBE use as prime contractors, consultants and vendors in a public agency’s direct procurements. DeKalb County has bid preferences and Clayton County awards preference points to SBEs when evaluating bids and proposals submitted for certain procurements. A small business that is not the low bidder can still be awarded a procurement if its bid is within a certain percentage of the low bid. Preference points systems give points to proposals from SBEs (for example, 5 points out of 100 given for SBE status when evaluating proposals or qualifications).

New York City has a preference program for MBEs in its selection of developers.

The discussion above is limited to SBE or MBE/WBE preference points. Receipt of federal funds and other legal risks make it problematic for a public housing authority to provide preferences based on geographic location.

**Contract compliance.** Whether or not an entity has an overall aspirational goal that PMDs and developers help it meet or sets MBE/WBE or SBE contract goals, agencies such as AHA typically have one or more staff responsible for monitoring compliance with the program. For example, contract compliance staff ensure that MBE/WBE and/or SBE participation reports are submitted by PMDs, developers and other firms working for the housing authority. These responsibilities can be combined with other contract compliance functions such as Davis-Bacon monitoring.

**Summary.** SBE and MBE/WBE programs typically include contract goals programs but sometimes include bid and proposal preferences and other encouragement for SBEs and/or MBE/WBEs. As noted previously in this report, and in Appendix A, SBE programs are more easily defended by the enacting jurisdiction.
7. Conclusions

Based on quantitative and qualitative evidence in this report, it appears there is not a level playing field for minority- and women-owned firms in the Atlanta area marketplace. This context is important as AHA considers efforts to further address potential barriers to MBE/WBE participation in AHA-related contracts.

In its own direct contracting, AHA has been successful in encouraging utilization of minority- and women-owned firms. MBE/WBE participation in AHA-awarded contracts (44%) exceeded the level expected from the availability analysis. Even so, additional outreach might be useful.

- AHA might consider additional efforts to inform small businesses, including MBE/WBEs, about AHA bid opportunities and assist firms in bidding, two areas of assistance mentioned by businesses interviewed in the study.

- AHA might focus certain additional outreach to firms owned by small businesses that had little participation in AHA contracts during the study period, including Asian-Pacific American-, Hispanic American- and Native American-owned businesses.

- Some housing authorities have emphasized small contracts programs (Philadelphia, for example), which AHA might consider. These housing authorities have broken larger procurements into smaller components and then encouraged small firms to bid as prime contractors.

- Improvements to its tracking and monitoring systems are needed if AHA seeks comprehensive information about future MBE/WBE participation in its contracts.

Keen Independent identified disparities in the utilization of MBEs and WBEs for contracts awarded by PMDs and developers. Even though PMDs achieved 35 percent participation of MBE/WBEs in their contracts, this result appears less than what may be possible from PMDs. Developer utilization of minority- and women-owned firms on their contracts (23%) was below what may be possible from those firms.

AHA might consider the following steps regarding PMDs and developers:

- AHA might encourage PMDs and developers on AHA-related properties to conduct outreach efforts, including those that have proven effective for AHA. AHA has not had such requirements in the past and would need to examine whether it could change certain policies to implement these measures.

- Systems are needed to track and report MBE/WBE participation in contracts awarded by PMDs and developers, including related subcontracts.

- AHA has been able to achieve substantial MBE/WBE participation on its own contracts without contract goals or preferences. If PMDs and developers implement outreach efforts and find that such measures are not effective in eliminating disparities in those contracts, AHA might evaluate whether other efforts, such as contract goals, are appropriate in light of state, local and federal laws.
- AHA might also consider immediately developing an SBE contract goals program or similar economic-based program. As part of any subcontract goals program, AHA would need to identify what certifications it will accept from other agencies, or create and staff its own certification process.

- AHA should more robustly monitor compliance concerning MBE/WBE outreach as it should do for HUD Section 3 requirements pertaining to Section 3 residents and businesses. AHA will need to invest in its compliance and audit capabilities in order to meet these federal requirements.

Additional information about the legal framework for the study, data collection and analytical methods, and quantitative and qualitative information from research concerning the Atlanta area marketplace can be found in Appendices A through J of this report.
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Legal Framework and Analysis
Prepared by Holland & Knight LLP
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APPENDIX A.
Legal Framework and Analysis

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned business enterprise (“MBE/WBE”) programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program, which DBE Program recently was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act), and the implementation of the Federal DBE Program by local and state governments. The appendix provides a summary of the legal framework for the disparity study as applicable to the Atlanta Housing Authority (“AHA”).

Appendix A begins with a review of the landmark United States Supreme Court decision in City of Richmond v. J.A. Croson. 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, (“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, MBE/WBE/DBE programs, and the strict scrutiny analysis. This analysis reviews in Section D below recent Eleventh Circuit Court of Appeals decisions that are instructive to the AHA and the study, which is in the Eleventh Circuit. 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 AHA and the study.

In addition, the analysis reviews in Section F below recent federal cases that have considered the validity of the Federal DBE Program and its implementation by local or state government agencies and the validity of local and state DBE programs, including: Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al. Western States Paving Co.

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5 Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187, (9th Cir. 2013).
The analyses of these and other recent cases summarized below are instructive to the AHA and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

**B. U.S. Supreme Court Cases**


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

   The Supreme Court held the City of Richmond’s “set-aside” action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the “strict scrutiny” standard, generally applicable to any race-based classification, which requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination and that any program adopted by a local or state government must be “narrowly tailored” to achieve the goal of remedying the identified discrimination.
The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.” The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors. The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

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

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII. 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.”

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.” 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.

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.” 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

17 488 U.S. at 500, 510.
18 488 U.S. at 480, 505.
19 488 U.S. at 507-510.
22 488 U.S. at 502.
23 Id.
24 488 U.S. at 509.
contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”

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.” “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.”

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.”


In Adarand I, the U.S. Supreme Court extended the holding in Croson and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

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

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25 Id.
26 488 U.S. at 509.
27 Id.
28 488 U.S. at 492.
C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs

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

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. 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.

a. The Compelling Governmental Interest Requirement.

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

It is instructive to the study 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

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29 Croson, 448 U.S. at 492-493; Adarand Constructors, Inc. v. Pena (Adarand I), 515 U.S. 200, 227 (1995); See Fisher v. University of Texas, 133 S.Ct. 2411 (2013) ; AGC, SDC v. Caltrans, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); Northern Contracting, 473 F.3d at 721; Western States Paving, 407 F.3d at 991; Sherbrooke Turf, 345 F.3d at 969; Adarand VII, 228 F.3d at 1176; W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999).

30 Adarand I, 515 U.S. 200, 227 (1995); 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, 199 F.3d 206 (5th Cir. 1999); Emergency 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 (“C-AEP I”), 6 F.3d 990 (3d Cir. 1993); Geiger Signal, Inc., 2014 WL 1309092.

31 Id.

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

33 See, e.g., Concrete Works I, 36 F.3d at 1520.
minority-owned construction businesses, and of barriers to entry.\textsuperscript{34} 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).\textsuperscript{35} 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.\textsuperscript{36}

- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.\textsuperscript{37}

- **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.\textsuperscript{38}

- **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.\textsuperscript{39}

- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted

\textsuperscript{34} 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; Geyer Signal, Inc., 2014 WL 1309092.
\textsuperscript{35} 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.
\textsuperscript{36} 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.
\textsuperscript{37} Adarand VII. at 1170-72; see DynaLantic, 885 F.Supp.2d 237.
\textsuperscript{38} Id. at 1172-74; see DynaLantic, 885 F.Supp.2d 237; Geyer Signal, Inc., 2014 WL 1309092.
\textsuperscript{39} Adarand VII, 228 F.3d at 1174-75; see Sherbrooke Turf, 345 F.3d at 973-4.
surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.\textsuperscript{40} Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.\textsuperscript{41}

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.\textsuperscript{42} If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.\textsuperscript{43} The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”\textsuperscript{44}

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.\textsuperscript{45} It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.\textsuperscript{46} In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”\textsuperscript{47}

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”\textsuperscript{48} “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


\textsuperscript{41} Id. at § 1101(b)(1).

\textsuperscript{42} See AGC, SDC v. Caltrans, 713 F.3rd at 1195; H. B. Rowe Co., Inc. v. NCDOT, 615 F.3d 233, 241-242 (4th Cir. 2010); Rathe 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’s Contractors Ass’n, 122 F.3d at 916; Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997); Geyer Signal, Inc., 2014 WL 1309092; DynaLantic, 885 F.Supp.2d 237, 2012 WL 3356813; Herschell Gill Consulting Engineers, Inc. v. Miami Dade County, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

\textsuperscript{43} Adarand VII, 228 F.3d at 1166; Eng’s Contractors Ass’n, 122 F.3d at 916; Geyer Signal, Inc., 2014 WL 1309092.

\textsuperscript{44} See, e.g., Adarand VII, 228 F.3d at 1166; Eng’s 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.

\textsuperscript{45} Id.; 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.


\textsuperscript{47} Croson, 488 U.S. at 500; see e.g., H. B. Rowe Co., Inc. v. NCDOT, 615 F.3d 233, 241-242 (4th Cir. 2010); Sherbrooke Turf, 345 F.3d at 971-972; Geyer Signal, Inc., 2014 WL 1309092.

\textsuperscript{48} Midwest Fence, 2015 WL. 1396376 at *7 (N.D. Ill. 2015), affirmed, 2016 WL 6543514 (7th Cir. 2016); see, e.g., 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).
locality or the locality’s prime contractors.” Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored. 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. 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.

To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence. 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. Conjecture and unsupported criticisms of the government’s methodology are insufficient. The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government’s showing.

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.’” It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 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

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49 Midwest Fence, 2015 W.L. 1396376 at *7, quoting Concrete Works, 36 F.3d 1513, 1522 (quoting Croson, 488 U.S. at 509); see also, Sherbrooke Turf, 345 F.3d at 973.
50 Croson, 488 U.S. at 509; see, e.g., AGC, SDC v. Caltrans, 713 R.3d at 1196; Midwest Fence, 2015 WL 1396376 at *7, affirmed, 2016 WL 6543514 (7th Cir. 2016).
53 Id.; Adarand V/II, 228 F.3d at 1166.
54 See e.g., H.B. Rowe v. North Carolina DOT (4th Cir. 2010), 615 F.3d 233, at 241-242; Concrete Works, 321 F.3d 950, 959 (quoting Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1175 (10th Cir. 2000)); Midwest Fence, 2015 W.L. 1396376 at *7, affirmed, 2016 WL 6543514 (7th Cir. 2016); see also, Sherbrooke Turf, 345 F.3d at 971-974; Geyer Signal, Inc., 2014 WL 1309092.
55 Id. H. B. Rowe Co., Inc. v. NCDOT, 615 F.3d 233, 241-242; See e.g., Engineering Contractors, 122 F.3d at 916; Contractors Association of E. Pa., Inc. v. City of Philadelphia, 6 F.3d 990, 1007 (3d Cir. 1993); Coastal Construction, Co. v. King County, 941 F.2d 910, 921 (9th Cir. 1991).
56 Id; H. B. Rowe Co., Inc. v. NCDOT, 615 F.3d 233, 241-242; Midwest Fence, 2016 WL 6543514 (7th Cir. 2016); see also, Sherbrooke Turf, 345 F.3d at 971-974; Geyer Signal, Inc., 2014 WL 1309092.
57 Midwest Fence, 2016 WL 6543514 (7th Cir. 2016); H.B. Rowe Co., 615 F.3d at 241; see e.g., Concrete Works, 321 F.3d at 958.
such subcontractors by the governmental entity or its prime contractors.\textsuperscript{60} It has been further held that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.\textsuperscript{61}

**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).\textsuperscript{62} “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.”\textsuperscript{63}

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.\textsuperscript{64} 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.\textsuperscript{65} However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.\textsuperscript{66}

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.\textsuperscript{66} There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered.\textsuperscript{67} “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”\textsuperscript{68}

\textsuperscript{60} *Croson*, 488 U.S. 509, see e.g., *H.B. Rowe*, 615 F.3d at 241.

\textsuperscript{61} *H.B. Rowe*, 615 F.3d at 241, *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see e.g., *AGC, San Diego v. Caltrans*, 713 F.3d at 1196.

\textsuperscript{62} See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-723; *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); *Geyer Signal, Inc.*, 2014 WL 1309092; see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).


\textsuperscript{64} *Croson*, 448 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rathe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* ("Concrete Works II"), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

\textsuperscript{65} See, e.g., *Croson*, 448 U.S. at 509; *AGG, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rathe*, 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); see also *Western States Paving*, 407 F.3d at 1001.

\textsuperscript{66} *Western States Paving*, 407 F.3d at 1001.


\textsuperscript{68} *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..."
Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.\textsuperscript{70}

Disparity index. An important component of statistical evidence is the “disparity index.”\textsuperscript{71} 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.”\textsuperscript{72}

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.\textsuperscript{73}

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.\textsuperscript{74} But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.\textsuperscript{75} 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.\textsuperscript{76}


\textsuperscript{71} See \textit{AGC, SDC v. Caltrans}, 713 F.3d at 1191-1197; \textit{Eng’g Contractors Ass’n}, 122 F.3d at 912; \textit{N. Contracting}, 473 F.3d at 717-720; Sherbrooke Turf, 345 F.3d at 973.

\textsuperscript{72} \textit{Eng’g Contractors Ass’n}, 122 F.3d at 914; \textit{W.H. Scott Constr. Co. v. City of Jackson}, 199 F.3d 206, 218 (5th Cir. 1999); \textit{Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia}, 6 F.3d 990 at 1005 (3rd Cir. 1993).

\textsuperscript{73} \textit{Eng’g Contractors Ass’n}, 122 F.3d at 914; \textit{W.H. Scott Constr. Co. v. City of Jackson}, 199 F.3d 206, 218 (5th Cir. 1999); \textit{H.B. Rowe Co.}, 615 F.3d 233, 243-244; \textit{Rotha}, 545 F.3d at 1041; \textit{Eng’g Contractors Ass’n}, 122 F.3d at 914, 923; \textit{Concrete Works I}, 36 F.3d at 1524.

\textsuperscript{74} \textit{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.; \textit{Peightal v. Metropolitan Eng’g Contractors Ass’n}, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in \textit{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.

\textsuperscript{75} \textit{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.; \textit{Peightal v. Metropolitan Eng’g Contractors Ass’n}, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in \textit{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.

\textsuperscript{76} \textit{Concrete Works I}, 36 F.3d at 1520.
Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets. 77

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. 78

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 Eleventh Circuit, 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. 79

77 See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197; Northern Contracting, 2005 W1. 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 V'I, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see Eng's 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).

78 See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197; Concrete Works II, 321 F.3d at 989; Eng's Contractors Ass'n, 122 F.3d at 924-26; Cone Corp., 908 F.2d at 915; Mountain West Holding, 2014 WL 668734, appeal pending, Northern Contracting, Inc. v. Illinois, 2005 W1. 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), affirmed 473 F.3d 715 (7th Cir. 2007).

79 See, e.g., Midwest Fence, 2016 WL 6543514 (7th Cir. 2016); AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; H. B. Rawe, 615 F.3d 233, 252-255; Rothe, 545 F.3d at 1036; Western States Paving, 407 F.3d at 993-995; Sherbrooke Turf, 345 F.3d at 971;
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 local and state 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.

In holding the Federal DBE regulations were narrowly tailored, the courts have stated those regulations “place strong emphasis on ‘the use of race-neutral means to increase minority business participation in government contracting’.”

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.” Courts, including the Supreme Court, 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.”

Similarly, the Sixth Circuit Court of Appeals in Associated Gen. Contractors v. Drabik (“Drabik II”), stated: “Adarand teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting … or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”

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80 See, e.g., Midwest Fence, 2016 WL 6543514 (7th Cir. 2016); AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; H. B. Rowe, 615 F.3d 233, 252-255; Western States Paving, 407 F.3d at 998; Sherbrooke Turf, 345 F.3d at 971; Adarand VII, 228 F.3d at 1181; Kernbass 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.

81 Sherbrooke Turf, Inc., 345 F.3d at 972, quoting Adarand Constrs., Inc., 515 U.S. at 237-38; see, e.g., Midwest Fence, 2016 WL 6543514 (7th Cir. 2016).

82 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 at 1354, 1380 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000).


The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*\(^\text{85}\) 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.”\(^\text{86}\) The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs, or in connection with determining appropriate remedial measures to achieve legislative objectives.

**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 remediating identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts, including the Eleventh Circuit, require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.\(^\text{87}\) 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.\(^\text{88}\)

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.”\(^\text{89}\)

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;

\(^{87}\) See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1199; H.B. Rown, 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; Coral Constr., 941 F.2d at 923.
\(^{88}\) 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; *Verdi*, 135 Fed. Appx. At 268.
\(^{89}\) *Croson*, 488 U.S. at 509-510.
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- 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.\(^90\)

The courts, including the Eleventh Circuit, 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. \(^91\)

**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.\(^92\) For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;\(^93\) (2) good faith efforts provisions;\(^94\) (3) waiver provisions;\(^95\) (4) a

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\(^90\) 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 V/II*, 228 F.3d 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; 49 CFR § 26.51(b).


\(^92\) *Midwest Fence*, 2016 WL 6543514 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, 252-255; *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).

\(^93\) *Midwest Fence*, 2016 WL 6543514 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

\(^94\) *Midwest Fence*, 2016 WL 6543514 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.
2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Eleventh Circuit, apply intermediate scrutiny to gender-conscious programs.

The Eleventh Circuit and other courts have interpreted this standard to require that gender-based classifications be:

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

2. Substantially related to the achievement of that underlying objective.

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.

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. 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.

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96 Id., Sherbrooke Turf, 345 F.3d at 971-973.
97 Id.
98 AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; H.B. Rowe, 615 F.3d 233, 252-255; Western States Paving, 407 F.3d at 998; Sherbrooke Turf, 2001 WL 150284 (unpublished opinion), affirmed 345 F.3d 964 (8th Cir 2003); AGC of Ca., 950 F.2d at 1417.
99 H.B. Rowe, 615 F.3d 233, 252-255; Sherbrooke Turf, 345 F.3d at 971-972; Peightal, 26 F.3d at 1559.
100 Coral Constr., 941 F.2d at 925.
101 See generally, AGC, SDC v. Caltrans, 713 F.3d at 1195; H.B. Rowe, 615 F.3d 233, 252-255; Western States Paving, 407 F.3d at 990 n. 6; Coral Constr. Co., 941 F.2d at 931-932 (9th Cir. 1991); Equal. Found. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); Eng’g Contractors Ass’n, 122 F.3d at 905, 908, 910; Ensley Branch N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994); see also U.S. v. Virginia, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”); Geyer Signal, Inc., 2014 WL 1309092.
102 Id.
103 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.
104 H. B. Rowe, 615 F.3d 233, 242 (4th Cir 2010).
105 Coral Constr. Co., 941 F.2d at 931-932; See Eng’g Contractors Ass’n, 122 F.3d at 910.
The Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”

3. Rational basis scrutiny 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. When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court inquires 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.

Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.” “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.” 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.”

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.” Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”

A small business program may be challenged on the ground that it violates equal protection by treating similarly situated businesses differently based on their size. “The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way.” However, because such an economic program would involve a classification implicating neither a suspect class (e.g., race, gender, ethnicity) nor a fundamental right (e.g., freedom
of speech, religion, right to privacy), it appears courts would apply a rational basis test in evaluating the constitutionality of a small business program.

If a law distinguishes among groups on the basis of a suspect classification or burdens the exercise of a fundamental right, the government must demonstrate that the regulation is necessary to further a compelling state or governmental interest and is the least drastic means available to further that interest under the strict scrutiny test.115

But “[a] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”116

The Georgia Supreme Court has held that under “the rational basis test, a court will uphold the statute if, under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship to a legitimate end of government not prohibited by the Constitution.”117 Georgia courts have applied the rational basis test to economic regulations when no fundamental right and no suspect class was involved.

For example, in Allied Chemical Corp., certain industrial consumers of electrical energy brought an action challenging the restructuring of electrical rates to charge industrial consumers at a higher rate than residential consumers.118 The plaintiffs contended that the new rates unjustifiably discriminated against industrial consumers in violation of the equal protection guarantees of the state and federal constitutions.119

The Georgia Supreme Court held that “[b]ecause rate making is a legislative act, our test under an equal protection analysis of this economic regulation matter is whether there was a rational basis for the differing rate treatment … and the rate must be approved unless we find it to be without a rational basis.”120 The court concluded that Georgia Power’s evidence regarding increased costs of providing electrical energy to industrial consumers and other market research provided a rational basis to justify the differential rates.121

In Ga. Dep’t of Human Resources v. Sweat, the plaintiff challenged Georgia’s statutory child support guidelines on the ground that they violated equal protection guarantees by placing different burdens on individuals who, “but for the award of child custody,” are similarly situated.122 The court held that because the statutory support guidelines did not infringe upon a fundamental right and the

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119 Id., 236 Ga. at 550, 224 S.E. 2d at 398.

120 Id., 236 Ga. at 552, 224 S.E. 2d at 399.

121 Id., 236 Ga. at 552-556, 224 S.E. 2d at 399-402.

complaining party was not a member of a suspect class, such guidelines were evaluated under the rational basis test.\footnote{123}

The court noted, “[i]n the arena of social welfare and economics, a statute is not rendered unconstitutional merely because its classifications are imperfect; if the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”\footnote{124} Only if the means adopted, or the resultant classifications, are not relevant to the government’s reasonable objective, or altogether arbitrary, does the statute offend due process.\footnote{125}

The court found the guidelines did not violate equal protection when they were designed to further the important and highly reasonable objective of ensuring that adequate support is provided to Georgia’s children whose parents have divorced or separated.\footnote{126} Also, the court concluded the guidelines’ means of determining the amount of support to be paid were not arbitrary and capricious, but based on the non-custodial parent’s income.\footnote{127}

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. \textit{Firstline Transportation Security, Inc. v. United States}, is instructive and analogous to some of the issues in a small business race-ethnic-gender-neutral program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations (“FAR”).\footnote{128}

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

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.\footnote{130} The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”\footnote{131}

\begin{footnotes}
\item[123] Id., 276 Ga. at 628-631, 580 S.E. 2d at 210-212.
\item[124] Id., 276 Ga. at 629-631, 580 S.E. 2d at 210-212.
\item[125] Id.
\item[126] Id.
\item[127] Id.
\item[128] 2012 WL 5939228 (Fed. Cl. 2012).
\item[129] Id.
\item[130] Id.
\item[131] Id.
\end{footnotes}
The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors ….” Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.\textsuperscript{132} The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns…the maximum practicable opportunity to participate as subcontractors ….”\textsuperscript{133}

4. Small Business Enterprise Programs

It appears there is no specific Georgia statutory procurement law that expressly prohibits or authorizes implementation of a small business program in connection with the award of contracts.

Georgia courts have interpreted legislation requiring that contracts be awarded to the “lowest and/or best bidder” to have the purpose of ensuring that public contracts are awarded without favoritism and at the lowest price consistent with the reasonable quality and expectation of completion.\textsuperscript{134} Additionally, Georgia courts have held statutes requiring that contracts be awarded to the lowest responsible bidder do not permit consideration of any other factors in the award of such contracts, which may potentially include providing preferences in the award of certain contracts to small businesses.\textsuperscript{135}

Legislation to expressly permit consideration of small business status in awarding contracts. Georgia courts have held that the consideration of criteria in awarding government contracts based on factors other than those specified in existing legislation is not permitted. In \textit{Georgia Branch Associated General Contractors of America, Inc. v. City of Atlanta}, the Georgia Supreme Court held that the City of Atlanta’s minority and female business enterprise ordinance was void since its implementation would directly conflict with the City Charter requirement that contracts go to “lowest and/or best bidder,” when the Charter requirement did not expressly provide for consideration of the fact that a bidder was a minority or female business enterprise in awarding contracts.\textsuperscript{136}

Likewise, in \textit{S.J. Groves & Sons Co. v. Fulton County}, the court held that the County’s minority business enterprise program violated Georgia’s low-bid statute when that statute did not expressly provide for consideration of a bidder’s minority business enterprise status in awarding government contracts.\textsuperscript{137} The court held the County’s consideration of any factor other than whether a contractor was the lowest responsible bidder violated the state regulatory scheme governing such procurements.\textsuperscript{138}

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{135} See id. See also \textit{S.J. Groves & Sons Co. v. Fulton County}, 920 F.2d 752 (11th Cir. 1991).
\textsuperscript{137} 920 F.2d 752 (11th Cir. 1991).
\textsuperscript{138} Id. at 762-63.
In *Hilton Construction Co. v. Rockdale County Board of Education*, the court held that under state school board regulations providing that projects using state funds will be awarded to the responsible bidder submitting the lowest acceptable bid, the county board of education was not authorized to reject a construction contractor’s bid on the basis that contractor was “unknown.” Based on the state school board regulations, whether the proposed bidder was “known” or “unknown” was not a factor expressly permitted to be considered in the award of contracts to the lowest responsible bidder.

At present, the provisions governing procurement in the AHA Procurement Policy do not expressly permit the consideration of a bidder’s small business enterprise status in the award of government contracts. Based on the precedent in Georgia case law holding invalid procurement programs that provide for consideration of factors other than those expressly permitted by legislation, AHA may need to enact specific provisions in its procurement policy and possibly obtain state legislation permitting the consideration of small business preferences or a bidder’s or proposer’s small business status in the award of AHA contracts.

**Small business programs that may be interpreted as restraints on competition.** Although small business programs appear to be legally defensible with appropriate legislation, it is important to note that the implementation of a small business *set-aside* program may face legal challenges on the ground that such a program constitutes a restraint on competition. For example, a 1980 Georgia Attorney General opinion concluded that the Georgia Department of Transportation (GDOT) could not establish a set-aside program whereby certain jobs or parts of jobs were reserved to be bid upon exclusively by a designated class of contractors because of the restraint on competition.

In the opinion, GDOT requested advice from the Office of the Attorney General regarding the establishment of a “set-aside program.” GDOT desired to establish a program whereby certain jobs or parts of jobs would be reserved to be bid upon exclusively by a “designated class of contractors.” As used in the opinion, the term “designated class of contractors” means a category of contractors established by criteria which were not job related.

The Office of the Attorney General responded that Article III, Section VIII, Paragraph VIII of the Georgia Constitution declares illegal and void all contracts and agreements which may have the effect, or be intended to have the effect, of defeating or lessening competition or encouraging monopoly. Thus, the Attorney General found GDOT’s proposed set-aside program would

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139 245 Ga. 533, 266 S.E.2d 157 (1980).
141 This provision is now found at art. III, § VI, ¶ V of the Georgia Constitution, which was last amended in 1983. In addition to the limitations on the General Assembly, this provision provides that the General Assembly shall have the power to authorize and provide by general law for judicial enforcement of contracts or agreements restricting or regulating competitive activities between or among: (a) employers and employees; (b) distributors and manufacturers; (c) lessors and lessees; (d) partnerships and partners; (e) franchisors and franchisees; (f) sellers and purchasers of a business or commercial enterprise; or (g) two or more employers. However, the language from the Georgia Constitution of 1976 regarding the lessening of competition which was central to the 1980 Attorney General opinion remains largely unchanged: “the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, which is hereby declared to be unlawful and void.” See Ga. Const. art. III, § VI, ¶ V (1983). Compare Ga. Const. art. III, § VIII, ¶ VIII (1976) (“All contracts and agreements, which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement.”)
likewise tend to defeat or lessen competition and any contract entered into pursuant to such a program would be null and void.

The Attorney General opinion also stated that because the General Assembly could not bestow upon GDOT powers, that are withheld from it by the Constitution, the General Assembly, consequently, would have no power to authorize any such contract or agreement. The Attorney General said that GDOT was created by the General Assembly and received its powers from the body. One of the powers provided was the power to contract for the construction or maintenance of public roads in such manner as provided by law, and under the law the contract must be awarded to the lowest reliable bidder. The Attorney General noted that where the government offers contracts for public works to the lowest bidder, the public is deeply interested in free competition in the bidding.

The Attorney General opinion also relied upon City of Atlanta v. Stein, in which the court invalidated a city ordinance prescribing that all printing work done for or by the city would be given exclusively to printers who belonged to a particular union. The court found that the ordinance was illegal because it tended to encourage monopoly and defeat competition. The Attorney General concluded that the same reasoning would apply to GDOT’s proposed “set-aside program” in which certain jobs would be reserved to be bid upon exclusively by a designated class of contractors.

It is important to note that while opinions of the Attorney General are persuasive authority, they do not constitute “controlling authority,” on the appellate courts. Nonetheless, according to this 1980 Attorney General opinion, the implementation of a small business set-aside program arguably may require an amendment to the Georgia Constitution that permits a set-aside program to the extent the program is construed to violate art. III, § 6, ¶ V of the Georgia Constitution.

Georgia’s Small Business Assistance Act. Georgia adopted The Small Business Assistance Act in 1975 to promote use of small businesses in state procurement, which has been amended several times and is now known as “The Small Business Assistance Act of 2015.” The legislative intent of the Small Business Assistance Act is declared as follows:

The most important element of the American economic system of private enterprise is free and vigorous competition. Only through the existence of free and vigorous competition can free entry into business and opportunities for personal initiative and individual achievement be assured. The preservation and expansion of such competition is essential for our economic well-being. In order to encourage such competition, it is the declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services for the state be placed with Georgia resident businesses and small businesses so long as the commodities and services of small businesses are competitive as to price and quality.

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142 111 Ga. 789, 793 (1900).
This codified legislative intent is an indication that the state recognizes the importance of small business participation in the award of government contracts. Further, the legislative intent of the Small Business Assistance Act appears to provide a source to assist in establishing a rational basis for the implementation of economic programs that promote and strengthen small business participation in government procurement.

The statutory language provides that it is the “declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts ... be placed with Georgia resident businesses and small businesses ....” Thus, the state appears to make a general finding that the utilization of small businesses in a “fair proportion” is a legitimate government objective.

Under the Small Business Assistance Act of 2012, until July 1, 2015, the term “small business” meant a “Georgia resident” business that was independently owned and operated. In addition, a small business was defined as having either fewer than 399 employees or less than $30 million in gross receipts per year. The Small Business Assistance Act of 2012 also provided that on and after July 1, 2015, the term “small business” as defined by the Small Business Act meant a business that was independently owned and operated and had fewer than 100 employees or less than $1 million in gross receipts per year.

Subsequently, The Small Business Assistance Act of 2015 repealed portions of The 2012 Act and now provides that a “small business” is defined as a business (not a “Georgia resident” business) that is independently owned and operated, and must have fewer than 300 employees or less than $30 million in gross receipts per year.

It should be noted that the definition of “small business” under the Georgia Procurement Manual (GPM) (January 2016) for the Department of Administrative Services also does not include the requirement of “Georgia resident” for an entity to be considered a “small business” for purposes of the Small Business Assistance Act or Georgia state procurement law. In addition, small businesses are provided the opportunity to “price match” or receive up to 5% of the available points in an RFP/RFQ solicitation as defined in Section 3.5.1.6 of the GPM.

Pursuant to O.C.G.A. § 50-5-123 (1975, 1982) of the Small Business Assistance Act, an advisory council is established as follows:

[...] there is created an advisory council to the [Department of Administrative Services] to be composed of representatives of designated small business enterprises to be named as follows: five by the Governor, two each by the President of the Senate and the Speaker of the House of Representatives, and one by the commissioner of administrative services to serve ex officio as chairman of the council. The members of the council shall serve without compensation. The council shall meet at least once monthly, or more often when necessary, at the call of the chairman in consultation with

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149 Section 3.5.1.6 of the GPM provides that the ability to “price match” will only be granted to bidders that are within 5% up to $10,000 of the lowest responsive and responsible bid.
the commissioner of administrative services or his designee who shall also serve without additional compensation as executive director of the council.\textsuperscript{150}

The advisory council’s duties include making a written report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the chairmen of the Senate Committee on Insurance and Labor and the House Economic Development and Tourism Committee at least once each year, no later than December 1. The report shall advise the Governor, the Speaker, the President, and the designated chairmen concerning progress toward achieving the legislative intent as set forth in Code Section 50-5-122 and shall contain such recommendations for legislation as the council provided for deems proper.\textsuperscript{151}

Summary of statutory key elements for small business programs. In reviewing legislation as to how other jurisdictions have established small business programs, certain key elements provided in the legislation for these programs include:

- Provide in legislation that the government is authorized to have a small business program, and that it may use small business status as a factor in competitive bidding on procurement;
- Authorize the use of goals for small business participation;
- Provide for flexibility and use of waivers;
- Authorize consideration of good faith efforts by the bidder or proposer to achieve any goal;
- Use objective, economic criteria to define a small business;
- Provide a specific definition for small businesses that limits and restricts which businesses are eligible, including limitations on gross receipts and number of employees, independently owned and operated, and operated for profit;
- Provide for graduation of small businesses from the program;
- Establish detailed criteria and rules for implementing program;
- Establish incentives and enforcement provisions for contractors and vendors to utilize small businesses, including meeting goals or exercising good faith efforts to meet goals.

5. Section 3 of the Housing and Urban Development Act

24 CFR Part 135 regarding economic opportunities for low-and very low-income persons and Section 3 business concerns provide regulations relating to Section 3 of the Housing and Urban Development Act.\textsuperscript{152} Section 3 applies to training, employment, contracting and other economic

opportunities arising from the expenditure of public housing assistance and community development assistance. The requirements of Section 3 apply to contractors and subcontractors performing work on Section 3 covered projects. Recipients, contractors and subcontractors that receive HUD assistance or other federal assistance are encouraged to provide, to the greatest extent feasible, trading, employment, and contracting opportunities generated by the expenditure of this assistance to low-and very low-income persons, and business concerns owned by low-and very low-income persons, or which employ low-and very low-income persons.

Recipient means any entity that receives Section 3 covered assistance directly from HUD or from another recipient, and includes, but is not limited to, any state, unit of local government, public housing authority or other public body, public or private non-profit organization, private agency or institution, developer, builder, property manager, community housing development organization and others. “Section 3 business concern” means a business concern that is 51 percent or more owned by Section 3 residents; or whose permanent full-time employees include persons, at least 30 percent of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern who were Section 3 residents; or that provide evidence of commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to be awarded to the “Section 3 business concern.”

Section 3 covered assistance includes public housing development assistance, public housing operating assistance, public housing modernization assistance, assistance provided under any HUD housing or community development program that is expended for work arising in connection with housing rehabilitation, housing construction or other public construction. Section 3 covered contract means a contract or subcontract (including a professional service contract) awarded by a recipient or contractor for work generated by the expenditure of Section 3 covered assistance, or for work arising in connection with a Section 3 covered project.

Section 3 covered project means the construction, reconstruction, conversion or rehabilitation of housing, other public construction which includes buildings or improvements assisted with housing or community development assistance. Subcontractor means any entity which has a contract with a contractor to undertake a portion of the contractor’s obligation for the performance of work generated by the expenditure of Section 3 covered assistance, or arising in connection with a Section 3 covered project.

153 24 CFR § 135.3
154 Id.
155 Id., 24 CFR Section 135.3 at (d).
156 24 CFR, Section 135.5.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
The federal regulations provide that recipients and covered contractors may demonstrate compliance with the “greatest extent feasible” requirement of Section 3 by meeting the numerical goals set forth in that section for providing training, employment, and contracting opportunities to Section 3 residents and Section 3 business concerns. Recipients that do not engage in training, or hiring, but award contracts to contractors that will engage in training, hiring, and subcontracting, must ensure that, to the greatest extent feasible, contractors will provide training, employment, and contracting opportunities as Section 3 residents and Section 3 business concerns.

The regulations provide that numerical goals represent minimum numerical targets for training and employment, Section 3 covered public housing programs and for other HUD programs covered by Section 3 in which recipients and their contractors and subcontractors are required to comply with the numerical goals by committing to employ Section 3 residents. Numerical goals set forth in the federal regulations apply to contracts awarded in connection with all Section 3 covered projects and Section 3 covered activities. Each recipient, contractor and subcontractor may demonstrate compliance with the requirements by committing to award to Section 3 business concerns certain numerical goals of a total dollar amount of Section 3 covered contracts.

In addition, federal regulations provide preferences for Section 3 business concerns in contracting opportunities, including order of priority in providing preference, eligibility for Section 3 contracting preference, and a Section 3 business concern’s submission of evidence to the recipient, contractor or subcontractor of its ability to complete contracts. Federal regulations also provide examples of efforts to award contracts to Section 3 business concerns in the Appendix to Part 135, including outreach type efforts; contacting business assistance agencies, minority contractors associations and community organizations to inform them of contracting opportunities; advertising contracting opportunities; providing written notice to Section 3 business concerns of contracting opportunities; coordinating pre-bid meetings informing Section 3 business concerns of contracting and subcontracting opportunities; carrying out workshops; advising Section 3 business concerns as to where they may obtain assistance to overcome limitations such as inability to obtain bonding; lines of credit, financing, and insurance; arranging solicitations to facilitate the participation of Section 3 business concerns; breaking out contract work items into economically feasible units to facilitate participation by Section 3 business concerns; developing a list of eligible Section 3 business concerns; establishing numerical goals for award of contracts to Section 3 business concerns and other efforts. The regulations provide examples of procurement procedures that provide for preference for Section 3 business concerns.

162 24 CFR Section 135.30(a).
163 Id at Section 135.30(a)(3).
164 Id, Section 135.30(b).
165 Id, Section 135.30(c).
166 Id.
167 Id, Section 135.36.
168 Id, Appendix to Part 135 (Section II).
169 Id, Appendix to Part 135 (Section III).
Guidance on MBE/WBE Outreach

I. Minimum Acceptable Outreach Standards

Section 281 of the National Affordable Housing Act requires each participating jurisdiction to prescribe procedures acceptable to the Secretary to establish and oversee a minority outreach program. The program shall include minority and woman-owned businesses in all contracting activities entered into by the participating jurisdiction to facilitate the provision of affordable housing authorized under this Act or any other federal housing law applicable to such jurisdiction. Therefore, minimum HUD standards require that each participating jurisdiction’s outreach effort to minority and women-owned businesses be:

- A good faith, comprehensive and continuing endeavor,
- Supported by a statement of public policy and commitment published in the print media of widest local circulation;
- Supported by an office and/or a key, ranking staff person with oversight responsibilities and access to the chief elected official; and
- Designed to utilize all available and appropriate public and private sector local resources.

II. Guidelines for a Minority/Women Business Outreach Program

Under the minimum HUD standards cited above, the following guidelines are provided for use by participating jurisdictions in implementing outreach programs to ensure the inclusion, to the maximum extent possible, of entities owned by minorities and women. Each participating jurisdiction should:

- Develop a systematic method for identifying and maintaining an inventory of certified minority and women’s business enterprises (MBEs and WBEs), their capabilities, services, supplies and/or products;
- Utilize the local media, electronic and print, to market and promote contract and business opportunities for MBEs and WBEs;
- Develop informational and documentary materials (fact sheets, program guides, procurement forecasts, etc.) on contract/subcontract opportunities for MBEs and WBEs;
- Develop procurement procedures that facilitate opportunities for MBEs and WBEs to participate as vendors and supplies of goods and services;

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171 42 USC § 12831
Sponsor business opportunity-related meetings, conferences, seminars, etc., with minority and women business organizations; and

Maintain centralized records with statistical data on the utilization and participation of MBEs and WBEs as contractors/subcontractors in all HUD-assisted program contracting activities.

Each participating jurisdiction, utilizing the standards and guidelines listed above, shall prescribe procedures and actions it will undertake in implementing a minority and women’s business enterprise outreach program. The above items represent basic outreach-related activities and are not all-inclusive actions a participating jurisdiction may undertake.

GUIDANCE ON SECTION 3

Section 3 of the Housing and Urban Development Act of 1968 (Section 3), as amended by the Section 915 of the Housing and Community Development Act of 1992, requires that economic opportunities generated by HUD financial assistance for housing and community development programs be targeted toward low- and very low-income persons. In effect, this means:

Whenever HUD assistance generates opportunities for employment or contracting, Public and Indian Housing Authorities, state and local grantees, and other recipients of HUD housing assistance funds must, to the greatest extent feasible, provide these opportunities to low- and very low-income persons and to businesses owned by or employing low- and very low-income persons.

The Section 3 requirements apply to job training, employment, contracting and subcontracting and other economic opportunities arising from assistance provided for construction, reconstruction, conversion, or rehabilitation of housing, other buildings, or improvements assisted with housing or community development assistance.

Section 3 applies to:

- Projects for which HUD’s share of project costs exceeds $200,000; and
- Contracts and subcontracts awarded on projects for which HUD’s share or project costs exceeds $200,000, and the contract or subcontract exceeds $100,000.

Recipients whose projects do not fall under Section 3 are nonetheless encouraged to comply with the Section 3 preference requirements.

Recipients and their contractors and subcontractors must direct their efforts to award Section 3 business concerns, to the greatest extent feasible, to Section 3 business concerns.
COMPLIANCE AND RECORDKEEPING

- Numerical goals for meeting the greatest extent feasible requirement:
  - For contracts awarded in connection with Section 3-covered projects, a commitment to award at least 10% of the total dollar amount of contracts for building trades work and at least 30% of the total dollar amount of all other Section 3-covered contracts.

- All recipients of assistance must:
  - Amend their employment and procurement policies to comply with Section 3.
  - Include the Section 3 clause is covered contracts and subcontracts.
  - Document their best efforts to comply with Section 3 and their success at hiring low-income persons.
  - Monitor their own compliance and the compliance of their contractors and subcontractors.
  - Provide annual reports to the Assistant Secretary for Fair Housing and Equal Opportunity as requested.

- Recipients must maintain the following records:
  - The good faith efforts made to make low-income persons aware of the positions, and to encourage and facilitate their application.
  - The number and dollar value of all contracts awarded to businesses and, in particular, Section 3 businesses during the fiscal year.
  - A description of the best efforts made to award contracts to Section 3 businesses.
  - The mechanisms by which they ensured that contractors and subcontractors complied with the Section 3 preferences for training, employment, and contract awarding.


Congress has provided that each participating jurisdiction with regard to providing affordable housing shall prescribe procedures to establish and oversee a minority outreach program within each jurisdiction to ensure the inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including, without limitation, real estate firms, construction firms, appraisal firms, management firms, financial institutions and others, in all contracts, entered
7. Uniform Administrative Requirements for Federal Awards Made by the Department of Housing and Urban Development to Non-Federal Entities

The federal regulations provide that public housing authorities must comply with administrative rules for federal awards to non-Federal entities through the United States Department of Housing and Urban Development.173

24 CFR Section 85.36 (prior to December 2014) provided regulations and standards for procurement. The federal regulations for procurement specifically addressed contracting with small and minority firms and women’s business enterprise firms, as follows:

1. “The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms are used when possible.”

2. “Affirmative steps shall include:

   a. Placing qualified small and minority businesses and women’s business enterprises on solicitation lists;
   b. Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources;
   c. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women’s business enterprises;
   d. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women’s business enterprises;
   e. Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
   f. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e) (2) (i) through (v) of this section.”174

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172 42 U.S.C. § 12831(a) Solicitation of contracts.
174 Id, 24 CFR Section 85.36(c).
On December 19, 2014, a joint interim final rule was issued implementing for all Federal award-making agencies the final guidance Uniform Administrative Requirements for Federal Awards (Uniform Guidance) published by the Office of Management and Budget.\textsuperscript{175}

24 CFR Section 85 was amended as follows:

Part 85—Administrative Requirements For Grants And Cooperative Agreements To State, Local And Federally Recognized Indian Tribal Governments.

“§85.1 Applicability of and cross reference to 2 CFR part 200.

(a) Federal awards with State, local and Indian tribal governments are subject to the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards at 2 CFR part 200.

(b) Federal awards made prior to December 26, 2014 will continue to be governed by the regulations in effect and codified in 24 CFR part 85 (2013 edition) or as provided by the terms of the Federal award. Where the terms of a Federal award made prior to December 26, 2014, state that the award will be subject to regulations as may be amended, the Federal award shall be subject to 2 CFR part 200.”\textsuperscript{176}

2 CFR Part 200, Section 200.321 provides as follows:

“§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

\textsuperscript{175} 79 FR 75871, Dec. 19, 2014. This interim final rule is effective on December 26, 2014.

\textsuperscript{176} 79 FR 76078-76079, Dec. 19, 2014.
(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.”177

8. Pending Cases (at the time of this report)

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


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


It is instructive to note the recent decision in **Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration,**178 which was affirmed on other grounds, by the United States Court of Appeals, District of Columbia Circuit,179 on September 9, 2016.180

Plaintiff Rothe Development, Inc. filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) challenging the constitutionality of the Section 8(a) Program on its face. The Constitutional challenge is nearly identical to the challenge brought in the case of **DynaLantic Corp. v. United States Department of Defense.**181 DynaLantic’s court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional.

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177 2 CFR Section 200.321.
179 2016 WL 4719049.
180 Id.
Plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in *DynaLantic*, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face. The district court in *Rothe* agreed with the court’s findings, holdings and reasoning in *DynaLantic*, and thus concluded that Section 8(a) is constitutional on its face.

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

*Rothe* appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal has just been decided as of the writing of this report. The Court of Appeals in *Rothe* affirmed the district court’s decision but on other grounds.

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

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

This list of pending cases is not exhaustive, but is illustrative of current pending cases that involve challenges to MBE/WBE/DBE programs.

**Ongoing review.** The above represents a brief summary of the legal framework pertinent to implementation of DBE/MBE/WBE, or race-ethnicity- or gender-neutral programs. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

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182 2016 WL 4719049 (September 9, 2016)
184 Id.
185 2016 WL 4719049 at **1-2.
186 Id.
D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Eleventh Circuit Court of Appeals

1. Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County, 122 F.3d 89 (11th Cir. 1997)

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

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

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

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

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

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

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

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

Id. at 903.

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

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

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” Id., citing Croson, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” Id. at 907, citing Enslie Branch, NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying Croson). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” Id. (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in United States v. Virginia, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. Id. at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. Id. at 910.
The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. Id. at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (i.e., evidence based on data related to years following the initial enactment of the BBE program). Id. However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” Id. at 912. A district court should not “speculate about what the data might have shown had the BBE program never been enacted.” Id.

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

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

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

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

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.” Id. at 914. “The utility of disparity indices or similar measures … has been recognized by a number of federal circuit courts.” Id.

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

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

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

The Eleventh Circuit then explained the burden of proof:

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

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

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

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

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

The Eleventh Circuit then summarized:
Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. Id. In anticipation of such an argument, the County conducted a regression analysis to control for firm size. Id. A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and firm size.” Id. (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” Id.

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. Id. The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. Id. The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (i.e., most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). Id. Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. Id. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. Id. The Eleventh Circuit held that this decision was not clearly erroneous. Id.

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

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

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

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

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

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” Id. The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. Id. at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. Id. The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. Id.

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

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

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

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

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

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

The study indicated substantial disparities in 1977 and 1987 but not 1982. \textit{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. \textit{Id.} However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. \textit{Id.} Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. \textit{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. \textit{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.” \textit{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. \textit{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. \textit{Id.} They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. \textit{Id.}

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

\textit{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.} \textit{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. \textit{Id}. at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. \textit{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. \textit{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. \textit{Id}. However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. \textit{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.


Although it is an unpublished opinion, \textit{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 \textit{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 (11\textsuperscript{th} Cir. 2005). Virdi also alleged the school district’s Minority Vendor Involvement Program was facially unconstitutional. \textit{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. \textit{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. \textit{Id}.

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. \textit{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. \textit{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[do] 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),
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.


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.


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.


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”). \textit{Id.} The MBE/WBE programs applied to A&E contracts in excess of $25,000. \textit{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. \textit{Id.} Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. \textit{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. \textit{Id.} at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994.” \textit{Id.}

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. \textit{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.” \textit{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.” \textit{Id.}

Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. \textit{Id.}

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.


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 \textit{Gratz} and \textit{Grutter} did not alter the constitutional analysis as set forth in \textit{Adarand} and \textit{Croson}. \textit{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, “If 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.


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.


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. \textit{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. \textit{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.” \textit{Id., citing Eng’g Contractors Ass’n}, 122 F.3d at 916.

[The district court then set forth the \textit{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. \textit{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. \textit{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. \textit{Id. at 1369}. The court cited \textit{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. \textit{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. \textit{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.” \textit{Id.} However, the court found that the Brimmer-Marshall Study contained no such data. \textit{Id.}

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. \textit{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. \textit{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. \textit{Id.}

The court next considered the County’s post-1994 disparity study. \textit{Id. at 1371}. The study first sought to determine the availability and utilization of minority- and female-owned firms. \textit{Id.} The court explained:

\textit{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. \textit{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).


This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation’s (“FDOT”) program of “setting aside” certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts “set aside” for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT’s claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities “supposedly willing and able to do road maintenance work,” and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in “somebody’s” discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.
E. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal


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 plaintiff’s 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 subcontractors 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. 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. \textit{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. \textit{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. \textit{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. \textit{Id.} The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. \textit{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. \textit{Id.} The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. \textit{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 \textit{quoting Grutter v. Bollinger,} 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina.
Id. at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. Id. at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, citing 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. Id.

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. Id. at 253, citing Adarand Constructors v. Slater, 228 F.3d at 1179 (quoting United States v. Paradise, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. Id.

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. Id. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. Id. The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. Id.

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. Id.
Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. Id.

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State’s compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. Id. at 254.

Women-owned businesses overutilized. The study’s public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. Id. The Court found the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires. Id. at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was “the result of mere chance.” Id. at 255. The Court found troubling the “evidentiary gap” that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. Id. at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. Id.

In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. Id.

The Court pointed out that it did not suggest that the proponent of a gender-conscious program “must always tie private discrimination to public action.” 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. Id. at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data’s probative value in this case. Id.

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not
experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

**Holding.** The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme’s flexibility and responsiveness to the realities of the marketplace, and given the State’s strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State’s application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court’s judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

**Concurring opinions.** It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.


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.* (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. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In Concrete Works the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In Concrete Works, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. Id.
The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures.*Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U.S. 469, 492 (1989) (plurality opinion). Because "an effort to alleviate the effects of societal discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence" supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on "empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality’s prime contractors." *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce "credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities." *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut
Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id., quoting Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*
In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. Id. at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. Id.

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, inter alia, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). Id. at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” Id.

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. Id. The statewide market was used because necessary information was unavailable for the Denver MSA. Id. at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. Id.

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. Id. Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. Id. Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. Id. at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. Id.
The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements … also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. Id.

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. Id. at 968-69.

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

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

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

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

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

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver’s evidence showed that there is pervasive discrimination. Id. at 970. The court, quoting Concrete Works II, stated that “the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination.” Id. at 970, quoting Concrete Works II, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver’s initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that “approaching a prima facie case of a constitutional or statutory violation,” not irrefutable or definitive proof of discrimination. Id. at 97, quoting Croson, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver’s “evidence did not support an inference of prior discrimination and thus a remedial purpose.” Id., quoting Adarand VII, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. Id. at 971. Thus, Denver’s evidence did not suffer from the problem discussed by the court in Croson. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The Croson majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” Id. at 971, quoting Croson, 488 U.S. at 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 remediying 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.* at 976. 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.

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

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

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

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity before they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

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

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 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.


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%, 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 remediying 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% of the total number of contracting firms in the state, but only get 3% 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% 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).

8. W.H. Scott Constr. Co. v. City of Jackson, 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% of all city contracts. 199 F.3d at 208. Id. The 5% 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% because it was found that 10% 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% participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5% 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% of procurement for minority business. Id. at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. Id. at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. Id. The study recommended that the City implement a range of MBE goals from 10-15%. 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% 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% 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%. 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% 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% 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% 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.
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% 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.
9. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

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

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

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

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. Id. at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” Id. The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas … [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” Id. at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited Concrete Works of Colorado v. Denver, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. Id. at 711.

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

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (e.g., inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson*, Co., 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

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

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

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

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

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the
mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” Id. at 1413 quoting Coral Construction, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. Id. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. Id. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” Id. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. Id. at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. Id. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. Id. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. Id. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. Id. The Ninth Circuit stated that in its decision in Coral Construction, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. Id. at 1414, citing to Coral Construction, 941 F.2d at 918 and Croson, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. Id. at 1414, quoting Coral Construction, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. Id at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. Id. The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” Id. at 1415 quoting Coral Construction, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. Id. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. Id.
The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction.” *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative … however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical
scope to the boundaries of the enacting jurisdiction. \textit{Id.} at 1418, \textit{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. \textit{Id.} 1418.

\textbf{11. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)}

In \textit{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 \textit{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. \textit{Id.} The court pointed out that the U.S. Supreme Court in \textit{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.” \textit{Id.} at 918, \textit{quoting Hazelwood School Dist. v. United States}, 433 U.S. 299, 307-08, and \textit{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. \textit{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. \textit{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. \textit{Id.}

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

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

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

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

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

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

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

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

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

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. Id. at 925. Here the court held that King County’s MBE program fails this third portion of “narrowly tailored” requirement. The court found the definition of “minority business” included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. Id. at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. Id. This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. Id. Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. Id.
In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. Id. at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County’s business community. Id. Because King County’s program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. Id. Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

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

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

**Recent District Court Decisions**


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 four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four 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.*
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*.  

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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 fifty 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 four 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 thirty-four 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 four-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.


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 remediating 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.


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

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projects all of which were rejected. \textit{Id.} The court found, however, that he provided no specifics about why he did not receive the work. \textit{Id.}

The VOP. Under the VOP, the City sets annual benchmarks or levels of participation for the targeted minorities groups. \textit{Id.} at 963. The VOP prohibits quotas and imposes various “good faith” requirements on prime contractors who bid for City projects. \textit{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. \textit{Id.} The VOP further imposes obligations on the City with respect to vendor contracts. \textit{Id.} The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} The court found they failed to show any instance in which their race was a determinant in the denial of any contract. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.}

The court stated that the plaintiffs must identify a discriminatory policy in effect. \textit{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. \textit{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. \textit{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. \textit{Id.} Therefore, the court held plaintiffs had no standing to challenge the VOP. \textit{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. \textit{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.


This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, $27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination
by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it
could maintain its certification list and require those contracting with the City to consider unsolicited
bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest
bid. It could also require firms seeking City work to post private jobs above a certain minimum on a
website or otherwise provide public notice …” Id.

The court concluded that other race-neutral means were available to impact credit, high interest rates,
and other potential marketplace discrimination. The court pointed to race-neutral means including
linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other
race-neutral programs referenced included quick pay and contract downsizing; restricting self-
performance by prime contractors; a direct loan program; waiver of bonds on contracts under
$100,000; a bank participation loan program; a 2 percent local business preference; outreach
programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly
suspect, can be used only as a last resort, and cannot be made by some mechanical formulation.
Therefore, the court concluded the City’s MWBE Program could not stand in its present guise. The
court held that the present program was not narrowly tailored to remedy past discrimination and the
discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its
Order, December 29, 2003. The court held that the City had a “compelling interest in not having its
construction projects slip back to near monopoly domination by white male firms.” The court ruled a
brief continuation of the program for six months was appropriate “as the City rethinks the many
tools of redress it has available.” Subsequently, the court declared unconstitutional the City’s MWBE
Program with respect to construction contracts and permanently enjoined the City from enforcing
the Program. 2004 WL 757697 (N.D. Ill 2004).

16. 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.


   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. \textit{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. \textit{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. \textit{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. \textit{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.” \textit{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.” \textit{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. \textit{Id.} at 1240, \textit{citing} to \textit{Associated General Contractors of Ohio, Inc. v. Drabik}, 214 F.3d 730, 735 (6th Cir. 2000) and \textit{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.” \textit{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 “encourage[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” \textit{Id.} In light of \textit{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. \textit{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. \textit{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. \textit{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 remediying 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 remediying 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.


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% and 3%, 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% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% 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 ... [b]ut 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% MBE and 3% WBE for all City contracts with no variation by market. Id. The court found the City simply readopted the 20% MBE and 3% 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% and 3% 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 remediying 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 remediying private discrimination in the private subcontracting inherent in the letting of City construction contracts. Id.

The Fourth Circuit, the court stated, has interpreted Croson to impose a “‘two step analysis for evaluating a race-conscious remedy.’” Id. at 619 citing Maryland Troopers Ass’n, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” Id. at 619, quoting Maryland Troopers Ass’n, 993 F.2d at 1076 (citing Croson).

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that “‘narrowly tailor’ any preferences based on race to meet their remedial goal.” Id. at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:
The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination. Id. at 620, quoting Maryland Troopers Ass’n, 993 F.2d at 1076–77 (citations omitted).

**Intermediate scrutiny analysis.** The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” Id. at 620, quoting Virginia, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” Id. at 620 quoting Virginia, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[ ] official action that closes a door or denies opportunity” on the basis of gender. Id. at 620, quoting Virginia, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” Id. at 620, quoting Virginia, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. Id. at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” Id. at 620, quoting Contractors Ass’n, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” Id. at 620, quoting Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors.” Id. at 620, quoting Contractors Ass’n, 6 F.3d at 1010.

**Preenactment versus postenactment evidence.** In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. Id. at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. Id. at 620-621.

The court noted the Supreme Court in Wygant, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” Id. at 621, quoting Wygant, 476 U.S. at 277.
The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% MBE participation in City construction subcontracts, and for analogous reasons, the 3% 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 & Burrows 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% for MBEs and 3% 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% 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% 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% MBE and 3% 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.


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

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

While this court’s decision related to construction contracts and the Ohio Supreme Court’s decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court’s decision in *Ritchey Produce.* The district court took
the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in 

Ritchey Produce, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a “blatantly unconstitutional program of race-based benefits. Id. at 745.

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

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

(1) Ohio’s MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. Id. at 745.

(2) A program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. Id.

(3) The state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially “worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report.” Id. at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. Id.

(5) The state Supreme Court applied an incorrect rule of law when it announced that Ohio’s program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. Id.

(6) The evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. Id.
Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. \textit{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. \textit{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. \textit{Id.}

\textbf{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. \textit{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”. \textit{Id.} at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in \textit{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”. \textit{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.” \textit{Id.} at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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.

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

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

**Recent Decisions in Federal Circuit Courts of Appeal**


Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants’ DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants’ motions for summary judgment. *Id.* at *1. See Midwest Fence Corp. v. U.S. Department of Transportation, et al., 84 F. Supp. 3d 705 (N.D. Ill. 2015) (see discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit
courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

**Procedural history.** Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT’s implementation of it, and the Tollway’s own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.

2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.

3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

*Id.* at *3-4. Midwest Fence also asserted that IDOT’s implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway’s program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.
Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. Id. at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. Id. at *5.

The court of appeals distinguished its ruling in the Dunnet Bay Construction Co. v. Borggren, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. Id. at *5. The court of appeals held this case is distinguishable from Dunnet Bay because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in Dunnet Bay, Id. at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” Id. at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. Id. at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. Id. Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. Id.

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. Id. at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. Id.

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. Id. Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. Id. The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. Id. at *6 citing Midwest Fence, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. Id.

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. Id. at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. Id. at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. Id. Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. Id.
Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. Id. at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” Id. The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” Id. at *7 quoting United States v. Paradise, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. Id. at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. Id. at *7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. Id. Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). Id. at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. Id.

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. Id. at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. Id. at *8. States are not locked into their initial DBE participation goals. Id. Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. Id.

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. Id. at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. Id. They must stop using race- and gender-conscious measures if those measures are no longer needed. Id.

The court found that the numerical goals are also tied to the relevant markets. Id. at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. Id. at *8, citing § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. Id. at *8.

Midwest Fence “mismatch” argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. Id. at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. Id. A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. Id. at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain
waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, citing § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “only on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, quoting § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with subcontractor dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of total funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, citing § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme
Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. \textit{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. \textit{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. \textit{Id.} First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} at *12. Midwest Fence contends this creates a \textit{de facto} system of quotas because contractors believe they must meet the DBE goal or lose the contract. \textit{Id.} But Appendix A to the regulations, the court noted, cautions against this very approach. \textit{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. \textit{Id.} For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. \textit{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% of prime contractors in the construction field, received 9.13% of prime contracts valued below $500,000 and 8.25% 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% of available subcontractors, and in the construction industry they receive 44.62% of available subcontracts, but those subcontracts amounted to only 10.65% 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% 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%.

**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% 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% 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.*


Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. *(See 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (See summary of district decision in Section E. below).* 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. 2015 WL 4934560 at *1. 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%. Id. at *2. 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 *3. 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 *3. 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 *3-1. 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%. Id. at *5. 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 *5. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. Id. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. Id. at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. Id. at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. Id. at *8, *17. 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 *9, *17. Dunnet Bay did meet the 22.77% 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 *9. 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 *31. 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 *10. (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 *10. Nothing in IDOT’s DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* at *13. 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.*

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 *13. 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 *14. 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 28.

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 *15. 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.*

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 *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* at *16. 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.* 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 *17. 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.* at *17.

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. 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 *17-18.

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 *18. 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 *19,* 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 *19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract’s DBE participation goal at 22% 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. \textit{Id.}

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was “arbitrary” and that IDOT manipulated the process to justify a preordained goal. \textit{Id.} at *20. 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. \textit{Id.} Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. \textit{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. \textit{Id.}

The FHWA approved IDOT’s methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. \textit{Id.} at *20. 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. \textit{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. \textit{Id.} at 20.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. \textit{Id.} at *20. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. \textit{Id.} The court stated that IDOT’s record of granting waivers refutes any suggestion of a no-waiver policy. \textit{Id.}

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. \textit{Id.} at *21. The court found IDOT’s determination that Dunnet Bay failed to show good faith efforts was supported in the record. \textit{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. \textit{Id.} at 21-22.

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. \textit{Id.} at *22. 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. \textit{Id.}

\textbf{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. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Petition was denied by the Supreme Court on October 3, 2016. See 2016 WL 193809.

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

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

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

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

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

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” Id. 1191, citing Western States Paving Co., 407 F.3d at 997-998.
Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the Western States Paving decision. Id. at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. Id. The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” Id. An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. Id. An index below 80 is considered a substantial disparity that supports an inference of discrimination. Id.

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

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” Id. at 1192.

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

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

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. Id. at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. Id.
Caltrans’ DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. Id. at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and women-owned firms. Id. The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. Id.

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

District Court proceedings. AGC then filed a complaint alleging that Caltrans’ implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans’ DBE program. The district court on motions of summary judgment held that Caltrans’ program was “clearly constitutional,” as it “was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. Id. at 1193.

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

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

The Court, however, held that the AGC did not establish associational standing. Id. at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans’ program. Id. at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. Id. at 1195.
Caltrans’ DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. Id. at 1194-1195. The Court held that Caltrans’ DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. Id. at 1195-1200.

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

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

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

Application of strict scrutiny standard articulated in Western States Paving. The Court held that the framework for AGC’s as-applied challenge to Caltrans’ DBE program is governed by Western States Paving. The Ninth Circuit in Western States Paving devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be “limited to those minority groups that have actually suffered discrimination.” Id. at 1195-1196 (quoting Western States Paving, 407 F.3d at 997-99).

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

The Court pointed out that Washington DOT’s DBE program in the Western States Paving case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. Id. at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington’s data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” Id. (quoting Western States Paving, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” Id.
Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” Id. at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. Id. The Court found the disparity study “accounted for the factors mentioned in Western States Paving as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” Id. (citing Western States, 407 F.3d at 1000).

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

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. Id. at 1196-1197. The Court found that the Supreme Court in Croson explicitly states that “[t]he degree of specificity required in the findings of discrimination … may vary.” Id. at 1197 (“quoting Croson, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in Croson that statistical disparities alone could be sufficient to support race-conscious remedial programs. Id. (citing Croson, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. Id.

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

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

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. Id. at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. Id.
Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol’ boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that every minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC’s early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans’ decision to include all women in its DBE program. *Id.* at 1195.

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

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans’ program “adheres precisely to the narrow tailoring requirements of *Western States.*” *Id.*
The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. Id. at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. Id. The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states not to separate different types of contracts. Id. The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime and subcontractors.” Id.

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

Second, the Court found that even if this requirement does apply to Caltrans’ program, narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.” Id. at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC’s claim that Caltrans’ program does not sufficiently consider race-neutral alternatives. Id. at 1199.

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

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

**Conclusion.** The Court concluded that the AGC did not have standing, and that further, Caltrans’ DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. Id. at 1200. The Court then dismissed the appeal. Id.
4. 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.

5. 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.*


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.

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

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

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

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

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state’s implementation
becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

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

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

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

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

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

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

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

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

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

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

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

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


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

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

Turning to the Tenth Circuit decision in Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.
It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

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

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. Id. at 1185-1186. The court held that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” Id. The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” Id.

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

Recent District Court Decisions


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

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.


**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
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 appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West’s claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court’s order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West’s claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible “only if they are narrowly tailored measures that further compelling governmental interests.” *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; see, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).
Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the
district court relied on three types of evidence offered by Montana. First, it cited a study, which
reported disparities in professional services contract awards in Montana. Second, the district court
noted that participation by DBEs declined after Montana abandoned race-conscious goals in the
years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited
anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017
WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light
of genuine disputes of material fact as to the study’s analysis, and because the second two categories
of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120
at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

**Disputes of fact as to study.** Mountain West’s expert testified that the study relied on several
questionable assumptions and an opaque methodology to conclude that professional services
contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few
examples that it found illustrated the areas in which there are disputes of fact as to whether the study
sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-
expected DBE participation is attributable to factors other than race or gender. *W.
States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain
whether or how it accounted for a given firm’s size, age, geography, or other similar
factors. The report’s authors were unable to explain their analysis in depositions for this
case. Indeed, the Court noted, even Montana appears to have questioned the validity of
the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.),
Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain
West argued that (a) it is unclear how the study selected that sample, (b) only a small
percentage of surveyed contractors responded to questions, and (c) it is unclear
whether responsive contractors were representative of nonresponsive contractors. 2017
WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance,
and the study consultant admitted that “some of the population samples were very
small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th
Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services
contracts and construction contracts, but professional services contracts composed less
than ten percent of total contract volume in the State’s transportation contracting
industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

**The post-2005 decline in participation by DBEs.** The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep't of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

**Anecdotal evidence of discrimination.** The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and quoting, *Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West’s case, it concluded that the record did not provide 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.
Recent District Court Decisions


In Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. Midwest Fence Corp. v. United States DOT, Illinois DOT, et al., 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring, 2015 WL 1396376 at *7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. Id. Since the Supreme Court decision in Croson, numerous courts have recognized that disparity studies provide probative evidence of discrimination. Id. The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality’s prime contractors. Id. The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. Id.
In addition to providing “hard proof” to back its compelling interest, the court stated that the
government must also show that the challenged program is narrowly tailored. Id. at *7. While narrow
tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” the court
said it does not require “exhaustion of every conceivable race-neutral alternative.” Id., citing Grutter v.

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past
discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party
challenging the affirmative action plan bears the ultimate burden of proving that the plan is
unconstitutional. 2015 WL 1396376 at *7. To successfully rebut the government’s evidence, a
challenger must introduce “credible, particularized evidence” of its own. Id.

This can be accomplished, according to the court, by providing a neutral explanation for the disparity
between DBE utilization and availability, showing that the government’s data is flawed,
demonstrating that the observed disparities are statistically insignificant, or presenting contrasting
statistical data. Id. Conjecture and unsupported criticisms of the government’s methodology are
insufficient. Id.

Standing. The court found that Midwest had standing to challenge the Federal DBE Program,
IDOT’s implementation of it, and the Tollway Program. Id. at *8. The court, however, did not find
that Midwest had presented any facts suggesting its inability to compete on an equal footing for the
Target Market Program contracts. The Target Market Program identified a variety of remedial
actions that IDOT was authorized to take in certain Districts, which included individual contract
goals, DBE participation incentives, as well as set-asides. Id. at *9.

The court noted that Midwest did not identify any contracts that were subject to the Target Market
Program, nor identify any set-asides that were in place in these districts that would have hindered its
ability to compete for fencing and guardrails work. Id. at *9. Midwest did not allege that it would have
bid on contracts set aside pursuant to the Target Market Program had it not been prevented from
doing so. Id. Because nothing in the record Midwest provided suggested that the Target Market
Program impeded Midwest’s ability to compete for work in these Districts, the court dismissed
Midwest’s claim relating to the Target Market Program for lack of standing.

Facial challenge to the Federal DBE Program. The court found that remediying the effects of race
and gender discrimination within the road construction industry is a compelling governmental
interest. The court also found that the Federal Defendants have supported their compelling interest
with a strong basis in evidence. Id. at *11. The Federal Defendants, the court said, presented an
extensive body of testimony, reports, and studies that they claim provided the strong basis in
evidence for their conclusion that race and gender-based classifications are necessary. Id. The court
took judicial notice of the existence of Congressional hearings and reports and the collection of
evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization
under MAP-21, including both statistical and anecdotal evidence. Id.

The court also considered a report from a consultant who reviewed 95 disparity and availability
studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that were
completed from 2000 to 2012. Id. at *11. Sixty-four of the studies had previously been presented to
Congress. Id. The studies examine procurement for over 100 public entities and funding sources
across 32 states. *Id.* The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id.* at *11.

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id.* at *11.* The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Roth Dev. Corp. v. Dep’t. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government’s compelling interest in implementing a national program. *Id.* at *12, citing Roth*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id.* at *12.

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at *12.* The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

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

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at *13.* The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*
Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at *13. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at *13. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

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

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

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

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

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at *14. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*
The court said that Midwest did not attempt to rebut the Federal Defendants’ evidence. *Id* at *14*. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at *14*. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

**As-applied challenge to IDOT’s implementation of the Federal DBE Program.** In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT’s implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit’s decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at *14*, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at *14.*

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

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

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

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* This resulted in a “weighted” DBE availability calculation. *Id.*
The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and
gender discrimination in the Illinois road construction industry, including one-on-one interviews and
a survey of more than 5,000 contractors. *Id.* at *15. The 2011 study, the court said, contained a
regression analysis of private sector data and found disparities in earnings and business ownership
rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

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

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

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

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

**Court rejected Midwest arguments as to the data and evidence.** The court rejected the challenges
by Midwest to the accuracy of IDOT’s data. For example, Midwest argued that the anecdotal
evidence contained in the 2011 study does not prove discrimination. *Id.* at *16. The court stated,
however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may
lend support to the government’s determination that remedial action is necessary. *Id.* at *16. The
court noted that anecdotal evidence on its own could not be used to show a general policy of
discrimination. *Id.*
The court rejected another argument by Midwest that the data collected after IDOT’s implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. Id. at *16. The court rejected that argument finding post-enactment evidence of discrimination permissible. Id.

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

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

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

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

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

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. Id. at *17, citing to Northern Contracting v. Illinois DOT, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. Id. The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. Id. at *17.
The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in Northern Contract v. Illinois DOT. Id. at *18. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. Id.

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

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

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

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

The court held IDOT was compliant with the federal regulations, noting that in the Northern Contracting v. Illinois DOT case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. Id. at *19. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. Id.
Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at *19. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. *Id.* at *19. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

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

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

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

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

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

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

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at *22. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

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

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

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

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

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.* at *23.
Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants’ motion for summary judgment.


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.
**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.*

**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 *

**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.* at *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 assessing 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.* at *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants’ consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.
The Federal Defendants’ consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

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

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

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

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

Court rejects Plaintiffs’ general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs’ general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs’ argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

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

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

**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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.}

\textbf{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. \textit{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. \textit{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. \textit{Id.}

\textbf{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.

**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.

**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.

**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.


In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

**Motion to Dismiss certain claims granted.** IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

**Motions for Summary Judgment.** Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was
relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

**Factual background.** Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay’s bid was the lowest received by IDOT. Its low bid was over IDOT’s estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay’s DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay’s good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay’s bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay’s bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder’s good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*
IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely “on the federal government’s compelling interest in remedying the effects of pass discrimination in the national construction market.” *Id. at* *26, quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is “insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority.” *Id. at* *26, quoting Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any “challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id. at* *26, quoting Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by *Northern Contracting, Id. at* *26.*

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

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

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

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

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

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT’s authority under federal law, the Court held Dunnet Bay’s claim failed under the *Northern Contracting* decision. *Id.*

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

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

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

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

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

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51.

Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

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

**Appeal.** Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision in 2015. See above discussion of the court of appeals decision in *Dunnet Bay*. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which Petition was denied on October 3, 2016. See 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (October 3, 2016).


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 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. Id. at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. 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.


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

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.*


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. \textit{Id.} at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. \textit{Id.} All groups other than Asian DBEs were found to be underutilized. \textit{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. \textit{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. \textit{Id.}

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” \textit{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.” \textit{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.” \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. \textit{Id.}
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 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.


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.” 2009 WL 2595607 at *4.

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.” 2009 WL 2595607 at *4. 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. 2009 WL 2595607 at *4. The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. 2009 WL 2595607 at *4.

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. Western States Paving Company v. Washington State DOT, 407 F.3d 983(9th Cir. 2005) 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. Northern Contracting, Inc. v. State of Illinois, 473 F.3d 715 (7th Cir. 2007) at *5.

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


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.


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

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

**Statistical evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. Id. at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder’s list. Id.
In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet’s Marketplace; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. Id. at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. Id. at *7. The study thus calculated a weighted average base figure of 22.7 percent. Id.

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

IDOT considered three reports prepared by expert witnesses. Id. at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. Id. The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” Id. The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. Id.

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

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

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

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

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

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

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

4. “Unbundling” large contracts; and

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

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

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

**Anecdotal evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*
The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

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

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

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

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

*That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables … [DBE] construction firms are generally smaller and less experienced because of industry discrimination.'*  
*Id.* at *21*, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

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

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

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

*Id.* at *23*. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), affirmed 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.


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.


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 remediing the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, citing Adarand VII, 228 F.3d at 1175.

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

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

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

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

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

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

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and businesses whose owners’ personal net worth exceed $750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in Sherbrooke Turf, that a recipient’s implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with Sherbrooke Turf that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient’s implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT’s DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government’s compelling interest. The court, therefore, denied the contractor plaintiff’s Motion for Summary Judgment and the Illinois DOT’s Motion for Summary Judgment.

20. 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.


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.


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.


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.

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**G. Recent Decisions and Authorities Involving Federal Procurement That May Impact MBE/WBE/DBE Programs**


In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration’s 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. _Id._ The court held, however, that Congress considered and rejected statutory language that included a racial presumption. _Id._ Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. _Id._

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. _Id._ *1. Businesses owned by “socially and economically disadvantaged” individuals are eligible to participate in the 8(a) program. _Id._ The statute defines socially disadvantaged individuals as persons “who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” _Id., quoting_ 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe’s allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. _Id._ *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. _Id._ The court said that makes this
statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. Id.

In contrast to the statute, the court found that the SBA’s regulation implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. Id *2, citing 13 C.F.R. § 124.103(b).

This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. Id. Rothe’s definition of the racial classification it attacks in this case, according to the court, does not include the SBA’s regulation. Id.

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. Id at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. Id *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. Id.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. Id *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. Id *2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. Id *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. Id. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. Id *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” Id *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged individuals as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are members or groups that have been subjected to prejudice or bias. Id.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. Id *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. Id *4. The court determined the statutory language does not create a presumption that
a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. Id. *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. Id. *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. Id.

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. Id. *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. Id. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. Id. *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. Id. *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. Id. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. Id. Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. Id. *10. Instead, the court considered whether the statute is supported by a rational basis. Id. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. Id. *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. Id. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. Id. *11. The statutory scheme, the court said, is rationally related to that end. Id.

The court declined to review the district court’s admissibility determinations as to the expert witnesses because it stated that it would affirm the district court’s grant of summary judgment even if the district court abused its discretion in making those determinations. Id. *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. Id.

Other issues. The court declined to review the district court’s admissibility determinations as to the expert witnesses because it stated that it would affirm the district court’s grant of summary judgment even if the district court abused its discretion in making those determinations. Id. *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. Id.
In addition, the court rejected Rothe’s contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe’s alternative argument on delegation also fails. *Id.*

**Dissenting Opinion.** There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)’s contract preference by virtue of their race. *Id* *13. The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe’s right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.*


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 disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial
classification.’’ The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in Rothe Development Corp. v. U.S. Dept. of Defense, 499 F.Supp.2d 775 (W.D. Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in Rothe, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in Concrete Works, Adarand Constructors, Sherbrooke Turf and Western States Paving (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). Rothe, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. Id. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. Id. at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization.

The district court initially rejected six legal arguments made by Rothe regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the Sherbrooke Turf, Western States Paving, Concrete Works, Adarand VII cases, and the Federal Circuit Court of Appeal in Rothe. Rothe at 825-833.

The district court discussed and cited the decisions in Adarand VII (2000), Sherbrooke Turf (2003), and Western States Paving (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in The Compelling Interest (a.k.a. the Appendix), more than satisfied the government’s burden of production.
regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*
The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the Appendix to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” Id. at n.86. The court also stated that it “accepts the reasoning of the Appendix, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” Id. at 839, quoting 61 Fed.Reg. 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. Id. at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. Id. at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. Id. at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in Sherbrooke Turf, Adarand VII, and Western States Paving. Id. at 872. The court pointed out that although it does not rely on the data contained in the Appendix to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. Id. at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. Id. at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. Id. at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. Id. at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. Id.

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. Id. The court stated it was law of the
case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id., quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

*Id.* The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress’ adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only “serious, good faith consideration of workable race-neutral alternatives.” *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.
**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, quoting *Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, quoting *Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

**Compelling interest – strong basis in evidence.** The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, quoting *Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether Croson’s evidentiary burden is satisfied. 545 F.3d at 1038, quoting *W.H. Scott*, 199 F.3d at 218.
The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

**Staleness.** The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by Rothe. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, citing to Western States Paving v. Washington State Department of Transportation, 407 F.3d 983, 992 (9th Cir. 2005) and Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertaining 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 V/I, 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.


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% of contract actions, 93.0% of dollars awarded, and in which 92.2% 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 two to five 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.
Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the decision of the district court on other grounds. See, 836 F.3d 57, 2016 WL 471909 (D.C. Cir. 2016).


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., 2012 WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. Id. at *2 quoting 15 U.S.C. § 631(f)(1)(B)-(c); see also 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which
requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; see 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. See 15 U.S.C. § 644(g)(1). DynaLantic, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. See Id. Each federal agency establishes its own goal by agreement between the agency head and the SBA. Id. DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. DynaLantic, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). DynaLantic, at *3-4; 13 CFR 124.501(b).

**Plaintiff’s business and the simulation and training industry.** DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. DynaLantic at *5.

**Compelling interest.** The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” DynaLantic, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” Id. quoting Sherbrooke Surf 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

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 areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. DynaLantic, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. Id. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. Id. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. Id.

**As-applied challenge.** DynaLantic also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. DynaLantic, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” Id. Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” DynaLantic, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” Id. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. DynaLantic, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. DynaLantic, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in Croson, as well as the Federal Circuit’s decision in O’Donnell Construction Company, which adopted Croson’s reasoning. DynaLantic, at *38. The Court holds that Croson made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. DynaLantic, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with Croson’s evidentiary requirement to show an inference of discrimination. DynaLantic, at *39, citing Croson, 488 U.S. 501. The Court rejects the federal
government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party’s definition of “industry” at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff’s industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.*
The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm’s participation in the program, places temporal limits on every individual’s participation in the program, and that a participant’s eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)’s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government’s evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants’ Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff’s Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.
Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed inter alia, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.


*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 B.
Utilization Data Collection

Keen Independent compiled data about procurements made by the Atlanta Housing Authority, property management companies (“PMCOs or PMDs”) working for AHA, and AHA’s development partners. The study team analyzed both prime contractors and subcontractors on those procurements.

Combined, Keen Independent examined $66 million worth of contract and procurement spending. From these data, the study team determined the geographic market area and subindustries representing the majority of expenses related to AHA multifamily property management, operation and development. Keen Independent also calculated the percentage of payments that went to minority-, women- and majority-owned businesses. The utilization analysis focused on construction, professional services, goods and other services procurements during the study period.

Appendix B describes Keen Independent’s utilization data collection in six parts:

A. Atlanta Housing Authority;
B. Property management companies/PMDs;
C. Development partners;
D. Types of contracts not included in the data analyses;
E. Compilation of data on other multifamily housing construction in the Atlanta area;
F. Steps to the utilization analysis; and
G. AHA review.

A. Atlanta Housing Authority

Keen Independent compiled information on AHA professional services and other services prime contracts and subcontracts, as well as on goods procurements.

Study period for the AHA data examined. AHA implemented a new electronic payment system in 2012, moving from ORACLE to YARDI. Because it was uncertain whether AHA staff could retrieve full payment information for all contracts and task orders from ORACLE for payments made prior to 2012, the study team decided to focus on AHA awards and payments made between July 2012 and June 2015.

During the study period, AHA administered a number of professional services indefinite quantity/indefinite quality (“IDIQ”) contracts and goods and other services basic ordering agreements (“BOAs”). Vendors received work through task order contracts issued under those agreements. Keen Independent treated each task order contract as a stand-alone contract element and examined task order agreements executed during the study period for IDIQs/BOAs awarded prior to July 2012 (for example, task orders issued in 2013 for a BOA awarded in 2011 were examined).
Data sources used. AHA provided Keen Independent with two main information sources: its annual contract reports to the U.S. Department of Housing and Urban Development ("HUD") and electronic payment data from YARDI.

HUD reports. Keen Independent reviewed annual reports on contracts and subcontracts awarded, showing the utilization of businesses, for the reporting periods of October 2012 to September 2015. Each report included the following information:

- Grant/Project ID;
- Grant/Project description;
- Contract type;
- Type of service procured;
- Prime contractor name;
- Prime contractor address;
- Prime contractor ownership information (race, ethnicity or gender);
- Subcontractor name (and corresponding prime);
- Subcontractor ownership information (race, ethnicity or gender);
- Participation in Section 3 Program; and
- Subcontractor address.

The HUD reports included BOAs or IDIQs awarded in the study period, but did not report individual task orders issued under BOAs or IDIQs issued prior to July 2012 (for example, a task order issued in 2013 for an IDIQ awarded in 2011, was not included in the HUD reports). Therefore, additional information was gathered from a second source, YARDI.

Payment information from YARDI. In addition, AHA assembled payment information for each contract identified in the HUD reports using YARDI. The information from YARDI also included payment information for all task orders awarded during the study period (and not necessarily included in the HUD reports). Overall, the study team examined $32 million in AHA-only spending for the study period, including expenditures for management fees and staffing of PMDs.

The YARDI report included the following information for contracts and task orders awarded from July 2012 through June 2015:

- Contract number;
- Contract description;
- Contractor name;
- Contractor ID number;
- Task order number (when applicable);
- Payments made during the study period;
- Description of work;
- Location of where work was performed; and
- Amendments made (when applicable).
Data related to PMD fees/staff. In addition to the contracts and payment data above, Keen Independent gathered information on property management fees-related payments to PMDs directly made by AHA. These payments covered:

- PMD salaries and benefits; and
- Property management fees and overhead not shown in the PMD financial reports.

Data related to development fees. Keen Independent also gathered information on payments made to the development partners directly by AHA. Development fees for development agreements entered in the study period were included under AHA-awarded contracts. These data covered:

- Project description;
- Development partners’ contracting entity;
- Development partners name (vendor/prime contractor name);
- Invoice number;
- Invoice amount;
- Developer fee;
- Project management fee;
- Overhead;
- Construction administration general conditions;
- Profit; and
- Time period.

B. Property Management Companies/PMDs

In 2013, AHA procured the services of three PMDs to manage its multi-family properties. The PMDs independently operate and maintain AHA properties. They procure maintenance-related construction services, professional services, and goods and other services following HUD and federal regulations, but do not follow AHA’s procurement policy.

Keen Independent compiled information on PMD professional services and other services prime contracts and subcontracts, as well as on goods procurements.

Study period for the PMD data examined. In 2013, AHA entered into new agreements with its property management companies (“PMCOs/PMDs”), under different terms. The study team therefore decided to examine contracts and procurements awarded after the newly selected PMDs were chosen. The PMD study period was therefore set as July 2013 to June 2015.

Data received from each PMD. The three PMDs, The Integral Group, Columbia Residential and The Michaels Organization, each manage multiple properties on behalf of AHA. The study team examined $15 million in contracts awarded by PMDs for the study period.

Keen Independent received three datasets from each PMD separately, described in more details below.
Capital contracts list and payment data. The PMDs shared their procurement tracking files for capital expenditures, showing the following information:

- Contract number;
- Contract description;
- Contractor name;
- Ownership information (race, gender or Section 3);
- Ethnicity;
- Date of award;
- Contract amount;
- Payments made during the study period;
- Description of the work performed; and
- Amendment information.

Operational contracts list. The PMDs shared their tracking files for operational expenditures, showing the following information:

- Contract number;
- Contract description;
- Contractor name;
- Ownership information (race, gender or Section 3);
- Ethnicity;
- Date of award;
- Contract amount;
- Description of the work performed; and
- Amendment information.

Operational contracts payment data. The PMDs separately provided their accounting files for operational expenditures, showing the following information:

- Property name;
- Contractor name;
- Payments made;
- Description of the work performed; and
- Vendor address.
C. Development Partners

Similar to many other housing authorities, AHA procures the services of development partners for its redevelopment projects. Development partners can be non-profit or for-profit entities, and provide for mixed-finance development of public housing units.

For this study, Keen Independent compiled information on construction and construction-related contracts and procurements from AHA’s development partners directly.

Study period for the development partners. Keen Independent examined information for construction-related contracts awarded between July 2011 and June 2015. The team collected procurement and payment data from Integral Development (dba Grady Redevelopment LLC, Capitol Gateway LLC and Harris Redevelopment LLC) and Brock Built (dba Perry Homes Redevelopment LLC), the two development partners with construction contracts awarded during the study period. A July 2011 start date for the study period was selected to capture more development activity than possible with a July 2012 beginning date.

Data received from each development partner. Each development partner shared their internal payment tracking files. The study team examined $16 million in development partner spending for the study period.

Brock Built payment data. Brock Built shared its accounting files along with a code book directly with Keen Independent, showing the following information:

- Project name;
- Vendor code;
- Vendor ID;
- Cost code;
- Invoice ID;
- Payment amount; and
- Payment date.

Integral Development payment data. Integral Development shared accounting reports directly with Keen Independent, showing the following information:

- Project name;
- Contract ID;
- Vendor name;
- Payments made during the study period; and
- Payment date.

These data were reconciled with additional payment data received directly from AHA.¹

¹The data shared by AHA and the development partners do not match up exactly due mostly to a delay between payments made by AHA and payments made by the development partners.
D. Types of Contracts Not Included in the AHA-related Data Analyses

There was $3 million in additional contracts that Keen Independent identified for the study period. These contracts were not analyzed as they were payments to government or not-for-profit agencies, payments to regulated utilities or contracts of other types typically excluded from disparity analyses.

E. Compilation of Data for Other Multifamily Housing Construction in the Atlanta Area

Keen Independent analyzed the utilization of minority- and women-owned construction firms as prime contractors on non-AHA multifamily construction projects in the Atlanta area. The study team examined information from two data sources:

- City building permits for multifamily construction projects within Atlanta city limits for January 2011 to December 2015 (excluding projects for AHA);
- Dodge Reports data for multifamily construction projects within the Atlanta Metropolitan Area with a start date of January 2011 to December 2015 (excluding projects for AHA).

For Dodge Reports data, Keen Independent could examine the estimated value of the construction project. Data were not reliable to perform this analysis for building permit data.

In addition, Keen Independent was able to examine the number of design contracts for projects reported in the Dodge Reports data. These data were not as complete as the construction data.

City building permit data. Keen Independent examined building permits for multifamily construction projects within Atlanta city limits from January 2011 to December 2015, about the same time period as examined for the utilization analysis for AHA contracts. These projects include new construction, alterations and repair.

The City requires general contractors to obtain permits as well as companies performing electrical, HVAC and plumbing work (including fire sprinklers). The data identified the specific type of work for the permit, which Keen Independent coded into standard work types.

At Keen Independent’s request, the City of Atlanta provided electronic records for building permits issued by the City from January 2011 to December 2015. Of these records, 9,145 were usable for this analysis. After excluding AHA properties and nonprofit firms, Keen Independent was able to determine ownership for the listed company on 7,657 permits.

Dodge Reports data. Keen Independent examined Dodge Reports data for multifamily construction projects within the Atlanta Metropolitan Area that had start dates from January 2011 to December 2015. The Dodge Reports data included information on the value of the project.

Keen Independent purchased electronic Dodge Reports data from Dodge Data & Analytics. These data identify the general contractor or construction manager for each project. For some projects, the Dodge Reports data also identify the design firm. Data concerning dollars for the design work were not provided, so the analysis was based on number of design contracts rather than dollars.
Keen Independent obtained data on 402 non-AHA multifamily construction projects with a value of $4.7 billion. The study team was able to compile ownership information for 341 companies listed on these projects ($4.4 billion in value).

The Dodge Reports data provided information for 430 design contracts involved in these multifamily projects. Keen Independent analyzed 383 design contracts for which company ownership information could be determined.

**F. Steps to the Utilization Analysis**

For each firm identified as working on AHA, PMD or developer contracts, as well as for construction firms active in the Atlanta metro market area identified through Dodge and City of Atlanta construction permits data, Keen Independent attempted to collect the race, ethnicity and gender of the business owner. Sources of information to determine whether firms were owned by minorities or women (including race/ethnicity) included:

- Study team telephone interviews with firm owners and managers (attempted with each utilized firm as well as with firms identified through Dodge and City of Atlanta construction permits data);
- Study team telephone interviews with Atlanta area firm owners and managers (attempted as part of the availability survey);
- City of Atlanta MFBE certification data;
- Data compiled as part of previous BBC and Keen Independent studies;
- Dun & Bradstreet business diversity data;
- AHA contract and subcontract activity tracking data; and
- Additional Keen Independent phone interviews and online research.

**G. AHA Review**

AHA staff reviewed Keen Independent utilization data for contracts awarded by AHA, PMDs and developers during several stages of the study process. The study team met with AHA staff multiple times to review the data collection process, information that the study team gathered and summary results. AHA staff also reviewed contract and vendor information. Keen Independent reviewed and incorporated AHA feedback throughout the study process.
APPENDIX C.
Availability Analysis

Keen Independent analyzed the availability of minority- and women-owned business enterprises (MBE/WBEs) that are ready, willing and able to perform Atlanta Housing Authority (AHA) prime contracts and subcontracts as well as those of AHA’s property management companies and development partners. The study team collected necessary data concerning availability for AHA-related work through a telephone survey of Atlanta area businesses performing certain types of work.

Because Keen Independent was surveying Atlanta Metropolitan Area construction, engineering and other firms at the same time for both AHA and for Atlanta Public Schools (APS), the availability survey combined questions for AHA and APS, as appropriate, for subindustries that related to work on both housing authority and school contracts and subcontracts (electrical work, for example).

Appendix C describes the study team’s availability analysis in eight parts:

A. Purpose of the availability analysis;
B. Definitions of MBEs, WBEs and majority-owned businesses;
C. General approach to collecting availability information;
D. Development of the interview instruments;
E. Businesses included in the availability database;
F. MBE/WBE availability calculations on a contract-by-contract basis;
G. Dollar-weighted availability results; and
H. Additional considerations related to measuring availability.

A. Purpose of the Availability Analysis

The 2017 Disparity Study compares AHA’s utilization of minority- and women-owned firms against an availability benchmark. MBE/WBE “availability” is defined as the percentage of dollars that might be expected to go to minority- and women-owned businesses based on their availability for specific types and sizes of AHA, PMD and development partner contracts.

Comparisons between utilization and availability identify whether any MBE/WBE groups were underutilized based on their availability for AHA work.

The balance of Appendix C explains each step in compiling availability data and determining the availability benchmarks, beginning with definitions of terms.
B. Definitions of MBEs, WBEs and Majority-owned Businesses

The following definitions of terms based on ownership and certification status are useful background to the availability analysis.

**MBE/WBEs.** The availability benchmark and the base figure analyses use the same definitions of minority- and women-owned business enterprises (MBE/WBEs), as do other components of the Disparity Study. This includes MBE/WBEs that are certified by other state or local agencies, such as the City of Atlanta or Georgia DOT, and firms that indicate they are minority- or women-owned but are not certified as such.

**Race, ethnic and gender groups.** The study team separately examined utilization, availability and disparity results for businesses owned by:

- African Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans;
- Hispanic Americans;
- Native Americans; and
- Non-Hispanic white women.

All other businesses are “majority-owned businesses.”

**Firms owned by minority women.** Businesses owned by minority women are included with the results for each minority group. The term “WBEs” in this report refers to non-Hispanic white women-owned businesses. This definition of WBEs gives the AHA information to answer questions that may arise pertaining to the utilization of non-Hispanic white women-owned businesses. Keen Independent’s approach is consistent with court decisions that have considered this issue.

**All MBE/WBEs, not only certified firms.** When availability results are used as a benchmark in the disparity analysis, all minority- and women-owned firms are counted as such whether or not they are certified as MBEs or DBEs. Analyzing the availability and utilization of minority- and women-owned firms regardless of certification status allows one to assess whether there are disparities affecting all MBE/WBEs and not just certified firms. Businesses may be discriminated against because of the race or gender of their owners regardless of whether they have successfully applied for certification.

The courts that have reviewed disparity studies have accepted analyses based on the race, ethnicity and gender of business ownership rather than on certification status.
Majority-owned businesses. Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white males). In the utilization and availability analyses, the study team coded each business as minority-, women-, or majority-owned.

C. General Approach to Collecting Availability Information

Keen Independent’s availability analysis focused on firms with Atlanta metro area locations that work in subindustries related to AHA construction, professional services, goods and other services contracts.

Based on a review of AHA prime contracts and subcontracts during the study period, the study team identified specific subindustries for inclusion in the availability analysis. Keen Independent contacted businesses within those subindustries by telephone to collect information about their availability for specific types and sizes of AHA prime contracts and subcontracts.

Keen Independent’s method of examining availability is sometimes referred to as a “custom census” and has been accepted in federal court. Figure C-1 summarizes characteristics of Keen Independent’s custom census approach to examining availability.

Overview of availability interviews. The study team conducted telephone interviews with business owners and managers to identify businesses that are potentially available for AHA prime contracts and subcontracts. Figure C-2 summarizes the process for identifying businesses, contacting them and completing the interviews.

Keen Independent began by compiling lists of business establishments that Dun & Bradstreet/Hoovers identified in certain subindustries in the Atlanta area.

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1 The study team offered business representatives the option of completing interviews via fax or email if they preferred not to complete interviews via telephone.

2 D&B’s Hoover’s database is accepted as the most comprehensive and complete source of business listings in the nation. Keen Independent collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that AHA awarded during the study period.
Dun & Bradstreet Hoover’s database. Dun & Bradstreet’s Hoover’s affiliate maintains the largest commercially-available database of businesses in the United States.

Keen Independent determined the types of work involved in AHA contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. D&B classifies types of work by 8-digit work specialization codes. Figure C-3 on the following page identifies the work specialization codes the study team determined were the most related to the AHA contract dollars in the study.

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3 D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.
### Figure C-3. D&B 8-digit codes for availability list source

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>17110300</td>
<td>Sprinkler Contractors</td>
<td>50630306</td>
<td>Telephone and telegraph wire and cable</td>
</tr>
<tr>
<td>17110301</td>
<td>Fire Sprinkler System Installation</td>
<td>50630400</td>
<td>Lighting fixtures</td>
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<tr>
<td>17110302</td>
<td>Irrigation Sprinkler System Installation</td>
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<td>Light bulbs and related supplies</td>
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<tr>
<td>73810105</td>
<td>Security guard service</td>
<td>50630402</td>
<td>Lighting fittings and accessories</td>
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<td>87489905</td>
<td>Environmental consultant</td>
<td>50630403</td>
<td>Lighting fixtures, commercial and industrial</td>
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<tr>
<td>71100000</td>
<td>Soil preparation services</td>
<td>50630404</td>
<td>Lighting fixtures, residential</td>
</tr>
<tr>
<td>7119906</td>
<td>Soil testing services</td>
<td>50740000</td>
<td>Plumbing and hydronic heating supplies</td>
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<tr>
<td>78200000</td>
<td>Lawn and garden services</td>
<td>50740100</td>
<td>Water heaters and purification equipment</td>
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<tr>
<td>78201000</td>
<td>Garden services</td>
<td>50740101</td>
<td>Water heaters, except electric</td>
</tr>
<tr>
<td>78201010</td>
<td>Garden maintenance services</td>
<td>50740102</td>
<td>Water purification equipment</td>
</tr>
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<td>Garden planting services</td>
<td>50740200</td>
<td>Heating equipment (hydronic)</td>
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<td>Lawn care services</td>
<td>50740201</td>
<td>Boilers, hot water heating</td>
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<td>50740202</td>
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<td>15220100</td>
<td>Hotel/motel and multi-family home-construction</td>
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<td>Pipes and fittings, plastic</td>
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<tr>
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<td>Apartment building construction</td>
<td>50740303</td>
<td>Plumbers’ brass goods and fittings</td>
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<tr>
<td>15220102</td>
<td>Co-op construction</td>
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<td>Plumbing and heating valves</td>
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<tr>
<td>15220103</td>
<td>Condominium construction</td>
<td>50749901</td>
<td>Sanitary ware, china or enameled iron</td>
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<td>15220106</td>
<td>Multi-family dwelling construction, nec</td>
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<td>Cleaning and maintenance equipment and supplies</td>
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<td>Multi-family dwellings, new construction</td>
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<td>15220200</td>
<td>Hotel/motel and multi-family home renovation and remodeling</td>
<td>50870303</td>
<td>Floor machinery, maintenance</td>
</tr>
<tr>
<td>15220201</td>
<td>Remodeling, multi-family dwellings</td>
<td>50870304</td>
<td>Janitors’ supplies</td>
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<tr>
<td>15310000</td>
<td>Operative builders</td>
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<td>Vacuum cleaning systems</td>
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<tr>
<td>15319901</td>
<td>Condominium developers</td>
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<td>Printing and writing paper</td>
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<tr>
<td>15319902</td>
<td>Cooperative apartment developers</td>
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<td>Printing paper</td>
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<td>15319905</td>
<td>Townhouse developers</td>
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<td>Writing instruments and supplies</td>
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<td>Specialized public building contractors</td>
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<td>Marking devices</td>
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<td>15420406</td>
<td>School building construction</td>
<td>51120102</td>
<td>Pens and/or pencils</td>
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<td>15429905</td>
<td>Stadium construction</td>
<td>51120400</td>
<td>Computer and photocopying supplies</td>
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<tr>
<td>16230000</td>
<td>Water, sewer, and utility lines</td>
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<td>Computer paper</td>
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<td>16230030</td>
<td>Water and sewer line construction</td>
<td>51120402</td>
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</tr>
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<td>51120404</td>
<td>Photocopying supplies</td>
</tr>
<tr>
<td>16230033</td>
<td>Water main construction</td>
<td>51120405</td>
<td>Laser printer supplies</td>
</tr>
<tr>
<td>16239903</td>
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<td>51120500</td>
<td>Office filing supplies</td>
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<td>Underground utilities contractor</td>
<td>51120502</td>
<td>Envelopes</td>
</tr>
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<td>51120507</td>
<td>Office supplies, nec</td>
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<td>Brick</td>
</tr>
<tr>
<td>17110000</td>
<td>Plumbing, heating, air-conditioning</td>
<td>52110502</td>
<td>Cement</td>
</tr>
<tr>
<td>17110001</td>
<td>Boiler and furnace contractors</td>
<td>52110504</td>
<td>Lime and plaster</td>
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<td>17110010</td>
<td>Boiler maintenance contractor</td>
<td>52110505</td>
<td>Paving stones</td>
</tr>
<tr>
<td>17110011</td>
<td>Heating systems repair and maintenance</td>
<td>52110506</td>
<td>Sand and gravel</td>
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<td>17110014</td>
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<td>52110507</td>
<td>Tile, ceramic</td>
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<td>17110400</td>
<td>Solar energy contractor</td>
<td>52130100</td>
<td>Glass</td>
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<td>17110403</td>
<td>Ventilation and duct work contractor</td>
<td>52130101</td>
<td>Glass, leaded or stained</td>
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<tr>
<td>17110404</td>
<td>Warm air heating and air conditioning contractor</td>
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<td>Paint and painting supplies</td>
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<td>17119901</td>
<td>Refrigeration contractor</td>
<td>52130201</td>
<td>Paint</td>
</tr>
<tr>
<td>17130000</td>
<td>Electrical work</td>
<td>52130202</td>
<td>Paint brushes, rollers, sprayers and other supplies</td>
</tr>
<tr>
<td>17130300</td>
<td>Communications specialization</td>
<td>52130300</td>
<td>Wall coverings</td>
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<td>17130301</td>
<td>Cable television installation</td>
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<td>Wallpaper</td>
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<td>Fiber optic cable installation</td>
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<td>Sound equipment specialization</td>
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<td>Air conditioning room units, self-contained</td>
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<tr>
<td>17130304</td>
<td>Telephone and telephone equipment installation</td>
<td>52170201</td>
<td>Electric household appliances, major</td>
</tr>
<tr>
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<td>Voice, data, and video wiring contractor</td>
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<td>Electric household appliances, small</td>
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<td>Lighting contractor</td>
<td>57229900</td>
<td>Appliance parts</td>
</tr>
<tr>
<td>17420000</td>
<td>Plastering, drywall, and insulation</td>
<td>57229904</td>
<td>Stoves, household, nec</td>
</tr>
<tr>
<td>17420100</td>
<td>Plaster and drywall work</td>
<td>65130000</td>
<td>Apartment building operators</td>
</tr>
<tr>
<td>17420101</td>
<td>Drywall</td>
<td>65139901</td>
<td>Appraiser, real estate</td>
</tr>
<tr>
<td>17420104</td>
<td>Plastering, plain or ornamental</td>
<td>73610000</td>
<td>Employment agencies</td>
</tr>
<tr>
<td>17420105</td>
<td>Stucco work, interior</td>
<td>73610100</td>
<td>Labor contractors (employment agency)</td>
</tr>
<tr>
<td>17420200</td>
<td>Acoustical and insulation work</td>
<td>73630100</td>
<td>Manpower pools</td>
</tr>
<tr>
<td>17420201</td>
<td>Acoustical and ceiling work</td>
<td>73630102</td>
<td>Temporary help service</td>
</tr>
</tbody>
</table>
Keen Independent obtained a list of firms from the D&B Hoover's database within relevant work codes that had locations in the Atlanta area. D&B provided phone numbers for these businesses. Keen Independent obtained nearly 26,000 business listings from this source (this count includes duplicate records). Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone interviews and other methods described below.
Telephone interviews. Figure C-2 outlines the process Keen Independent used to complete interviews with businesses possibly available for AHA work.

- The study team contacted firms by telephone to ask them to participate in the interviews (identifying the AHA as the organization requesting the information). Firms indicating over the phone that they were not interested or not involved in AHA work were not asked to complete the other interview questions. Interviews began in January 2017 and were completed at the end of February 2017. Keen Independent contracted with Customer Research International (CRI), a telephone survey research firm, to complete this work. CRI has extensive experience performing similar interviews for disparity studies throughout the country.

- Some firms completed interviews when first contacted. For firms not immediately responding, the study team executed intensive follow-up over many weeks.

- CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the interview.

- Firm owners could also request that questionnaires be faxed or emailed to them. Twelve firms returned completed questionnaires via fax/email.

CRI provided Keen Independent with daily data reports.

Screening of firms for the availability database. The study team asked business owners and managers several questions concerning the types of work that their companies performed; their past bidding history; and their qualifications and interest in working on contracts for the AHA among other topics. Keen Independent considered businesses to be potentially available for AHA prime contracts or subcontracts if they reported possessing all of the following characteristics:

- a. Being a private business (as opposed to a public agency or not-for-profit organization);
- b. Providing goods or services relevant to AHA;
- c. Having bid on or obtained relevant contracts (or subcontracts) in the Atlanta area in the previous five years; and
- d. Reporting qualifications for and interest in work for AHA.

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4 The study team decided to launch the availability survey for AHA jointly with another Atlanta public agency, considering the overlap in firms on each agency’s list. By doing this jointly, the team anticipated a higher participation rate.
D. Development of the Interview Instrument

The study team developed a general interview instrument which was then tailored for each industry in the study. Individual surveys were developed for each industry so that firms were only asked questions that were relevant to their area of work. For example, goods firms were not asked about bonding requirements and construction firms were not asked about brand specifications. A total of six instruments were developed:

- Construction and construction management;
- Architecture, engineering, environmental consulting and design-related professional services;
- Legal services;
- Real estate and appraisal services;
- IT-related professional services; and
- Goods and other services.

AHA staff reviewed each of the draft interview instruments. The availability interview instrument for construction firms can be found at the end of this appendix.

**Interview structure.** The availability interview included eight sections for construction, architecture, engineering, environmental consulting and design-related professional services while the goods and other services interviews included seven sections. The study team did not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information was a key component of the interview.

Areas of interview questions included:

- **Identification of purpose.** The interviews began by identifying the AHA as the interview sponsor and describing the purpose of the study.

- **Verification of correct business name.** CRI confirmed that the business reached was, in fact, the business sought out.

- **Contact information.** CRI then collected complete contact information for the establishment and the individual who completed the interview.

- **Verification of work related to AHA projects.** All firms were asked to verify their main line of business. Because construction and professional services firms often work in multiple, inter-related, areas, they were asked about the specific types of work they perform related to commercial or public sector projects. For example, a construction firm’s main line of business may be excavation, but they also do trucking. In contrast, firms providing other services and goods related to commercial are very specialized and were not asked to identify all of the types of work they perform.
Verification of for-profit business status. The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity. Interviewers continued the interview with businesses that responded “yes” to that question.

Identification of main lines of business. Construction, construction management, architecture, engineering, environmental consulting and other design-related professional services firms chose from a list of work types that their firm performed. In addition to choosing all areas that the firms did work, the study team asked businesses to briefly describe their main line of business as an open-ended question. Keen Independent then coded the responses into standardized work types.

Sole location or multiple locations. The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined responses from multiple locations into a single record for multi-establishment firms.)

Past bids or work with government agencies and private sector organizations. The survey then asked about bids and work on past government and private sector contracts. The questions were asked in connection with both prime contracts and subcontracts.

Qualifications and interest in future public work. The interviewer asked about businesses’ qualifications and interest in future work with the AHA and other government agencies in connection with both prime contracts and subcontracts.

Largest contracts. The study team asked businesses to identify the value of the largest contract or subcontract on which they had bid or had been awarded during the past five years.

Ownership. Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. The study team reviewed reported ownership against other available data sources, such as directories of certified firms. When respondents refused to answer or provided unclear information about the ownership information for a business, Keen Independent conducted additional research (e.g., through City of Atlanta directory, GDOT UCP directory, past disparity studies and other publicly available information).

Business background. The study team asked businesses to identify the approximate year in which they were established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.
Potential barriers in the marketplace. Establishments were asked a series of questions concerning general insights about the marketplace and AHA contracting practices including obtaining loans, bonding and insurance (when applicable). The interview also included an open-ended question asking for any additional barriers or general thoughts about doing work in the Atlanta area. In addition, the interview included a question asking whether interviewees would be willing to participate in a follow-up interview about marketplace conditions.

Establishments that the study team successfully contacted. Figure C-4 presents the disposition of the businesses the study team attempted to contact for availability interviews.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning list of 25,338 unique businesses).

Because results are based on a simple count of firms with no analysis of availability for specific AHA contracts, they only reflect the first step in the availability analysis.

| Figure C-4. Disposition of attempts to interview business establishments |
|---------------------------------------------------------------|-------------|
| **Number of firms** | **Percent of business listings** |
| Beginning list (unique businesses) | 25,338 | 100.0 % |
| Less non-working phone numbers | 2,187 |
| Less wrong number | 297 |
| Firms with working phone numbers | 22,854 |
| Less no answer | 11,351 |
| Less could not reach responsible staff member | 1,095 |
| Less could not continue in English or Spanish | 49 |
| Less unreturned fax/email | 625 |
| Less said they already completed the survey but didn’t | 27 |
| Firms successfully contacted | 9,707 | 42.5 % |

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (2,187); or
- Wrong numbers for the desired businesses (297).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them.
Working phone numbers. As shown in Figure C-4, there were 22,854 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- **No answer.** Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (11,351) establishments.
- **Could not reach responsible staff member.** For a small number of businesses (1,095), a responsible staff person could not be reached after repeated attempts.
- **Could not continue in English or Spanish.** For a very small number of businesses (49), a responsible staff person speaking English or Spanish could not be reached after repeated attempts.
- **Unreturned fax/email.** The study team sent faxes or emailed the availability questionnaires upon request. There were 625 businesses that requested such surveys but did not return them.
- **Said they already filled out the survey but didn’t.** The study team noted 27 firms who claimed to have filled out the survey but didn’t.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 9,707 businesses, or 42.5 percent of those with working phone numbers.

Establishments included in the availability database. Figure C-5 presents the disposition of the 9,707 businesses the study team successfully contacted and how that number resulted in the 1,395 businesses the study team included in the availability database.

<table>
<thead>
<tr>
<th>Firms successfully contacted</th>
<th>Number of firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less businesses not interested</td>
<td>3,819</td>
</tr>
<tr>
<td>Less no longer in business</td>
<td>532</td>
</tr>
<tr>
<td>Firms that completed interviews about business characteristics</td>
<td>5,356</td>
</tr>
<tr>
<td>Less unrelated work</td>
<td>2,735</td>
</tr>
<tr>
<td>Less not a for-profit business</td>
<td>99</td>
</tr>
<tr>
<td>Less residence, not a business</td>
<td>1,110</td>
</tr>
<tr>
<td>Less duplicate responses</td>
<td>17</td>
</tr>
<tr>
<td>Total firms included in availability database</td>
<td>1,395</td>
</tr>
</tbody>
</table>

Establishments not interested in discussing availability for AHA work. Of the 9,707 businesses that the study team successfully contacted, 3,819 were not interested in discussing their availability for AHA work. This typically indicates that firms are not available for AHA work.
Establishments no longer in business. 532 respondents stated that they were no longer in business, thus not available for AHA work.

Businesses excluded from the availability database. Many firms completing interviews were excluded from the final availability database because they indicated that they did not perform work related to AHA contracting or reported that they were not a for-profit business:

- Keen Independent excluded 2,735 businesses that indicated that they did not perform work related to AHA contracting.
- Of the completed interviews, 99 indicated that they were not a for-profit business (including non-profits, government agencies). Interviews ended when respondents reported that their establishments were not for-profit businesses.
- 1,110 respondents interviewed were called on a residential or cell phone, not a business phone.
- Of the completed interviews, 17 were conducted with duplicate firms. Duplicate answers were compared and the data combined.

After those final screening steps, the interview effort produced a database of 1,395 businesses potentially available for AHA work.

Coding responses from multi-location businesses. As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.

E. Businesses Included in the Availability Database

After completing interviews with 5,356 Atlanta area businesses, the study team developed a database of information about the 1,395 businesses that are potentially available for AHA construction, professional services, goods and services contracts (and subcontracts). The study team used the availability database to produce availability benchmarks to determine whether there were any disparities in AHA utilization of MBE/WBEs during the study period.

Data from the availability interviews allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of AHA construction, professional services, goods and other services contracts, but it should not be considered an exhaustive list of every business that could potentially participate in AHA contracts.

Figure C-6 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. The study team’s research identified 1,395 businesses reporting that they were available for specific types of contracts that the AHA awarded during the study period. Of those businesses 664 (47.2%) were MBEs or WBEs.
F. MBE/WBE Availability Calculations on a Contract-by-Contract Basis

Keen Independent analyzed information from the availability database to develop dollar-weighted availability estimates for use as a benchmark in the disparity analysis.

- Dollar-weighted availability estimates represent the percentage of AHA contract dollars that MBE/WBEs might be expected to receive based on their availability for specific types and sizes of AHA prime contracts and subcontracts.

- Keen Independent’s approach to calculating availability was a bottom up, contract-by-contract process of “matching” available firms to specific prime contracts and subcontracts.

**Steps to calculating availability.** Only a portion of the businesses in the availability database were considered potentially available for any given AHA construction, professional services, other services or goods contract or subcontract (referred to collectively as “contract elements”). The study team first examined the characteristics of each specific contract element, including type of work, role (prime or sub or materials supplier) contract size and contract date. The study team then identified businesses in the availability database that perform work of that type, size and role. (The process of considering availability did not include purchase size for goods procurements.)
Steps to the availability calculations. The study team identified the specific characteristics of each of the prime contracts and subcontracts included in the utilization analysis and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
   - Are qualified and interested in performing work in that particular role, for that specific type of work, for AHA or on an AHA property; and
   - Except for goods firms, had bid on or performed work of that size in the Atlanta area in the past five years (or had done so based on contract data for the study period).

2. For the specific contract element, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in Step 1.

3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure C-7).

   The study team repeated those steps for each contract element examined. The study team multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was a dollar-weighted estimate of overall availability of MBE/WBEs and estimates of availability for each MBE/WBE group. Figure C-7 provides an example of how the study team calculated availability for a specific subcontract in the study period.

Special considerations for supply contracts. When calculating availability for a particular type of goods, including construction materials supplies, Keen Independent counted as available all firms supplying those materials that reported qualifications and interest in that work for AHA or for AHA properties and indicated that they could provide supplies. Bid capacity was not considered in these calculations.

Improvements on a simple “head count” of businesses. Keen Independent used a “custom census” approach to calculating MBE/WBE availability for AHA-related work rather than using a simple “head count” of MBE/WBEs (i.e., simply calculating the percentage of all Atlanta area businesses that are minority- or women-owned). Using a custom census approach typically results in
lower availability estimates for MBEs and WBEs than a headcount approach due in large part to Keen Independent’s consideration of “bid capacity” in measuring availability and because of dollar-weighting availability results for each contract element (a large prime contract has a greater weight in calculating overall availability than a small subcontract). The largest contracts that MBE/WBEs have bid on or performed in the Atlanta area tend to be smaller than those of other businesses, as discussed in Appendix H. Therefore, MBE/WBEs are less likely to be identified as available for the largest prime contracts and subcontracts.

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

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

Keen Independent’s approach accounts for the size of prime contracts and subcontracts. The study team considered the size — in terms of dollar value — of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., bid capacity) when determining whether to count that business as available for a particular contract element. When counting available businesses for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value in the Atlanta area in the previous five years, based on the most inclusive information from survey results.

Keen Independent’s approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability.

Keen Independent’s approach generates dollar-weighted results. Keen Independent examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements.

G. Dollar-weighted Availability Results

Keen Independent used the approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for each of the contracts awarded by AHA, PMDs and developers during the study period, including associated subcontracts.

Figure C-8 presents overall dollar-weighted availability estimates by MBE/WBE group for those contracts.

This analysis provided benchmarks for the percentage of AHA-related contract dollars one might expect to go to MBE/WBEs given the current availability of firms to perform specific types and sizes of those prime contracts and subcontracts. The availability analysis considered bid capacity of firms, only counting a company as available for sizes of contracts it had been awarded or had bid on in the local marketplace in the previous five years.
Figure C-8 shows the availability benchmarks for contracts awarded by AHA, PMDs and developers. As shown, minority- and women-owned firms might be expected to receive close to one-third of AHA-awarded contract dollars during the study period after considering the specific types and sizes of prime contracts and subcontracts involved. Dollar-weighted availability was higher (50%+) for contracts awarded by PMDs and by developers.

Figure C-8.
Percentage of dollars that might be expected to go to MBE/WBEs based on availability analysis

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Contracts awarded by AHA</th>
<th>Contracts awarded by PMDs</th>
<th>Contracts awarded by developers</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>18.3 %</td>
<td>29.0 %</td>
<td>36.8 %</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>1.9</td>
<td>1.8</td>
<td>1.3</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>1.8</td>
<td>2.1</td>
<td>0.5</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>1.5</td>
<td>5.5</td>
<td>6.0</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>1.2</td>
<td>1.4</td>
<td>1.1</td>
</tr>
<tr>
<td>Total MBE</td>
<td>24.7 %</td>
<td>39.8 %</td>
<td>45.7 %</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>6.9</td>
<td>18.9</td>
<td>7.9</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>31.6 %</td>
<td>58.7 %</td>
<td>53.6 %</td>
</tr>
</tbody>
</table>

Note: AHA results pertain to contracts awarded by AHA (including AHA contracts with PMDs and developers). PMD results pertain to contracts awarded by PMDs. Developer results pertain to contracts awarded by developers.

Source: Keen Independent 2017 availability analysis using AHA-, PMD- and developer-awarded contracts and 2017 availability data.

**H. Additional Considerations Related to Measuring Availability**

The study team made several additional considerations related to its approach to measuring availability.

**Not providing a count of all businesses available for AHA-related work.** The purpose of the availability interviews was to provide precise and representative estimates of the percentage of MBE/WBEs potentially available for AHA-related work. The availability analysis did not provide a comprehensive listing of every business that could be available for AHA work and should not be used in that way. Federal courts have approved the approach to measuring availability that Keen Independent used in this study.

**Not using MBE/WBE directories, prequalification lists or bidders lists.** The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the availability interviews provide data on businesses’ qualifications, relative bid capacity and interest in AHA-related work, which allowed the study team to take a more refined approach to measuring availability.
**Using D&B lists.** Dun & Bradstreet (D&B) was the source of business listings in Keen Independent’s availability analysis. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in the Atlanta area due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.

Keen Independent is not able to quantify how much, if any, underrepresentation of MBE/WBEs exists in the final availability database. However, based on its experience in this field, Keen Independent concludes that any such underrepresentation would be minor and would not have a meaningful effect on the availability and disparity analyses presented in this report.

**Selection of specific subindustries.** Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. However, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be interviewed, which leave some businesses off the availability survey contact list.

**Non-response bias.** An analysis of non-response bias considers whether businesses that were not successfully interviewed are systematically different from those that were successfully interviewed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship; and
- Work specializations.

**Research sponsorship.** Interviewers introduced themselves by identifying AHA (and Atlanta Public Schools, as explained in more detail at the beginning of this Appendix) as the interview sponsors because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

**Work specializations.** Businesses in highly mobile fields may be more difficult to reach for availability interviews than businesses more likely to work out of fixed offices (e.g., some professional firms). That assertion suggests that response rates may differ by work specialization. Simply counting all interviewed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone.
However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for those firms to be less likely to complete an interview is less important because the percentage of MBE/WBE availability is calculated within each discipline before being combined with information from other work fields in a dollar-weighted fashion. For example, work specialization would be a greater source of non-response bias if particular subsets of trucking firms were less likely than other subsets to be easily contacted by telephone.

**Response reliability.** Business owners and managers were asked questions that may be difficult to answer, including questions about revenue and employment.

Keen Independent explored the reliability of interview responses in a number of ways. For example, Keen Independent reviewed data from the availability interviews in light of information from other sources such as the City of Atlanta M/FBE directory and other vendor information that the study team collected. This included data on the race/ethnicity and gender of the owners of M/FBE-certified businesses and was compared with interview responses concerning business ownership.

A copy of the construction availability survey interview instrument follows.
SURVEY OF ATLANTA AREA CONSTRUCTION BUSINESSES

Hello. My name is [interviewer name]. We are calling on behalf of the Atlanta Housing Authority (AHA) and Atlanta Public Schools (APS). This is not a sales call. These agencies are jointly compiling a list of companies interested in performing construction, repair and maintenance work in Atlanta.

Who can I speak with to get the information we need from your firm?

We are contacting thousands of contractors, suppliers and other types of businesses in the Atlanta area.

You may call Vona Cox at AHA at 404-685-4881 or LaShon Hunt at APS at 404-802-2531 for more information.

The information developed in these interviews will add to AHA’s and APS’ existing data on companies interested in working with those two agencies.
Introduction

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=Right company – SKIP TO A3

2=Not right company

3=Refused to give information – TERMINATE

X2. Can you give me any information about [firm name]?

[NOTE TO INTERVIEWER – READ LIST.]

1=Yes, same owner doing business under a different name – SKIP TO X5

2=Yes, can give information about [firm name]

3=Company bought/sold/changed ownership – SKIP TO X5

4=No, does not have information – TERMINATE

5=Refused to give information – TERMINATE

X3. Can you give me the phone number of [firm name]?

[NOTE TO INTERVIEWER – ENTER UPDATED PHONE OF NAMED COMPANY.]

1=VERBATIM

2=No, does not have information

3=Refused to give information

X4. Can you give me the complete address for [firm name]?

[NOTE TO INTERVIEWER – RECORD IN THE FOLLOWING FORMAT:

1. STREET ADDRESS

2. CITY

3. STATE

4. ZIP]

1=VERBATIM

2= No, does not have information
3=Refused to give information

X5. And what is the new name of the business that used to be [firm name]?

[NOTE TO INTERVIEWER – ENTER UPDATED NAME.]

1=VERBATIM

2=No, does not have information

3=Refused to give information

X6. Can you give me the name of the owner or manager of this business? [NOTE TO INTERVIEWER – THIS IS THE BUSINESS FROM X5.]

[NOTE TO INTERVIEWER – ENTER UPDATED NAME.]

1=VERBATIM

2=No, does not have information

3=Refused to give information

X7. Can I have a telephone number for them?

[NOTE TO INTERVIEWER – ENTER UPDATED PHONE NUMBER.]

1=VERBATIM

2=No, does not have information

3=Refused to give information

X8. Can you give me the complete address or city for [new firm name]?

[NOTE TO INTERVIEWER – RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS

. CITY

. STATE

. ZIP]

1=VERBATIM

2=SAME AS X4
3=No, does not have information

4=Refused to give information

X9. Do you work for this new company?

1=Yes – CONTINUE

2=No – TERMINATE

Confirmation of Business and Commercial or Public Work

A1. [NONE]

A2. [NONE]

A3. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

1=Yes

2=No [END – INTERVIEW COMPLETE.]

98=(Don’t know)

A4. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is this correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY.]

1=Yes – SKIP TO A6

2=No

98=(Don’t know)

99=(Refused)

A5. What would you say is the main line of business of your company?

[NOTE TO INTERVIEWER – ENTER VERBATIM RESPONSE.]

1=VERBATIM
A6. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location
2=Have other locations
98=(Don’t know)
99=(Refused)

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=ENTER NAME
98=(Don’t know) – SKIP TO B1
99=(Refused) – SKIP TO B1

A8. [NOTE TO INTERVIEWER – ENTER NAME OF PARENT COMPANY.]

1=VERBATIM
Type of Work

B1. What types of work does your firm perform? Please select from the list of industries that I am about to read. [NOTE TO INTERVIEWER – READ, MULTIPUNCH.]

11=Developer of multifamily properties
12=Building construction or other general contractor for multifamily properties
13=Building construction or other general contractor for school properties
14=Construction management for multifamily properties
15=Construction management for school properties
16=Site preparation
17=Concrete work
18=Plumbing, heating or air conditioning
19=Water and sewer lines
20=Electrical work
21=Construction materials and supplies
22=Plaster and drywall work
88=Other [DON’T READ]
98=(Don’t know)
99=(Refused)
Role in Construction Work

C1. Next, thinking about work in the past five years in the Atlanta metro area, has your company bid on or been awarded work related to apartments or other multifamily housing?

1=Yes

2=No – SKIP TO C3

3=Other [DON’T READ] – SKIP TO C3

98=(Don’t know) – SKIP TO C3

99=(Refused) – SKIP TO C3

C2. Were those bids or awards to work as a prime contractor, a subcontractor or a supplier?

11=Prime contractor

12=Subcontractor

13=Supplier (or manufacturer)

14=Prime and Sub

15=Sub and Supplier

16=Prime and Supplier

17=Prime, Sub, and Supplier

98=(Don’t know)

99=(Refused)

C3. Is your company qualified and interested in working with the Atlanta Housing Authority or on an AHA-related property as a developer?

1=Yes

2=No

98=(Don’t know)

99=(Refused)
C4. Is your company qualified and interested in working with the Atlanta Housing Authority or on an AHA-related property as a prime contractor?

1=Yes
2=No
98=(Don’t know)
99=(Refused)

C5. Is your company qualified and interested in working with the Atlanta Housing Authority or on an AHA-related property as a subcontractor or construction materials supplier?

1=Yes
2=No
98=(Don’t know)
99=(Refused)

C6. My next questions are about your company’s involvement in school-related contracts. Thinking about work in the past five years in the Atlanta metro area, has your company bid on or been awarded work related to schools?

1=Yes
2=No – SKIP TO C8
3=Other [DON’T READ] – SKIP TO C8
98=(Don’t know) – SKIP TO C8
99=(Refused) – SKIP TO C8

C7. Were those bids or awards to work as a prime contractor, a subcontractor or a supplier?

11=Prime contractor
12=Subcontractor
13=Supplier (or manufacturer)
14=Prime and Sub
15=Sub and Supplier
16=Prime and Supplier
C8. Is your company qualified and interested in working with Atlanta Public Schools as a *prime contractor*?

1 = Yes
2 = No
98 = (Don’t know)
99 = (Refused)

C9. Is your company qualified and interested in working with the Atlanta Public Schools as a *subcontractor* or *construction materials supplier*?

1 = Yes
2 = No
98 = (Don’t know)
99 = (Refused)

**Contract History**

D1. My next questions are about the firm’s contract history. In rough dollar terms, what was the largest contract or subcontract your company was awarded in the Atlanta metro area during the past five years?

[NOTE TO INTERVIEWER – INCLUDES CONTRACTS NOT YET COMPLETED.]

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY:]

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>2</td>
<td>More than $100,000 to $500,000</td>
</tr>
<tr>
<td>3</td>
<td>More than $500,000 to $1 million</td>
</tr>
<tr>
<td>4</td>
<td>More than $1 million to $2 million</td>
</tr>
<tr>
<td>5</td>
<td>More than $2 million to $5 million</td>
</tr>
<tr>
<td>6</td>
<td>More than $5 million to $10 million</td>
</tr>
<tr>
<td>7</td>
<td>More than $10 million to $20 million</td>
</tr>
<tr>
<td>8</td>
<td>$20 million to $100 million</td>
</tr>
<tr>
<td>9</td>
<td>$100 million or more</td>
</tr>
<tr>
<td>97</td>
<td>(None) – SKIP TO E1</td>
</tr>
<tr>
<td>98</td>
<td>(Don’t know) – SKIP TO E1</td>
</tr>
<tr>
<td>99</td>
<td>(Refused) – SKIP TO E1</td>
</tr>
</tbody>
</table>
D2. Was this the largest contract or subcontract that your company bid on or submitted quotes for in the Atlanta metro area during the past five years?

1=Yes – SKIP TO E1
2=No
98=(Don’t know) – SKIP TO E1
99=(Refused) – SKIP TO E1

D3. What was the largest contract or subcontract that your company bid on or submitted quotes for in the Atlanta metro area during the past five years?

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY:]

1=$100,000 or less
2=More than $100,000 to $500,000
3=More than $500,000 to $1 million
4=More than $1 million to $2 million
5=More than $2 million to $5 million
6=More than $5 million to $10 million
7=More than $10 million to $20 million
8=More than $20 million to $100 million
9=$100 million or more
97=(None)
98=(Don’t know)
99=(Refused)

Ownership

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is your firm a woman-owned business?

1=Yes
2=No
98=(Don’t know)
99=(Refused)

E2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is your firm a minority-owned business?

1=Yes
2=No – SKIP TO F1
E3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American or Native American?

1=African 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 Common-wealth 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 group [SPECIFY]

98=(Don’t know)

99=(Refused)

E3. [NOTE TO INTERVIEWER – OTHER GROUP – SPECIFY.]

1=VERBATIM

Business Background

F1. My next questions are about the background of the business. About what year was your firm established?

[NOTE TO INTERVIEWER – RECORD FOUR-DIGIT YEAR, e.g., '1977'.]

9998=(Don’t know)

9999=(Refused)

1=NUMERIC (1600-2016)
F2. My next set of questions pertain to annual averages for your company for 2014 through 2016 [NOTE TO INTERVIEWER – OR JUST YEARS IN BUSINESS IF FORMED AFTER 2012]. Dun & Bradstreet indicates that your company has about \( \text{number} \) employees working out of just your location. Is that an accurate estimate of your company’s average employees from 2014 through 2016?

[NOTE TO INTERVIEWER – INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION.]

1=Yes – SKIP TO F4
2=No
98=(Don’t know) – SKIP TO F4
99=(Refused) – SKIP TO F4

F3. About how many employees did you have working out of just your location, on average, from 2014 through 2016?

[NOTE TO INTERVIEWER – RECORD NUMBER OF EMPLOYEES:]

NUMERIC (1-999999999)
999999998=(Don’t know)
999999999=(Refused)

F4. Dun & Bradstreet lists the annual gross revenue of your company, just considering your location, to be \( \text{dollar amount} \). Is that an accurate estimate for your company’s average annual gross revenue from 2014 through 2016 (or for the years your company was in business if started after 2014)?

1=Yes – SKIP TO F6
2=No
98=(Don’t know) – SKIP TO F6
99=(Refused) – SKIP TO F6
F5. Roughly, what was the average annual gross revenue of your company, just considering your location, from 2014 through 2016? Would you say . . . [NOTE TO INTERVIEWER – READ LIST:]

21=Less than $1 million
22=$1 million to $5 million
23=$5.1 million to $7.5 million
24= $7.6 million to $11 million
25= $11.1 million to $15 million
26=$15.1 million to $20.5 million

27=$20.6 million to $36.5 million
28=more than $36.5 million
98=(Don’t know)
99=(Refused)

F6. [NOTE TO INTERVIEWER – ASK IF MULTI-LOCATION FIRM NOTED IN A6. IF SINGLE LOCATION FIRM NOTED IN A6, GO TO G1a.] About how many employees did you have, on average, for all of your Atlanta metro area locations from 2014 through 2016?

[NOTE TO INTERVIEWER – RECORD NUMBER OF EMPLOYEES:]

NUMERIC (1-999999999)

999999998=(Don’t know)
999999999=(Refused)

F7. Roughly, what was the average annual gross revenue of your company, for all of your Atlanta metro area locations from 2014 through 2016 (or for the years your company was in business if started after 2014)? Would you say . . . [NOTE TO INTERVIEWER – READ LIST:]

21=Less than $1 million
22=$1 million to $5 million
23=$5.1 million to $7.5 million
24= $7.6 million to $11 million
25= $11.1 million to $15 million
26=$15.1 million to $20.5 million

27=$20.6 million to $36.5 million
28=more than $36.5 million
98=(Don’t know)
99=(Refused)
**Barriers or Difficulties**

Finally, we’re interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion in your industry, or with obtaining work. Think about your experiences within the past five years as you answer these questions.

G1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

1=Yes  
2=No  
97=(Does not apply)  
98=(Don’t know)  
99=(Refused)

G1b. Has your company obtained or tried to obtain a bond for a project?

1=Yes  
2=No – SKIP TO G1d  
97=(Does not apply) – SKIP TO G1d  
98=(Don’t know) – SKIP TO G1d  
99=(Refused) – SKIP TO G1d

G1c. Has your company had any difficulties obtaining bonds needed for a project?

1=Yes  
2=No  
97=(Does not apply)  
98=(Don’t know)  
99=(Refused)

G1d. Have you had any difficulty in being prequalified for work?

1=Yes  
2=No  
97=(Does not apply)
G1e. Have any insurance requirements on projects presented a barrier to bidding?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1f. Has the large size of projects presented a barrier to bidding?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1g. Has your company experienced any difficulties learning about bid opportunities directly with the Atlanta Housing Authority?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1h. Has your company experienced any difficulties learning about bid opportunities directly with Atlanta Public Schools?

1=Yes
2=No
97=(Does not apply)
G1i. Has your company experienced any difficulties learning about bid opportunities with other public agencies in the Atlanta metro area?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1j. Has your company experienced any difficulties learning about bid opportunities from property managers or developers of multifamily properties?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1k. Has your company experienced any difficulties with learning about bid opportunities in the private sector in general in the Atlanta metro area?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1l. Has your company experienced any difficulties learning about subcontracting opportunities with Atlanta metro area prime contractors?

1=Yes
2=No
G1m1. Has your company experienced any difficulties receiving payment from the Atlanta Housing Authority?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1m2. Has your company experienced any difficulties receiving payment from Atlanta Public Schools?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1n. Has your company experienced any difficulties receiving payment from property managers or developers?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)
G1o. Has your company experienced any difficulties receiving payment from prime contractors?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1p. Has your company experienced any difficulties receiving payment from other customers in the private sector?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G1q. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

1=Yes
2=No
97=(Does not apply)
98=(Don’t know)
99=(Refused)

G2. Do any other barriers come to mind about winning work as a prime or subcontractor in the Atlanta metro area? Also, do you have any general thoughts or insights on starting and expanding a business in your field?

1=VERBATIM [NOTE TO INTERVIEWER – PROBE FOR COMPLETE THOUGHTS.]
97=(Nothing/None/No comments)
98=(Don’t know)
G3. Would you be willing to participate in a follow-up interview about any of these issues?

1=Yes
2=No
97=(Does not apply)
98=(Don't know)
99=(Refused)

Additional Questions

H1. Just a few last questions. What is your name?

[NOTE TO INTERVIEWER – RECORD FULL NAME:]

1=VERBATIM
99=(Refused)

H2. What is your position at [firm name / new firm name]?

1=Receptionist
2=Owner
3=Manager
4=CFO
5=CEO
6=Assistant to Owner/CEO
7=Sales manager
8=Office manager
9=President
10=Other [SPECIFY]
99=(Refused)
H2. [NOTE TO INTERVIEWER – ENTER OTHER – SPECIFY:]

1=VERBATIM

H3. For purposes of receiving procurement information from the Atlanta Housing Authority and Atlanta Public Schools, is your mailing address [firm address]?

1=Yes – SKIP TO H5
2=No
98=(Don’t know) – SKIP TO H5
99=(Refused) – SKIP TO H5

H4. What mailing address should the agencies use to get any materials to you?

1=VERBATIM
99=(Refused)

H5. What fax number could they use to fax any materials to you?

1=NUMERIC (1000000000-9999999999)
97=(No fax)
98=(Don’t know)
99=(Refused)

H6. What e-mail address could they use to get any materials to you?

1=ENTER E-MAIL
97=(No email address)
98=(Don’t know)
99=(Refused)


1=VERBATIM

[NOTE TO INTERVIEWER – END OF SURVEY MESSAGE:]
Thank you for your time. This is very helpful for the Atlanta Housing Authority and Atlanta Public Schools.
APPENDIX D.
Disparity Analysis Methodology

Keen Independent’s disparity analysis compares that percentage of contract dollars going to MBEs and WBEs with the level of participation that might be expected based on the availability analysis. Appendix D provides an overview of the disparity analysis calculations and describes the statistical significance of the disparity analysis results.

A. Disparity Analysis for AHA-related Contracts

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on AHA-related prime contracts and subcontracts (reported in Appendix B) with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work (discussed in Appendix C). Availability is also referred to as the “benchmark” for the disparity analysis. Keen Independent compared utilization with availability benchmarks for individual MBE/WBE groups.

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

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

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

1 Some courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F. 3d 1187 (9th Cir. 2013); Rothe Development Corp v. U.S. Dept of Defense, 545 F.3d 1023 (Fed. Cir. 2008); Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 914 (11th Circuit 1997); Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994). Also see Appendix A for additional discussion.
Results for contracts awarded by AHA. Figure D-2 shows disparity indices for each MBE group and for white women-owned firms on contracts awarded by AHA. Because utilization exceeded availability for African American-, Subcontinent Asian American- and white women-owned firms, disparity indices for these groups exceeded 100. The disparity index for MBEs overall also exceeded 100. Disparity indices were less than 80 for Asian-Pacific American-, Hispanic American- and Native American-owned firms.

Figure D-2.
Disparity analysis for contracts awarded by AHA, July 2012-June 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>32.8 %</td>
<td>18.3 %</td>
<td>179</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>0.0</td>
<td>1.9</td>
<td>0</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>2.7</td>
<td>1.8</td>
<td>150</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>0.6</td>
<td>1.5</td>
<td>40</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.0</td>
<td>1.2</td>
<td>0</td>
</tr>
<tr>
<td>Total MBE</td>
<td>36.1 %</td>
<td>24.7 %</td>
<td>146</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>8.4</td>
<td>6.9</td>
<td>122</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>44.5 %</td>
<td>31.6 %</td>
<td>141</td>
</tr>
</tbody>
</table>

Note: Disparity index = 100 x Utilization/Availability
Source: Keen Independent utilization and availability analyses for contracts awarded by AHA (including management fees and staff costs for PMDs and developers selected by AHA).

Results for contracts awarded by PMDs. Figure D-3 presents results for contracts awarded by PMDs. There were disparities for each MBE group and for WBEs. For each group except for African American-owned firms, disparity indices were less than 80, indicating a substantial disparity.

Figure D-3.
Disparity analysis for contracts awarded by PMDs, July 2012-June 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>25.2 %</td>
<td>29.0 %</td>
<td>87</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>0.1</td>
<td>1.8</td>
<td>6</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>0.1</td>
<td>2.1</td>
<td>5</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>1.9</td>
<td>5.5</td>
<td>35</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.0</td>
<td>1.4</td>
<td>0</td>
</tr>
<tr>
<td>Total MBE</td>
<td>27.3 %</td>
<td>39.8 %</td>
<td>69</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>7.6</td>
<td>18.9</td>
<td>40</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>34.9 %</td>
<td>58.7 %</td>
<td>59</td>
</tr>
</tbody>
</table>

Note: Disparity index = 100 x Utilization/Availability
Source: Keen Independent utilization and availability analyses for contracts awarded by PMDs (does not include management fees and staff costs for PMDs).
Results for contracts awarded by developers. As with AHA- and PMD-awarded contracts, Keen Independent calculated disparity indices for contracts awarded by developers. Figure D-4 provides these results by MBE group and for WBEs. Disparity indices were less than 80 for each group. Therefore, there were substantial disparities between the utilization and availability of each MBE group and WBEs for developer-awarded contracts.

Figure D-4.
Disparity analysis for contracts awarded by developers, July 2011-June 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American-owned</td>
<td>22.0 %</td>
<td>36.8 %</td>
<td>60</td>
</tr>
<tr>
<td>Asian-Pacific American-owned</td>
<td>0.1</td>
<td>1.3</td>
<td>8</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>0.1</td>
<td>0.5</td>
<td>20</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>0.1</td>
<td>6.0</td>
<td>2</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.0</td>
<td>1.1</td>
<td>0</td>
</tr>
<tr>
<td>Total MBE</td>
<td>22.3 %</td>
<td>45.7 %</td>
<td>49</td>
</tr>
<tr>
<td>WBE (white women-owned)</td>
<td>0.7</td>
<td>7.9</td>
<td>9</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>23.0 %</td>
<td>53.6 %</td>
<td>43</td>
</tr>
</tbody>
</table>

Note: Disparity index = 100 x Utilization/Availability
Source: Keen Independent utilization and availability analyses for contracts awarded by developers (does not include development fees for developers).

B. Statistical Significance of Disparity Analysis Results for AHA-related Contracts

Testing for statistical significance relates to testing the degree to which a researcher can reject “random chance” as an explanation for any observed differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. However, the study team attempted to contact every firm in the relevant geographic market area identified as possibly doing business within relevant subindustries (as described in Appendix C), mitigating many of the concerns associated with random chance in data sampling as they may relate to Keen Independent’s availability analysis.

The utilization analysis also approaches a “population” of contracts. Therefore, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant.”

Figure D-5.
Confidence intervals for availability and utilization measures
Keen Independent conducted telephone interviews with 1,395 business establishments, which might be treated as a “population,” not a sample. However, if the results are treated as a sample, the reported 36.5 percent representation of MBEs among all available firms is accurate within about +/- 1.9 percentage points. The level of accuracy for WBEs is similar (+/- 0.6 of the overall figure of 10.7 percent). By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Keen Independent applied a 95 percent confidence level and the finite population correction factor when determining these confidence intervals.)

Keen Independent attempted to collect data for all relevant AHA-related contracts during the study period and no confidence interval calculation applies for the utilization results.
Monte Carlo analysis. There were many opportunities in the sets of prime contracts and subcontracts for MBE/WBEs to be awarded work. Some contract elements involved large dollar amounts and others involved only a few thousand dollars.

Monte Carlo analysis was a useful tool for the study team to use for statistical significance testing in the disparity study, because there were many individual chances at winning contracts, each with a different payoff. Figure D-6 describes Keen Independent’s use of Monte Carlo analysis.

Results. Keen Independent identified a substantial disparity between MBE utilization and availability and between WBE utilization and availability for PMD-awarded contracts and for developer-awarded contracts. Therefore, the Monte Carlo simulation focused on these results.

Figure D-7 presents the results from the Monte Carlo analysis as they relate to the statistical significance of disparity analysis results for MBEs for PMD- and developer-awarded contracts.
**PMD-awarded contracts.** Figure D-7 presents the results of the Monte Carlo simulations for contracts awarded by PMDs and contracts awarded by developers.

For PMD-awarded contracts, Monte Carlo simulations replicated the observed disparity for MBEs in seven, or less than 0.1 percent of the 10,000 simulation runs. The simulations replicated the disparity for WBEs in just one of the simulation runs. This result means that one can be confident that chance in contract award can be rejected as an explanation of the observed disparity for minority-owned firms and white women-owned businesses in contracts awarded by PMDs.

**Developer-awarded contracts.** Results for developer-awarded contracts are shown in the right-most two columns of Figure D-7. Monte Carlo simulations replicated the observed disparity for MBEs in 156 of the 10,000 simulation runs. Because this represents only 1.56 percent of the simulations, one can be confident in rejecting chance in contract awards as a cause of the disparity observed for MBEs in developer-awarded contracts.

The simulations replicated the disparity for WBEs in 50 of the simulation runs (0.5%). One can be confident that chance in contract award can be rejected as an explanation of the observed disparity for white women-owned businesses in contracts awarded by developers.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion in Figure D-5 and elsewhere in this appendix), and it may not be appropriate for a very small population of firms.²

![Figure D-4. Monte Carlo results for MBEs and WBEs for PMD-awarded contracts and developer-awarded contracts](image)

<table>
<thead>
<tr>
<th></th>
<th>PMD-awarded contracts</th>
<th>Developer-awarded contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>MBE</td>
<td>WBE</td>
</tr>
<tr>
<td><strong>Utilization</strong></td>
<td>27.3 %</td>
<td>7.6 %</td>
</tr>
<tr>
<td><strong>Disparity index</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Number of simulation runs out of 10,000 that replicated observed utilization</strong></td>
<td>69</td>
<td>40</td>
</tr>
<tr>
<td><strong>Probability of observed disparity occurring due to &quot;chance&quot;</strong></td>
<td>&lt; 0.1 %</td>
<td>&lt; 0.1 %</td>
</tr>
<tr>
<td><strong>Reject chance in awards of contracts as a cause of disparity?</strong></td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

*Note:* Disparity index = 100 x Utilization/Availability

*Source:* Keen Independent from data on PMD- and developer-awarded contracts.

² Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contract elements included in the analysis. Results can also be affected by the size distribution of contract elements.
C. Disparity Results for Analysis of Multifamily Housing Projects in the Atlanta Area

Keen Independent compiled data on multifamily housing projects in the Atlanta area, as described in Appendix B. Results are analyzed below.

City of Atlanta building permits for multifamily construction. Figure D-5 presents the number of building permits obtained by minority-, women- and majority-owned contractors for general contracting, electrical work, plumbing and sprinkler work combined on multifamily projects within Atlanta city limits from 2011 through 2015. (These specialties are those for which City building permits must be issued.)

Of the 7,657 permits for which Keen Independent could determine firm ownership, minority-owned firms accounted for 510, or 6.7 percent of the total permits. Businesses identified as white women-owned obtained 426 permits (5.6% of the total). Combined, MBE/WBE contractors obtained 12.2 percent of the multifamily housing construction permits.

Figure D-5.
Number of public and private sector building permits issued on non-AHA multifamily projects within Atlanta city limits, January 2011-December 2015

<table>
<thead>
<tr>
<th>Building permits</th>
<th>Number of permits</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned</td>
<td>510</td>
<td>6.7 %</td>
</tr>
<tr>
<td>White women-owned</td>
<td>426</td>
<td>5.6 %</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>936</td>
<td>12.2 %</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>6,721</td>
<td>87.8 %</td>
</tr>
<tr>
<td>Total</td>
<td>7,657</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Source: Keen Independent from City of Atlanta building permits data.

Keen Independent compared the relative number of permits on multifamily housing projects obtained by MBEs and WBEs to availability benchmarks for those firms.

- The study team identified firms among the companies in the 2017 availability survey that reported qualifications and interest in multifamily housing projects and performed development, multifamily housing construction, electrical work and plumbing work. Companies performing more than one type of work were counted once. There were 266 companies in these disciplines in the availability database.

- Of 266 companies available for multifamily development, building construction, electrical work and plumbing, 119 were minority-owned and 28 were white women-owned. Using these figures, one might anticipate that MBEs might obtain 45 percent of the City building permits for multifamily construction and that WBEs might obtain 10 percent of those permits.
As shown in Figure D-6, the 6.7 percent of City of Atlanta building permits for multifamily construction obtained by MBEs appears to be considerably less than what might be expected given the relative availability of MBEs for that work (44.7%). The 5.6 percent of building permits obtained by WBEs was also less than the 10.5 percent availability of white women-owned firms for such work. Both of these disparities were substantial (disparity indices of 15 for MBEs and 53 for WBEs).

Figure D-6.
Disparity analysis for public and private sector building permits issued on non-AHA multifamily projects within Atlanta city limits, January 2011-December 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned</td>
<td>6.7 %</td>
<td>44.7 %</td>
<td>15</td>
</tr>
<tr>
<td>White women-owned</td>
<td>5.6%</td>
<td>10.5%</td>
<td>53</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>12.2 %</td>
<td>55.3 %</td>
<td>22</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>87.8 %</td>
<td>44.7 %</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td></td>
</tr>
</tbody>
</table>

Source: Keen Independent utilization and availability analyses using City of Atlanta building permits data and 2017 availability survey.

Keen Independent did not weight the availability results by type of work involved in the permit, but sensitivity analysis indicates that disparities would persist if the availability data were weighted. The availability analysis did not take into account size of project, but further analysis of the availability results suggests that any differences in bid capacity of MBE/WBEs would not account for the observed disparities.

Dodge Reports data for multifamily developers and contractors. Keen Independent examined Dodge Reports data for multifamily construction projects within the Atlanta Metropolitan Area that had start dates from January 2011 to December 2015. The Dodge Reports data included information on the value of the project.

Keen Independent examined 341 non-AHA public and private sector contracts for which firm ownership could be determined. Those contracts had a total value of $4.4 billion. Minority-owned companies were the contractors for $87 million of these projects, or about 2 percent of the total contract dollars. Firms identified as white women-owned were the general contractors for about $47 million, or 1 percent of the dollars. Figure D-7 provides detailed results.
Figure D-7.
Dollars of prime contracts on non-AHA multifamily construction projects within the Atlanta Metropolitan Area, January 2011-December 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned</td>
<td>2.0 %</td>
<td>54.5 %</td>
<td>4</td>
</tr>
<tr>
<td>White women-owned</td>
<td>1.1 %</td>
<td>6.8</td>
<td>16</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>3.1 %</td>
<td>61.4 %</td>
<td>5</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>97.0</td>
<td>38.6</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100.1 %</td>
<td>100.0 %</td>
<td></td>
</tr>
</tbody>
</table>

Source: Keen Independent from analysis of Dodge Data & Analytics Dodge Reports data and 2017 availability survey data.

As with the City building permit data, Keen Independent compared the Dodge utilization results for multifamily contractors with what might be anticipated based on the availability survey data. There were 48 minority-owned firms among the 88 companies in the availability database reporting qualifications and interest in multifamily projects that performed either development or multifamily building construction. There were six white women-owned firms for these specialization in the availability data. Percentage availability is 54.5 percent for MBEs and 6.8 percent for WBEs based on these data, as shown in the middle column of Figure D-8 on the following page.

Utilization of MBEs (2.0%) was substantially below what might be expected based on the availability analysis (54.5%). Utilization of WBEs (1.1%) was also substantially below the availability benchmark of 6.8 percent.

Figure D-8.
Disparity analysis for prime contracts on non-AHA multifamily construction projects within the Atlanta Metropolitan Area, January 2011-December 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned</td>
<td>2.0 %</td>
<td>54.5 %</td>
<td>4</td>
</tr>
<tr>
<td>White women-owned</td>
<td>1.1 %</td>
<td>6.8</td>
<td>16</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>3.1 %</td>
<td>61.4 %</td>
<td>5</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>97.0</td>
<td>38.6</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100.1 %</td>
<td>100.0 %</td>
<td></td>
</tr>
</tbody>
</table>

Source: Keen Independent from analysis of Dodge Data & Analytics Dodge Reports data and 2017 availability survey data.
It is important to note that these data do not include subcontract information and only provide a partial picture of overall participation of MBE/WBEs on these contracts. The availability data were collected for firms qualified and interested in multifamily development and building in the AHA availability survey, which might not reflect availability for multifamily projects across the Atlanta Metropolitan Area. The analysis did not reflect any differences in bid capacity of MBE/WBEs compared to majority-owned firms. In addition, there were certain limitations in identifying ownership of minority-, women- and majority-owned contractors identified in the Dodge data.

Keen Independent’s sensitivity analyses examining certain of the above factors would not fully explain the observed disparities, however.

**Dodge Reports data for design firms for multifamily projects in the Atlanta Metropolitan Area.**
The Dodge Reports data also provided information on the lead design firm working on many of those multifamily projects. Limiting the analysis to businesses for which Keen Independent could determine ownership, design firms were listed 383 times (some projects had multiple firms listed.). Minority-owned firms were identified as the design firm 19 times and businesses owned by white women were listed 15 times. Relative to the total number of design contracts identified, MBEs accounted for 5.0 percent of the design contracts and WBEs received 3.9 percent of the design contracts. (Dollars of design contracts were not provided in the Dodge Reports data.)

**Figure D-9.**
Number of A&E firms on non-AHA multifamily construction projects within the Atlanta Metropolitan Area, January 2011-December 2015

<table>
<thead>
<tr>
<th></th>
<th>Number of firms</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned</td>
<td>19</td>
<td>5.0 %</td>
</tr>
<tr>
<td>White women-owned</td>
<td>15</td>
<td>3.9 %</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>34</td>
<td>8.9 %</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>349</td>
<td>91.1 %</td>
</tr>
<tr>
<td>Total</td>
<td>383</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Source: Keen Independent from analysis of Dodge Data & Analytics Dodge Reports data and 2017 availability survey data.

There were 202 architectural and engineering (A&E) firms reporting qualifications and interest in AHA-related multifamily work in the 2017 availability survey. Fifty-nine companies were minority-owned (29%) and 23 businesses were white women-owned (11%).
Figure D-10 compares the percentage of design contracts going to MBEs and WBEs with those availability benchmarks. As shown, the representation of minority-owned firms and white women-owned businesses was substantially below what might be anticipated from the availability analysis.

Figure D-10.
Disparity analysis for design firms on non-AHA multifamily construction projects within the Atlanta Metropolitan Area, January 2011-December 2015

<table>
<thead>
<tr>
<th>Race/ethnicity and gender</th>
<th>Utilization</th>
<th>Availability</th>
<th>Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority-owned</td>
<td>5.0 %</td>
<td>29.2 %</td>
<td>17</td>
</tr>
<tr>
<td>White women-owned</td>
<td>3.9 %</td>
<td>11.4 %</td>
<td>34</td>
</tr>
<tr>
<td>Total MBE/WBE</td>
<td>8.9 %</td>
<td>40.6 %</td>
<td>22</td>
</tr>
<tr>
<td>Majority-owned</td>
<td>91.1 %</td>
<td>59.4 %</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td></td>
</tr>
</tbody>
</table>

Source: Keen Independent from Dodge Data & Analytics Dodge Reports data.
APPENDIX E.
Entry and Advancement in the Construction, Professional Services, Goods and Other Services Industries in the Atlanta Housing Authority Market Area

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”1 Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), the study team examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in the Atlanta Metropolitan Statistical Area (MSA).2

One potential source of barriers to business formation are barriers associated with entry and advancement in the construction, professional services, goods, and other services industries. Appendix E examines recent data on education, employment, and workplace advancement that may ultimately influence business formation in the Atlanta MSA construction, professional services, goods, and other services industries.3, 4

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1 Sherbrooke Turf, Inc., 345 F.3d at 970, (citing Adarand Constructors, Inc., 228 F.3d at 1167 – 76); Western States Paving Co. v. Washington State DOT, 407 F. 3d 983 (9th Cir. 2005) at 992.

2 For the purposes of the marketplace analyses in this study (Appendices E, F, G and H), the Atlanta Housing Authority market area corresponds to the 29 county Atlanta-Sandy Springs-Roswell, GA Metropolitan Statistical Area (MSA) as defined by the Office of Management and Budget (OMB) in 2013. Because the Census suppresses county information in the American Community Survey (ACS) data to safeguard respondent confidentiality, this target geography must be approximated using Public Use Microdata Areas (PUMAs). Specifically, a PUMA is assigned to the study area if and only if the majority of that PUMA’s population resided in the Atlanta MSA in 2010. Note that the University of Minnesota IPUMS platform includes a derived variable — MET2013 — that directly identifies the approximated study area. Further, due to a redrawing of PUMA boundaries that took place between 2011 and 2012 in response to updated data from 2010 Census, the effective geography underlying the 2010-2011 portion of the 5-year ACS sample is slightly different from that of the 2012-2014 portion. The 2013 geographic area used in the marketplace analyses encompasses the entire 20 county area used for the availability analysis and 97% of the population in the 29 county market area resides within the 20 county area.

3 In Appendix E and other marketplace appendices, information for “professional services” refers to Legal services; Architectural, engineering, and related services; and Management, scientific, and technical consulting services. “Goods” refers to Household appliances and electrical and electronic goods merchant wholesalers; Hardware, plumbing and heating equipment and supplies merchant wholesalers; Furniture and home furnishing stores; Household appliances retailers; Electronics stores; Building materials and supplies dealers; Hardware stores; and Office supplies and stationery stores. “Other services” refers to Real estate; Employment services; Landscaping services; Investigation and security services; Services to buildings and dwellings (except cleaning during construction and immediately after construction).

4 Several other report appendices analyze other quantitative aspects of conditions in the Atlanta MSA marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that the study team used in those appendices.
Introduction

Appendix E uses the 2010-2014 American Community Survey (ACS) data to analyze education, employment, and workplace advancement — all factors that may influence whether individuals from construction, professional services, goods or other services businesses. The study team studied barriers to entry into construction, professional services, goods and other services separately, because entrance requirements and opportunities for advancement differ for those industries.

Minority workers and business owners in the Atlanta MSA. As a starting point, the study team examined the representation of racial/ethnic minorities among workers and business owners in the Atlanta MSA. Figure E-1 shows demographics of the labor force, business owners in the Atlanta MSA construction, professional services, goods, and other services industries, and business owners in the Atlanta MSA in other non-study industries based on 2010-2014 data.

Due to small sample sizes, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities are studied together throughout much of this appendix. (Demographics of the construction, professional services, goods, and other services industries are considered separately later in Appendix E.)

Demographic results for the Atlanta MSA in 2010 through 2014 indicated that most minority groups had a lower representation among construction, professional services, goods, and other services business owners than in the workforce as a whole:

- African Americans accounted for about 33 percent of all workers and 24 percent business owners in non-study industries, but only 17 percent of business owners in the study industries; and
- Other minorities accounted for approximately 11 percent of non-study industry business owners, but only 4 percent of business owners in the study industries.

Both Hispanic American and non-Hispanic whites had a higher representation among business owners in the relevant study industries than among business owners in all other industries in the Atlanta MSA in 2010 through 2014:

- Hispanic Americans accounted for approximately 10 percent of all workers, 9 percent of non-study industry business owners, and 16 percent of business owners in the study industries; and
- Non-Hispanic whites accounted for about 51 percent of all workers in the Atlanta MSA, 57 percent of non-study industry business owners, and 64 percent of study industry business owners.

Female workers and business owners in the Atlanta MSA. Figure E-1 also presents the representation of women among workers and business owners in 2010 through 2014, in the Atlanta MSA. In 2010 through 2014, women accounted for about 48 percent of the Atlanta MSA labor force and 45 percent of non-study industry business owners. However, women only accounted for 22 percent of business owners in the construction, professional services, goods, and other services industries during those years.
Figure E-1. Demographic distribution of the workforce and business owners, 2010-2014

Note:
** Denotes that the difference in proportions between all non-study industry business owners and business owners in the relevant study industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

<table>
<thead>
<tr>
<th>Race/ethnicity</th>
<th>Workforce in all industries 2010-14 (n=117,957)</th>
<th>Business owners in non-study industries 2010-14 (n=7,347)</th>
<th>Business owners study industries 2010-14 (n=4,661)</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>33.2 %</td>
<td>23.8 %</td>
<td>16.5 % **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>9.9</td>
<td>8.7</td>
<td>15.7 **</td>
</tr>
<tr>
<td>Other Minority</td>
<td>6.2</td>
<td>10.7</td>
<td>4.1 **</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>50.7</td>
<td>56.9</td>
<td>63.6 **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Gender</th>
<th>Workforce in all industries 2010-14 (n=117,957)</th>
<th>Business owners in non-study industries 2010-14 (n=7,347)</th>
<th>Business owners study industries 2010-14 (n=4,661)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>47.9 %</td>
<td>44.8 %</td>
<td>21.6 % **</td>
</tr>
<tr>
<td>Male</td>
<td>52.1</td>
<td>55.2</td>
<td>78.4 **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

Educational attainment in the Atlanta MSA. A need for advanced education or training can be a barrier to entry or advancement in many industries. Based on 2010-2014 ACS data, Figure E-2 presents the percentage of workers age 25 and older with at least a four-year college degree in the Atlanta MSA.

Race/ethnicity. In the Atlanta MSA, about 48 percent of all non-Hispanic white workers age 25 and older had at least a four-year degree in 2010 through 2014. For other racial/ethnic groups, the data for the Atlanta MSA indicated that:

- About 32 percent of African Americans had at least a four-year college degree;
- Only 18 percent of Hispanic Americans had at least a four-year college degree; and
- About 38 percent of Native Americans had at least a four-year college degree.

Subcontinent Asian Americans in the Atlanta MSA were more likely than non-Hispanic whites to be college graduates in 2010 through 2014.

Gender. In the Atlanta MSA in 2010 through 2014, about 42 percent of women and 39 percent of men had at least a four-year college degree.
Figure E-2.
Percentage of all workers age 25 and older with at least a four-year degree in the Atlanta metro area, 2010-2014

Note:
** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male gender groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:
BBC Research & Consulting from 2000 U.S. Census 5% sample and 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/)

<table>
<thead>
<tr>
<th></th>
<th>Atlanta MSA 2010-2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race/ethnicity</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>32.0 % **</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>46.2</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>78.1 **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>17.6 **</td>
</tr>
<tr>
<td>Native American</td>
<td>38.1 **</td>
</tr>
<tr>
<td>Other Minority</td>
<td>45.5</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>47.5</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>41.7 % **</td>
</tr>
<tr>
<td>Male</td>
<td>38.8</td>
</tr>
</tbody>
</table>

Construction Industry

The study team examined how education, training, employment, and advancement may affect the number of businesses that individuals of different races/ethnicities and genders owned in the construction industry in the Atlanta MSA in 2010 through 2014.

**Education.** Formal education beyond high school is not a prerequisite for most construction jobs. For that reason, the construction industry often attracts individuals who have relatively low levels of educational attainment. Most construction industry employees in the Atlanta MSA do not have a four-year college degree. Based on the 2010-2014 ACS, 42 percent of workers in the construction industry in the Atlanta MSA were high school graduates with no post-secondary education, and 26 percent had not finished high school. Only 14 percent of those working in the construction industry in the Atlanta MSA had a four-year college degree or higher, compared to 40 percent of all workers.

**Race/ethnicity.** Hispanic Americans represented an especially large pool of workers with no post-secondary education in the Atlanta MSA. As can be seen in Figure E-2 above, in 2010 through 2014, only 18 percent of all Hispanic American workers 25 and older in the Atlanta MSA held at least a four-year college degree, far below the figure for non-Hispanic whites working in the region (48%). The percentage of African American (32%) and Native American (38%) workers in the Atlanta MSA with a four-year college degree was also substantially lower than that of non-Hispanic whites in 2010 through 2014. Based on educational requirements of entry-level jobs and the limited education beyond high school for many African Americans, Native Americans, and Hispanic Americans in the Atlanta MSA, one would expect a relatively high representation of those groups in the construction industry, especially in entry-level positions.

A substantial proportion of Subcontinent Asian American workers 25 and older (78%) in the Atlanta MSA had four-year college degrees in 2010 through 2014. Given the relatively high levels of education for Subcontinent Asian Americans in the area, the representation of those groups in the construction industry in the AHA might be similar to or lower than that of non-Hispanic whites.
Apprenticeship and training. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers, or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school or through an apprenticeship or other employer-provided training program. Apprenticeship programs can be developed by employers, trade associations, trade unions, or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction. Opportunities for those programs across race/ethnicity are discussed later in Appendix E.

Employment. With educational attainment as context, the study team examined the demographics of employment in the Atlanta MSA construction industry. Figure E-3 presents data from 2010 through 2014 to compare the demographic composition of the construction industry with the total workforce in all other industries in the Atlanta MSA.

Figure E-3.
Demographics of workers in construction and all non-construction industries, 2010-2014

Note:
** Denotes that the difference in proportions between workers in the construction industry and all non-construction industries for the given ACS year is statistically significant at the 95% confidence level.

Source:
BBC Research & Consulting from 2010-2014 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Race/ethnicity. Based on 2010-2014 ACS data, approximately 50 percent of people working in the construction industry in the Atlanta MSA were minorities. An examination of the Atlanta MSA construction workforce in 2010 through 2014 shows that:

- Thirty-four percent was made up of Hispanic Americans;
- Fourteen percent was made up of African Americans; and
- Two percent was made up of other minorities.

---

In the Atlanta MSA, Hispanic Americans made up a much larger percentage of workers in construction (34%) than in other non-construction industries (8%). In contrast, African Americans and other minorities accounted for smaller percentages of workers in the construction industry than in non-construction industries.

Average educational attainment of African Americans and Native Americans is consistent with requirements for construction jobs, so education does not explain the relatively low number of African American and Native American workers in the Atlanta MSA construction industry. Several studies throughout the United States have argued that race discrimination by construction unions has contributed to the low employment of African Americans in construction trades. The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination is now less prevalent in unions).

Gender. There were large differences between the percentage of all workers who were women and the percentage of construction workers who were women in the Atlanta MSA in 2010 through 2014. During those years, women represented about 51 percent of all non-construction workers in the Atlanta MSA but only 10 percent of construction workers.

Academic research concerning the effect of race- and gender-based discrimination. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry. The literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment. Research concerning highway construction projects in three major U.S. cities (Boston, Los Angeles, and Oakland) identified evidence of prevailing attitudes that women do not belong in construction, and that such discrimination was worse for women of color than for white women.

Importance of unions to entry in the construction industry. Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry. The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have claimed that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.

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themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering into the industry.\textsuperscript{11}

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be the best road for African Americans and other underrepresented groups into the industry. However, some researchers have identified racial discrimination by trade unions that have historically prevented minorities from obtaining employment in skilled trades.\textsuperscript{12} Some researchers argue that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.\textsuperscript{13}

- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.\textsuperscript{14}

- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.\textsuperscript{15}

- Traditionally, white unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.\textsuperscript{16}


\textsuperscript{13} \textit{Ibid.}, \textit{See United States v. Iron Workers Local 86 (1971), Sims v. Sheet Metal Workers International Association (1973), and United States v. International Association of Bridge, Structural and Ornamental Iron Workers (1971).}

\textsuperscript{14} Applebaum. 1999. Construction Workers, U.S.A.

\textsuperscript{15} \textit{Ibid.} 299. A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.  

According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs. 

However, more recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males:

Glover and Bilginsoy (2005) analyzed apprenticeship programs in the U.S. construction industry during the period 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited “markedly better performance for all groups on rates of attrition and completion” compared to employer-run programs.

In a similar analysis focusing on female apprentices, Bilginsoy and Berik (2006) found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.

A recent study on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program. Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

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Other data also indicate a more productive relationship between unions and minority workers than that which may have prevailed in the past. For example, 2012 Current Population Survey (CPS) data indicate that union membership rates for African Americans is slightly higher than for non-Hispanic whites and union membership rates for Hispanic Americans are similar to those of non-Hispanic whites.\textsuperscript{22} The CPS asked participants, “Are you a member of a labor union or of an employee association similar to a union?” CPS data showed union membership to be 13 percent for African American workers, 10 percent for Hispanic American workers and 11 percent for non-Hispanic white workers. In the construction industry, the union membership rates for both African American workers and non-Hispanic white workers is 17 percent, but the rate for Hispanic construction workers is only 8 percent.

Although union membership and union program participation varies based on race/ethnicity, the causes of those differences and their effects on construction industry employment are unresolved. Research is especially limited on the impact of unions on Asian American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in the Atlanta MSA are different from other parts of the country. In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups.

\textbf{Advancement.} To research opportunities for advancement in the Atlanta MSA construction industry, the study team examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics.\textsuperscript{23} Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2010-2014 ACS for the study team to analyze.

\textbf{Racial/ethnic composition of construction occupations.} Figure E-4 presents the race/ethnicity of workers in select construction-related occupations in the Atlanta MSA, including low-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians), and supervisory roles. Figure E-4 presents those data for 2010 through 2014.

Based on 2010-2014 ACS data, there are large differences in the racial/ethnic makeup of workers in various trades related to construction in the Atlanta MSA. Overall, minorities comprised 50 percent of the construction industry workforce in 2010 through 2014.


Minorities comprised a relatively large percentage of laborers working as:

- Cement masons (86%);
- Drywall installers (83%);
- Brick masons (82%);
- Painters (80%);
- Roofers (76%); and
- Construction laborers (71%).

Some occupations had relatively low representations of minorities:

- Iron and steel workers (23%);
- Machine operators (32%);
- Sheet metal workers (36%); and
- Electricians (39%).

Minorities made up 31 percent of first-line supervisors in 2010 through 2014. That percentage was much less than the total percentage of construction workers who were minorities during those years (50%).

Most minorities working in the Atlanta MSA construction industry in 2010 through 2014 were Hispanic Americans. The representation of Hispanic Americans was substantially larger among:

- Drywall installers (73%);
- Roofers (70%);
- Painters (67%);
- Brick masons (65%);
- Cement masons (65%);
- Construction laborers (53%); and
- Carpet installers (51%).

Those occupations tend to be low-skill occupations. In contrast, among the higher-skilled occupations, Hispanic Americans were less represented:

- Iron and steel workers (5%);
- Supervisors (16%);
- Machine operators (17%);
- Sheet metal workers (19%); and
- Electricians (17%).
The representation of African Americans in the construction industry was not greater than 25 percent for any occupation.

Figure E-4.
Minorities as a percentage of selected construction occupations in the Atlanta MSA, 2010-2014

<table>
<thead>
<tr>
<th>Occupation</th>
<th>African American</th>
<th>Hispanic</th>
<th>Other Minority</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cement Masons (n=33)</td>
<td>21%</td>
<td>65%**</td>
<td>14%</td>
<td>86%</td>
</tr>
<tr>
<td>Drywall (n=107)</td>
<td>11%</td>
<td>73%**</td>
<td>16%</td>
<td>83%</td>
</tr>
<tr>
<td>Brickmasons (n=69)</td>
<td>17%</td>
<td>65%**</td>
<td>6%</td>
<td>82%</td>
</tr>
<tr>
<td>Painters (n=466)</td>
<td>11%**</td>
<td>67%**</td>
<td>2%</td>
<td>80%</td>
</tr>
<tr>
<td>Roofers (n=171)</td>
<td>6%**</td>
<td>70%**</td>
<td>4%</td>
<td>80%</td>
</tr>
<tr>
<td>Laborers (n=1,121)</td>
<td>15%</td>
<td>53%**</td>
<td>3%</td>
<td>71%</td>
</tr>
<tr>
<td>Carpet (n=100)</td>
<td>9%</td>
<td>51%**</td>
<td>4%</td>
<td>63%</td>
</tr>
<tr>
<td>Carpenters (n=688)</td>
<td>10%**</td>
<td>47%**</td>
<td>1%</td>
<td>59%</td>
</tr>
<tr>
<td>Helpers (n=43)</td>
<td>18%</td>
<td>33%</td>
<td>4%</td>
<td>55%</td>
</tr>
<tr>
<td>All Construction (n=6,788)</td>
<td>14%</td>
<td>34%</td>
<td>2%</td>
<td>51%</td>
</tr>
<tr>
<td>Drivers (n=75)</td>
<td>23%</td>
<td>20%**</td>
<td>4%</td>
<td>43%</td>
</tr>
<tr>
<td>Glaziers (n=26)</td>
<td>4%**</td>
<td>30%</td>
<td>9%</td>
<td>43%</td>
</tr>
<tr>
<td>Pipelayers (n=242)</td>
<td>18%</td>
<td>20%**</td>
<td>4%</td>
<td>41%</td>
</tr>
<tr>
<td>Electricians (n=350)</td>
<td>19%</td>
<td>17%**</td>
<td>3%</td>
<td>39%</td>
</tr>
<tr>
<td>Sheet Metal (n=34)</td>
<td>13%</td>
<td>19%</td>
<td>4%</td>
<td>36%</td>
</tr>
<tr>
<td>Machine Operators (n=156)</td>
<td>13%</td>
<td>17%**</td>
<td>2%</td>
<td>32%</td>
</tr>
<tr>
<td>Supervisors (n=534)</td>
<td>15%</td>
<td>16%**</td>
<td>1%</td>
<td>31%</td>
</tr>
<tr>
<td>Iron and Steel Workers (n=25)</td>
<td>16%</td>
<td>5%*</td>
<td>3%</td>
<td>23%</td>
</tr>
</tbody>
</table>

Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

** Denotes that the difference in proportions between workers in the construction industry overall and specified construction occupations at the 95% confidence level.

Source: BBC Research & Consulting from 2010-2014 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

Gender composition of construction occupations. The study team also analyzed the proportion of women in construction-related occupations. Figure E-5 summarizes the gender of workers in select construction-related occupations for 2010 through 2014. Overall, only 10 percent of construction workers in the Atlanta MSA were women in 2010 through 2014.
In 2010 through 2014, less than 2 percent of workers were women in the following trades:

- Glaziers;
- Drivers;
- Pipelayers;
- Brickmasons;
- Roofers; and
- Iron and steel workers.

The proportion of first-line supervisors who were women was 2 percent in 2010 through 2014.

Figure E-5.
Women as a percentage of selected construction occupations in the Atlanta MSA, 2010-2014

Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

** Denotes that the difference in proportions between workers in the construction industry overall and specified construction occupations at the 95% confidence level.

Source: BBC Research & Consulting from 2010-2014 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).
Percentage of minorities and women who are managers. To further assess advancement opportunities for minorities and women in the Atlanta MSA construction industry, the study team examined differences between demographic groups and the proportion of construction workers who reported being managers. Figure E-6 presents the percentage of construction workers who reported being construction managers in 2010 through 2014 for the Atlanta MSA by racial/ethnic and gender group.

**Figure E-6.** Percentage of construction workers who worked as a manager in the Atlanta MSA, 2010-2014

Note:

** Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:
BBC Research & Consulting 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

In 2010 through 2014, about 11 percent of non-Hispanic whites in the Atlanta MSA construction industry were managers. Compared with non-Hispanic whites, a smaller percentage of African Americans and Hispanic Americans were managers in the Atlanta MSA construction industry:

- Approximately 7 percent of African Americans working in the Atlanta MSA construction industry were managers; and
- About 2 percent of Hispanic Americans were managers.

Female construction workers in the Atlanta MSA were also less likely than men to be managers.

### Professional Services Industry

The study team also examined how education and employment may potentially influence the number of minority and female entrepreneurs working in the Atlanta MSA professional services industry.

**Education.** In contrast to the construction industry, lack of educational attainment may preclude workers’ entry into the professional services industry because many occupations require at least a four-year college degree and some require licensure. According to the 2010-2014 ACS, 73 percent of individuals over the age of 24 and working in the Atlanta MSA professional services industry had at least a four-year college degree. Therefore, barriers to education can restrict employment opportunities, advancement opportunities, and, ultimately, business ownership. Any disparities in business ownership rates in professional services-related work could have resulted from the lack of sufficient education for particular race/ethnicity and gender groups.24

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Based on 2010-2014 ACS data, Figure E-2 presents the percentage of workers age 25 and older with at least a four-year college degree in the Atlanta MSA. The level of education necessary to work in the professional services industry may partially restrict employment opportunities for African Americans, Hispanic Americans, and Native Americans. For each of those groups, the percentage of workers age 25 or older with a bachelor’s degree or higher was substantially lower than that of non-Hispanic whites in the Atlanta MSA for 2010 through 2014.

**Employment.** After consideration of educational opportunities and attainment for minorities and women, the study team examined the race/ethnicity and gender composition of workers in the professional services industry in the Atlanta MSA. Figure E-7 compares the demographic composition of workers in the Atlanta MSA professional services industry to that of all workers in the Atlanta MSA who are 25 years or older and have a college degree.

**Figure E-7.**
Demographic distribution of professional services-related workers and workers age 25 and older with a four-year college degree in all industries in Atlanta, 2010-2014.

<table>
<thead>
<tr>
<th></th>
<th>Workers 25+ with college degree</th>
<th>Professional services workforce</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(n=45,905)</td>
<td>(n=3,647)</td>
</tr>
<tr>
<td><strong>Race/ethnicity</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>25.9 %</td>
<td>16.2 % **</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>4.4</td>
<td>3.6</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>3.7</td>
<td>2.7 **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>4.1</td>
<td>3.2 **</td>
</tr>
<tr>
<td>Native American</td>
<td>0.4</td>
<td>0.3</td>
</tr>
<tr>
<td>Other Minority</td>
<td>0.3</td>
<td>0.1</td>
</tr>
<tr>
<td><strong>Total minority</strong></td>
<td><strong>38.7 %</strong></td>
<td><strong>26.0 %</strong></td>
</tr>
<tr>
<td><strong>Non-Hispanic white</strong></td>
<td>61.3</td>
<td>74.0 **</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100.0 %</strong></td>
<td><strong>100.0 %</strong></td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>49.6 %</td>
<td>37.9 % **</td>
</tr>
<tr>
<td>Male</td>
<td>50.4</td>
<td>62.1 **</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100.0 %</strong></td>
<td><strong>100.0 %</strong></td>
</tr>
</tbody>
</table>

**Race/ethnicity.** In 2010 through 2014, about 26 percent of the workforce in the professional services industry in the Atlanta MSA was made up of minorities. Of that workforce:

- Sixteen percent was made up of African Americans;
- Approximately 4 percent was made up of Asian-Pacific Americans;
- Nearly 3 percent was made up of Subcontinent Asian Americans;
- About 3 percent was made up of Hispanic Americans; and
- Less than one-half of one percent was made up of Native Americans.

Other minorities comprised less than one-half of one percent of the Atlanta MSA professional services workforce in 2010 through 2014.
In 2010 through 2014, African Americans made up 26 percent of workers with a four-year college degree but only 16 percent of workers in the professional services industry. Subcontinent Asian Americans made up approximately 4 percent of workers with a college degree but 3 percent of professional services workers. Asian Pacific Americans, Hispanic Americans, and Native Americans comprised a similar percentage of workers in the professional services industry and of workers with a college degree in all industries.

**Gender.** Compared to their representation among workers 25 and older with a college degree in all industries, substantially fewer women work in the professional services industry. In 2010 through 2014, women represented about 50 percent of workers with a four-year college degree but only 38 percent of professional services-related workers in the Atlanta MSA.

**Goods Industry**

The study team also examined how employment may potentially influence the number of minority and female entrepreneurs working in the goods industry in the Atlanta MSA.

**Employment.** The study team also examined the demographics of employment in the Atlanta MSA goods industry. Figure E-8 presents data from 2010 through 2014 to compare the demographic composition of the goods industry with the total workforce in all other industries in the Atlanta MSA.

**Race/ethnicity.** Based on 2010-2014 ACS data, 39 percent of people working in the goods industry in the Atlanta MSA were minorities. An examination of the Atlanta MSA goods workforce in 2010 through 2014 shows that:

- Twenty-eight percent was made up of African Americans;
- Seven percent was made up of Hispanic Americans; and
- Five percent was made up of other minorities.

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**Figure E-8.**

Demographics of workers in goods and all non-goods industries, 2010-2014

<table>
<thead>
<tr>
<th></th>
<th>Non-goods industries</th>
<th>Goods industry</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2010-14 (n=115,005)</td>
<td>2010-14 (n=2,952)</td>
</tr>
<tr>
<td>Atlanta MSA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>33.3 %</td>
<td>27.9 % **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>9.9</td>
<td>6.5   **</td>
</tr>
<tr>
<td>Other Minority</td>
<td>6.3</td>
<td>5.0   **</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>50.5</td>
<td>60.6  **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>48.2 %</td>
<td>35.5 % **</td>
</tr>
<tr>
<td>Male</td>
<td>51.8</td>
<td>64.5   **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

**Note:**

** Denotes that the difference in proportions between workers in the construction industry and all non-construction industries for the given ACS year is statistically significant at the 95% confidence level.

**Source:**

BBC Research & Consulting from 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).
In the Atlanta MSA, all minority groups, including African Americans, Hispanic Americans, and other minorities, made up smaller percentages of workers in the goods industry than in non-goods industries.

**Gender.** There was a substantial difference between the percentage of all non-goods workers who were women and the percentage of goods industry workers who were women in the Atlanta MSA in 2010 through 2014. During those years, women represented 48 percent of all non-goods workers in the Atlanta MSA but only 36 percent of goods industry workers.

**Other Services Industry**

The study team also examined how employment may potentially influence the number of minority and female entrepreneurs working in the Atlanta MSA other services industry.

**Employment.** The study team also examined the demographics of employment in the Atlanta MSA other services industry. Figure E-9 presents data from 2010 through 2014 to compare the demographic composition of the other services industry with the total workforce of all other industries in the Atlanta MSA.

**Figure E-9.**
Demographics of workers in other services and all non-other services industries, 2010-2014

**Note:**
** Denotes that the difference in proportions between workers in the construction industry and all non-construction industries for the given ACS year is statistically significant at the 95% confidence level.

**Source:**
BBC Research & Consulting from 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

**Race/ethnicity.** Based on 2010-2014 ACS data, 56 percent of people working in the other services industry in the Atlanta MSA were minorities. An examination of the Atlanta MSA other services workforce in 2010 through 2014 shows that:

- Thirty-five percent was made up of African Americans;
- Eighteen percent was made up of Hispanic Americans; and
- Three percent was made up of other minorities.

In the Atlanta MSA, African American and Hispanic Americans made up a larger percentage of workers in other services (35% and 18%, respectively) than in non-other services industries (33% and 10%). In contrast, other minorities and non-Hispanic whites made up smaller percentages of workers in the other services industry than in non-other services industries.
Gender. There were large differences between the percentage of all non-other services workers and the percentage of other services workers who were women in the Atlanta MSA in 2010 through 2014. During those years, women represented 48 percent of all non-other services workers in the Atlanta MSA but only 41 percent of other services workers. In contrast, there was a larger representation of men in other services relative to non-other service workers (59% and 52%, respectively).

Summary

The study team’s analyses suggest that there are barriers to entry for certain minority groups and for women in the construction, professional services, goods and other services industries in the Atlanta MSA.

- Fewer African Americans and other minorities worked in the Atlanta MSA construction industry than what might be expected based on their representation in the overall workforce.
- Fewer African Americans, Hispanic Americans and Subcontinent Asian Americans worked in the Atlanta MSA professional services industry than what might be expected based on their representation among workers 25 and older with a college degree.
- Lack of education appeared to be a barrier to entry into the Atlanta MSA professional services industry for African Americans, Hispanic Americans and Native Americans. Workers in each of those groups were less likely to have a four-year college degree compared to non-Hispanic whites.
- Fewer African Americans, Hispanic Americans, and other minorities worked in the Atlanta MSA goods industry than what might be expected based on their representation in the overall workforce.
- Fewer other minorities worked in the Atlanta MSA other services industry than what might be expected based on their representation in the overall workforce.
- Women accounted for relatively few workers in the Atlanta MSA construction, professional services, goods, and other services industries.

Barriers to advancement for certain minority groups and for women are also evident in the Atlanta MSA construction trades and management positions.

- Representation of minorities and women was much lower in certain construction trades (including first-line supervisors) compared with other trades.
- Compared to non-Hispanic whites, African Americans and Hispanic Americans were less likely to be managers in the construction industry.
- Women were less likely to be managers in the construction industry relative to men.
APPENDIX F.
Business Ownership in the Construction, Professional Services, Goods and Other Services Industries in the Atlanta Metropolitan Area

About one in four construction workers in the Atlanta Metropolitan Area was a self-employed business owner in 2010 through 2014.1 About one in six workers in the local professional services industry and local other services industry was a self-employed business owner. For the goods industry, about one in twelve workers was a self-employed business owner.2 Focusing on those four industries, BBC Research & Consulting examined business ownership for different racial/ethnic and gender groups in the study area. The study team used Public Use Microdata Samples (PUMS) from the 2010 through 2014 American Community Survey (ACS) to study business ownership rates in the construction, professional services, goods, and other services industries. Note that “self-employment” and “business ownership” are used interchangeably in Appendix F.

Business Ownership Rates

Many studies have explored differences between minority and non-minority business ownership at the national level.3 Although overall self-employment rates have increased for minorities and women over time, a number of studies indicate that race/ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and from state to state.

Construction industry. Compared to other industries, construction has a large number of business owners relative to the number of people working in the industry. In 2010 through 2014, 25 percent of workers in the construction industry in the Atlanta Metropolitan Area were self-employed.

1 For the purposes of this study, the Atlanta Metropolitan Area corresponds to the 29 county Atlanta-Sandy Springs-Roswell, GA Metropolitan Statistical Area (MSA) as defined by the Office of Management and Budget (OMB) in 2013. Because the Census suppresses county information in the American Community Survey (ACS) data to safeguard respondent confidentiality, however, this target geography must be approximated using Public Use Microdata Areas (PUMAs). Specifically, a PUMA is assigned to the study area if and only if the majority of that PUMA’s population resided in the Atlanta MSA in 2010. Note that the University of Minnesota IPUMS platform includes a derived variable — MET2013 — that directly identifies the approximated study area. Further, due to a redrawing of PUMA boundaries that took place between 2011 and 2012 in response to updated data from 2010 Census, the effective geography underlying the 2010-2011 portion of the 5-year ACS sample is slightly different from that of the 2012-2014 portion.

2 In Appendix F and other marketplace appendices, information for “professional services” refers to Legal services; Architectural, engineering, and related services; and Management, scientific, and technical consulting services. “Goods” refers to Household appliances and electrical and electronic goods merchant wholesalers; Hardware, plumbing, and heating equipment and supplies merchant wholesalers; Furniture and home furnishing stores; Household appliances retailers; Electronics stores; Building materials and supplies dealers; Hardware stores; and Office supplies and stationary stores. “Other services” refers to Real estate; Employment services; Landscaping services; Investigation and security services; Services to buildings and dwellings (except cleaning during construction and immediately after construction).

(in incorporated or unincorporated businesses) compared with only 9 percent of workers across all industries. However, rates of self-employment in the local construction industry vary by race/ethnicity and gender. Figure F-1 shows the percentage of workers in the Atlanta Metropolitan Area who were self-employed in the construction industry by group for 2010 through 2014. Due to small sample sizes, Subcontinent Asian Americans and other minority groups are included in the “Other Minority” category.

Figure F-1. Percentage of workers in the construction industry who were self-employed, 2010-2014

<table>
<thead>
<tr>
<th>Race/ethnicity</th>
<th>Self-Employment Rate</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta MSA 2010-2014</td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>25.7 % **</td>
<td>923</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>35.3 %</td>
<td>92</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>18.5 % **</td>
<td>1,708</td>
</tr>
<tr>
<td>Native American</td>
<td>33.0 %</td>
<td>36</td>
</tr>
<tr>
<td>Other Minority†</td>
<td>34.5 %</td>
<td>22</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>29.3 %</td>
<td>4,007</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Gender</th>
<th>Self-Employment Rate</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female 2010-2014</td>
<td>16.2 % **</td>
<td>749</td>
</tr>
<tr>
<td>Male 2010-2014</td>
<td>26.2 %</td>
<td>6,039</td>
</tr>
<tr>
<td>All individuals</td>
<td>25.2 %</td>
<td>6,788</td>
</tr>
</tbody>
</table>

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.
† Other minority includes Subcontinent Asian Americans and other minority groups.

Source: BBC Research and 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

Business ownership rates in 2010 through 2014. In 2010 through 2014, a substantial disparity existed in the business ownership rate for African Americans and Hispanic Americans when compared to non-Hispanic whites.

- Approximately 26 percent of African American construction workers in the Atlanta Metropolitan Area owned their businesses, which was lower than the 29 percent of non-Hispanic whites.
- About 19 percent of Hispanic Americans in the construction industry owned businesses in 2010 through 2014, substantially less than the rate for non-Hispanic whites in the Atlanta Metropolitan Area.

Sixteen percent of women working in the construction industry in the Atlanta Metropolitan Area were self-employed in 2010 through 2014, compared with 26 percent of men (a statistically significant difference).

Professional services industry. BBC also examined business ownership rates in the professional services industry. Figure F-2 presents the percentage of workers who were self-employed in the professional services industry in 2010 through 2014. Due to small sample sizes, Native Americans are included in the “Other Minority” category.
Figure F-2.
Percentage of workers in the professional services industry who were self-employed, 2010-2014

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.
† Other minority includes Native Americans and other minority groups.

Source: BBC Research & Consulting and 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Business ownership rates in 2010 through 2014. As shown in Figure F-2, African Americans and Subcontinent Asian Americans had substantially lower business ownership rates than non-Hispanic whites in the local professional services industry.

- The business ownership rate in 2010 through 2014 for African Americans (15%) was less than two-thirds that of non-Hispanic whites (24%);
- The business ownership rate of Subcontinent Asian Americans (11%) was less than half that of non-Hispanic whites;
- However, the business ownership rate for Asian-Pacific Americans (25%) was slightly higher than the business ownership rate for non-Hispanic whites.

The rate of business ownership for women (15%) working in the professional services industry was substantially lower than men (26%) in 2010 through 2014.

Goods industry. BBC also examined business ownership rates in the goods industry. Figure F-3 presents the percentage of workers who were self-employed in the goods industry in 2010 through 2014. Due to small sample sizes, Subcontinent Asian Americans are included in the “Other Minority” category.

Business ownership rates in 2010 through 2014. As shown in Figure F-3, the rate of business ownership for African Americans was substantially lower than that of non-Hispanic whites (6%).

The business ownership rate for African Americans was 2 percent, less than one-third the rate for non-Hispanic whites. The were no statistical significant disparities in business ownership rates for other minority groups.

The rate of business ownership for women working in the goods industry in the relevant geographic market area was almost equivalent to the rate for men (5%) in 2010 through 2014.
Figure F-3.
Percentage of workers in the goods industry who were self-employed, 2010-2014

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.
† Other minority includes Subcontinent Asian Americans and other minority groups.

Source: BBC Research & Consulting and 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

<table>
<thead>
<tr>
<th></th>
<th>Self-Employment Rate</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Atlanta MSA 2010-2014</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>1.8 % **</td>
<td>666</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>11.3 %</td>
<td>88</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>5.1 %</td>
<td>146</td>
</tr>
<tr>
<td>Native American</td>
<td>4.9 %</td>
<td>20</td>
</tr>
<tr>
<td>Other Minority†</td>
<td>12.1 %</td>
<td>49</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>6.2 %</td>
<td>1,983</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>4.5 %</td>
<td>1,066</td>
</tr>
<tr>
<td>Male</td>
<td>5.5 %</td>
<td>1,886</td>
</tr>
<tr>
<td>All individuals</td>
<td>5.1 %</td>
<td>2,952</td>
</tr>
</tbody>
</table>

Other services industry. The study team also examined business ownership rates within the other services industry. Figure F-4 presents the percentage of workers who were self-employed in the other services industry for 2010 through 2014. Due to small sample sizes, Native Americans, Subcontinent Asian Americans and other minority groups are included in the “Other Minority” category.

Business ownership rates in 2010 through 2014. As shown in Figure F-4, the rate of business ownership for African Americans and Hispanics was substantially lower than for non-Hispanic whites.

- The business ownership rate for Hispanic Americans was 14 percent, less than one-half the rate for non-Hispanic whites (30%).
- The rate of business ownership for African Americans (13%) was less than one-half the rate for non-Hispanic whites.

The rate of business ownership for women (18%) working in the other services industry in the relevant geographic market area was less than the rate for men (23%) in 2010 through 2014.
Figure F-4.
Percentage of self-employed workers in other services in the Atlanta Metropolitan Area, 2010-2014

<table>
<thead>
<tr>
<th>Race/ethnicity</th>
<th>Self-Employment Rate</th>
<th>Sample Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta MSA</td>
<td>2010-2014</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>12.5 % **</td>
<td>2,140</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>40.1 % *</td>
<td>114</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>14.2 % **</td>
<td>793</td>
</tr>
<tr>
<td>Other Minority†</td>
<td>29.1 %</td>
<td>84</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>29.6 %</td>
<td>3,301</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>17.9 % **</td>
<td>2,777</td>
</tr>
<tr>
<td>Male</td>
<td>23.1 %</td>
<td>3,655</td>
</tr>
<tr>
<td>All individuals</td>
<td>21.0 %</td>
<td>6,432</td>
</tr>
</tbody>
</table>

Note: *, ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.
† Other minority includes Native Americans, Subcontinent Asian Americans and other minority groups.

Source: BBC Research & Consulting and 2010-2014 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

Potential causes of differences in business ownership rates. Researchers have examined whether there are disparities in business ownership rates after considering business owners’ race- and gender-neutral personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such race- and gender-neutral factors.

- Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found a positive relationship between start-up capital and business formation, expansion, and survival.\(^4\) In addition, one study found that housing appreciation measured at the Metropolitan Statistical Area level is a positive determinant of becoming self-employed.\(^5\) However, unexplained differences still exist when statistically controlling for those factors.\(^6\) Access to capital is discussed in more detail in Appendix G.

- Education has a positive effect on the probability of business ownership in most industries. However, findings from multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.\(^7\)

- Intergenerational links affect one’s likelihood of self-employment. One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.\(^8\)

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Time since immigration and assimilation into American society are also important determinants of self-employment, but unexplained differences in business ownership between minorities and non-minorities still exist when accounting for those factors.  

**Business Ownership Regression Analysis**

Race, ethnicity, and gender can affect opportunities for business ownership, even when accounting for individuals’ race- and gender-neutral personal characteristics such as education, age, and familial status. To further examine business ownership, the study team developed multivariate regression models to explore patterns of business ownership in the Atlanta Metropolitan Area. Those models estimate the effect of race/ethnicity and gender on the probability of business ownership while statistically controlling for other factors.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age, and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity analyses. For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and engineering industries persist after statistically controlling race- and gender-neutral personal characteristics.  

Those studies have incorporated probit econometric models using data from the U.S. Bureau of the Census and have been among materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

The study team used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables. Independent variables included:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, disability, marital status, number of children in the household, number of elderly people in the household, and English-speaking ability;
- Indicators of educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and

---


12 Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed; “0” for individuals who are not self-employed. The model enables estimation of the probability that a worker in a given estimation sample is self-employed. The study team excluded observations where the Census Bureau had imputed values for the dependent variable, business ownership.
Variables representing the race/ethnicity and gender of the individuals included in the analysis along with interaction variables to represent the combined effect of being a minority and being female.

The study team developed four models using PUMS data from the 2010 through 2014 ACS:

- A probit regression model for the construction industry in the relevant geographic market area in 2010 through 2014 that included 6,152 observations;
- A probit regression model for the professional services industry in the relevant geographic market area in 2010 through 2014 that included 4,733 observations;
- A probit regression model for the goods industry in the relevant geographic market area in 2010 through 2014 that included 2,671 observations; and
- A probit regression model for the other services industry in the relevant geographic market area in 2010 through 2014 that included 5,769 observations.

Results specific to the construction industry in the Atlanta Metropolitan Area in 2010 through 2014. Figure F-5 presents the coefficients from the probit model predicting business ownership in the construction industry in the relevant geographic market area in 2010 through 2014. The model indicates that several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the construction industry:

- Older individuals were more likely to be business owners; an increase in the number of children living in the worker’s household was associated with an increase in the worker’s likelihood of owning a business;
- For those who owned a home, higher home values were associated with a higher likelihood of business ownership;
- Income from a spouse or partner increased workers’ likelihood of owning a business; and
- Having some college education was associated with a higher likelihood of business ownership; however, having a four-year degree was associated with a lower likelihood of business ownership.

After controlling for race- and gender-neutral factors, a statistically significant difference persisted in the rates of business ownership for female construction workers in the relevant geographic market area.
Figure F-5.
Construction industry business ownership model 2010 through 2014 Dependent Variable: Business Ownership

Note: *, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2010-2014 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-1.8148 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.0260 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.0001</td>
</tr>
<tr>
<td>Married</td>
<td>-0.0782</td>
</tr>
<tr>
<td>Number of children in household</td>
<td>0.0424 *</td>
</tr>
<tr>
<td>Number of people over 65 in household</td>
<td>-0.0140</td>
</tr>
<tr>
<td>Owns home</td>
<td>0.0557</td>
</tr>
<tr>
<td>Home value ($000s)</td>
<td>0.0000 **</td>
</tr>
<tr>
<td>Monthly mortgage payment ($000s)</td>
<td>0.0001</td>
</tr>
<tr>
<td>Interest and dividend income ($000s)</td>
<td>0.0000</td>
</tr>
<tr>
<td>Income of spouse or partner ($000s)</td>
<td>0.0000 **</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>0.1114</td>
</tr>
<tr>
<td>Disabled</td>
<td>0.0084</td>
</tr>
<tr>
<td>Less than high school education</td>
<td>0.0221</td>
</tr>
<tr>
<td>Some college</td>
<td>0.1018 *</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>-0.2885 **</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>-0.2129</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>-0.0627</td>
</tr>
<tr>
<td>African American</td>
<td>-0.0315</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>0.2075</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>0.4733</td>
</tr>
<tr>
<td>Native American</td>
<td>0.0944</td>
</tr>
<tr>
<td>Other Minority</td>
<td>0.4075</td>
</tr>
<tr>
<td>Female</td>
<td>-0.5300 **</td>
</tr>
</tbody>
</table>

Simulations of business ownership rates. The study team used the 2010 through 2014 results to simulate business ownership rates if women had the same probability of self-employment as similarly situated non-Hispanic white males. Again, the study team performed these calculations for only those groups where race, ethnicity or gender was a statistically significant negative factor in business ownership (as shown in Figure F-5). Figure F-6 shows actual and simulated (“benchmark”) business ownership rates for non-Hispanic white female construction workers in the study area.

Simulation results for women in 2010 through 2014 indicated a substantial disparity. About 36 percent of women would own businesses in the construction industry if gender did not have an impact on self-employment. However, the actual 2010 through 2014 self-employment rate for women was 17 percent (disparity index of 48).
Figure F-6.  
Comparison of actual business ownership rates to simulated rates for Atlanta Metropolitan Area construction workers, 2010 through 2014

<table>
<thead>
<tr>
<th>Group</th>
<th>Self-employment rate</th>
<th>Disparity index (100 = parity)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Benchmark</td>
</tr>
<tr>
<td>Non-Hispanic white female</td>
<td>17.1%</td>
<td>35.5%</td>
</tr>
</tbody>
</table>

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: BBC Research & Consulting from statistical models of 2010-2014 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Results specific to the professional services industry in the Atlanta Metropolitan Area in 2010 through 2014. Figure F-7 presents the coefficients from the probit model predicting business ownership in the professional services industry in the Atlanta Metropolitan Area in 2010 through 2014. The model indicates that several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the professional services industry:

- For those that own a home, higher home values are associated with a higher likelihood of business ownership;
- Income from a spouse or partner increased likelihood of owning a business; and
- Having a four-year degree or an advanced degree was associated with a higher likelihood of business ownership.

After controlling for race- and gender-neutral factors, a statistically significant difference persisted in the rates of business ownership for Subcontinent Asian Americans and female professional services workers in the relevant geographic market area.
Figure F-7.
Professional services industry business ownership model, 2010 through 2014

Note: *, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2010-2014 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Simulations of business ownership rates. The study team simulated business ownership rates in the professional services industry using the same approach as it used for the construction industry. Figure F-8 presents actual and simulated (“benchmark”) business ownership rates for Subcontinent Asian American and non-Hispanic white female workers in the local professional services industry.

Figure F-8.
Comparison of actual business ownership rates to simulated rates for Atlanta Metropolitan Area professional service workers, 2010 through 2014

<table>
<thead>
<tr>
<th>Group</th>
<th>Self-employment rate</th>
<th>Disparity index (100 = parity)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Benchmark</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>10.7%</td>
<td>18.2%</td>
</tr>
<tr>
<td>Non-Hispanic white female</td>
<td>17.1%</td>
<td>24.0%</td>
</tr>
</tbody>
</table>

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Source: BBC Research & Consulting from statistical models of 2010-2014 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.
Approximately 11 percent of Subcontinent Asian Americans in the Atlanta Metropolitan Area professional service industry were business owners in 2010 through 2014, compared with a benchmark business ownership rate of 18 percent (a disparity index of 59). Similarly, simulation results for women in 2010 through 2014 indicated a disparity. Twenty-four percent of women would own businesses in the construction industry if gender did not have an impact on self-employment. However, the actual 2010 through 2014 self-employment rate for women was 17 percent (disparity index of 71).

**Results specific to the goods industry in the Atlanta Metropolitan Area in 2010 through 2014.**

Figure F-9 presents the coefficients from the probit model predicting business ownership in the goods industry in the relevant geographic market area in 2010 through 2014. The model indicates that some race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the goods industry:

- Higher home values were associated with a higher likelihood of business ownership;
- Having less than a high school education was associated with a higher likelihood of business ownership; and
- Having individuals in the household 65 years or older was associated with a higher likelihood of business ownership.

After statistically controlling for race- and gender-neutral factors, the regression model indicated that no minority group was less likely than non-Hispanic whites to own goods businesses in the relevant geographic market area in 2010 through 2014. Asian-Pacific Americans and Subcontinent Asian Americans were more likely than non-Hispanic whites to own goods businesses.
Figure F-9.
Goods industry business ownership model 2010 through 2014 Dependent Variable: Business Ownership

Note: *, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2010-2014 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Results specific to other services industry in the Atlanta Metropolitan Area in 2010 through 2014. Figure F-10 presents the coefficients from the probit model predicting business ownership in the other services industry in the relevant geographic market area in 2010 through 2014. The model indicates that several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the other services industry:

- Older age was associated with a higher likelihood of business ownership in the goods industry, but the marginal effect was lower for the oldest individuals;
- Having individuals in the household 65 years or older was associated with a higher likelihood of business ownership;
- Owning a home was associated with a higher likelihood of business ownership;
- Having less than a high school education was associated with a higher likelihood of business ownership; and
- Income from a spouse or partner and interest and dividend income increased likelihood of owning a business.

After statistically controlling for race- and gender-neutral factors, the regression model indicated that Hispanic Americans, African Americans and Subcontinent Asian Americans working in the other services industry were less likely than non-Hispanic whites to own businesses in 2010 through 2014. Women were less likely to own businesses than men.
Simulations of business ownership rates. The study team simulated business ownership rates in the other services industry using the same approach as it used for the construction, professional services and goods industries. Figure F-11 presents actual and simulated (“benchmark”) business ownership rates for Hispanic American, African American, Subcontinent Asian American and white female workers in the other services industry.

Figure F-11.
Comparison of actual business ownership rates to simulated rates for the Atlanta Metropolitan Area other service workers, 2010-2014

<table>
<thead>
<tr>
<th>Group</th>
<th>Self-employment rate</th>
<th>Disparity index (100 = parity)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Benchmark</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>14.8%</td>
<td>24.6%</td>
</tr>
<tr>
<td>African American</td>
<td>12.9%</td>
<td>24.7%</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>14.0%</td>
<td>24.9%</td>
</tr>
<tr>
<td>Non-Hispanic white female</td>
<td>27.3%</td>
<td>35.2%</td>
</tr>
</tbody>
</table>

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-4.

Source: BBC Research & Consulting from statistical models of 2010-2014 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable Coefficient

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-2.5012 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.0578 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.0004 **</td>
</tr>
<tr>
<td>Married</td>
<td>0.0036</td>
</tr>
<tr>
<td>Number of children in household</td>
<td>0.0204</td>
</tr>
<tr>
<td>Number of people over 65 in household</td>
<td>0.1665 **</td>
</tr>
<tr>
<td>Owns home</td>
<td>0.2378 **</td>
</tr>
<tr>
<td>Home value ($000s)</td>
<td>0.0000</td>
</tr>
<tr>
<td>Monthly mortgage payment ($000s)</td>
<td>0.0050</td>
</tr>
<tr>
<td>Interest and dividend income ($000s)</td>
<td>0.0000 **</td>
</tr>
<tr>
<td>Income of spouse or partner ($000s)</td>
<td>0.0000 **</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>0.0713</td>
</tr>
<tr>
<td>Disabled</td>
<td>0.0238</td>
</tr>
<tr>
<td>Less than high school education</td>
<td>0.2444 **</td>
</tr>
<tr>
<td>Some college</td>
<td>0.1138</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>0.0717</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>0.0457</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>-0.3064 **</td>
</tr>
<tr>
<td>African American</td>
<td>-0.4651 **</td>
</tr>
<tr>
<td>Asian-Pacific American</td>
<td>0.2753</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>-0.5262 *</td>
</tr>
<tr>
<td>Native American</td>
<td>0.3076</td>
</tr>
<tr>
<td>Other Minority</td>
<td>0.8196 *</td>
</tr>
<tr>
<td>Female</td>
<td>-0.2806 **</td>
</tr>
</tbody>
</table>
The simulated business ownership rates indicated that Hispanic Americans, African Americans and Subcontinent Asian Americans working in the other services industry own their firms at about one-half of the rate observed for similarly-situated non-Hispanic whites. Thirty-five percent of women would own businesses in the other services industry if gender did not have an impact on self-employment. The actual 2010 through 2014 self-employment rate for women was approximately 28 percent (disparity index of 78).

**Summary of Business Ownership in Construction, Professional Services, Goods and Other Services**

Disparities in business ownership were present in the local construction industry a:

- Business ownership rates for African Americans and Hispanic Americans were substantially lower than that of non-Hispanic whites in 2010 through 2014.
- Business ownership rates for women were substantially lower than that of men.
- After statistically controlling for a number of race- and gender-neutral factors, substantially fewer women owned construction businesses than similarly-situated men in 2010 through 2014.

The study team also identified disparities in business ownership in the professional services industry in the Atlanta Metropolitan Area:

- Business ownership rates for African Americans and Subcontinent Asian Americans were substantially lower than that of non-Hispanic whites in 2010 through 2014.
- Business ownership rates for women were substantially lower than that of men.
- BBC used regression models to investigate the presence of race/ethnicity- and gender-based disparities in business ownership rates after accounting for race- and gender-neutral factors. The results indicated substantial disparities for Subcontinent Asian Americans and women in 2010 through 2014.

The study team also identified disparities in business ownership in the goods and other services industries:

- Business ownership rates for African Americans were substantially lower than that of non-Hispanic whites in 2010 through 2014 in the goods industry.
- In the other services industry, business ownership rates for African Americans, Hispanic Americans and Subcontinent Asian Americans were substantially lower than that of non-Hispanic whites in 2010 through 2014.
- Business ownership rates for women were substantially lower than that of men in 2010 through 2014 in the other services industry.
- After statistically controlling for a number of race- and gender-neutral factors, substantially fewer African Americans, Hispanic Americans, Subcontinent Asian Americans and women owned other services businesses than similarly-situated non-Hispanic whites (or non-Hispanic white males) in 2010 through 2014.
APPENDIX G.
Access to Capital for Business Formation and Success

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.\(^1\) Researchers have also found that the amount of start-up capital can affect long-term business success, and, on average, minority- and women-owned businesses appear to have less start-up capital than non-Hispanic white-owned businesses and male-owned businesses.\(^3\) For example:

- In 2007, 30 percent of majority-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had start-up capital of $25,000 or more.\(^4\)
- Only 17 percent of African American-owned businesses indicated a comparable amount of start-up capital, and disparities in start-up capital were identified for every other minority group except Asian Americans.
- Nineteen percent of female-owned businesses reported start-up capital of $25,000 or more compared with 32 percent of male-owned businesses (not including businesses that were equally owned by men and women).

Race- or gender-based discrimination in start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.\(^5\) Therefore, any discrimination in the traditional means to obtain start-up capital (equity in a home and the ability to borrow against that equity) could also have long-term impacts on business ownership and success. Housing discrimination and discrimination in mortgage lending decades ago could have lasting effects today for these current or potential business owners.

Appendix G presents information about homeownership and mortgage lending, because home equity can be an important source of capital to start and expand businesses. BBC Research & Consulting conducted the analyses presented in Appendix G.


\(^3\) \textit{Ibid.}

\(^4\) Business owners were asked, “What was the total amount of capital used to start or acquire this business? (Capital includes savings, other assets, and borrowed funds of owner(s)).” From U.S. Census Bureau, Statistics for All U.S. Firms by Total Amount of Capital Used to Start or Acquire the Business by Industry, Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2007 Survey of Business Owners: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB16&prodType=table.

Homeownership and Mortgage Lending

The study team analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Homeownership. Wealth created through homeownership can be an important source of capital to start or expand a business. In sum:

- A home is a tangible asset that provides borrowing power;
- Wealth that accrues from housing equity and tax savings from homeownership contributes to capital formation;
- Next to business loans, mortgage loans have traditionally been the second largest loan type for small businesses; and
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses.

Any barriers to homeownership and home equity growth for minorities and women can affect business opportunities by constraining their available funding. Similarly, any barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. The study team analyzed homeownership rates and home values before considering loan denial and subprime lending.

Homeownership rates. Many studies have documented past discrimination in the national housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women. For example, in the past, a woman’s participation in homeownership was secondary to that of her husband and parents. The study team used 2010-2014 American Community Survey (ACS) data to examine homeownership rates in the Atlanta Metropolitan Area. Figure G-1 presents homeownership rates for minority groups and non-Hispanic whites.

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6 The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Holland & Knight discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.


13 For the purposes of this study, the Atlanta Metropolitan Area corresponds to the 29 county Atlanta-Sandy Springs-Roswell, GA Metropolitan Statistical Area (MSA) as defined by the Office of Management and Budget (OMB) in 2013. Because the Census suppresses county information in the American Community Survey (ACS) data to safeguard respondent confidentiality, however, this target geography must be approximated using Public Use Microdata Areas.
As shown in the figure above, about three-quarters of non-Hispanic white households in the Atlanta Metropolitan Area were homeowners. Disparities in homeownership rates between racial/ethnic minorities and non-minorities were apparent in 2010 through 2014.

- Approximately half (49%) of African American households were homeowners, compared to 76 percent of non-Hispanic white households;
- About 43 percent of Hispanic American households were homeowners;
- Homeownership rates for Subcontinent Asian Americans and Asian-Pacific Americans were 57 percent and 66 percent, respectively; and
- Native American households owned homes at a rate of 67 percent.

Lower rates of homeownership may reflect lower incomes for minorities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. An older study found that the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.14

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Home values. Research has shown homeownership and home values to be direct determinants of available capital to form or expand businesses.\textsuperscript{15} Using 2010 through 2014 ACS data, the study team compared median home values by racial/ethnic group.\textsuperscript{16}

Figure G-2 presents median home values by racial/ethnic groups in the Atlanta Metropolitan Area. African Americans ($125,000), Hispanic Americans ($130,000) and Native Americans ($156,000) had substantially lower median home values than non-Hispanic whites ($182,000) in the Atlanta Metropolitan Area. On average, Asian-Pacific Americans and Subcontinent Asian Americans owned homes of greater value than non-Hispanic whites.

Figure G-2.
Median home values, 2010-2014

Note: The sample universe is all owner-occupied housing units.

Source: BBC from 2010-2014 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: \url{http://usa.ipums.org/usa/}.

Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid $335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.\textsuperscript{17}

The study team explored market conditions for mortgage lending in the Atlanta Metropolitan Area. The best available source of information concerning mortgage lending is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions, and some mortgage companies receive.\textsuperscript{18} Those data


\textsuperscript{16} The study team also examined the proportion of homeowners who own their homes free and clear but the differences among racial/ethnic groups were minimal. In addition, an analysis of home values for homes owned free and clear was not substantially different than trends reflected in the analysis of median home values for all homes by race/ethnicity.


\textsuperscript{18} Depository institutions were required to report 2014 HMDA data if they had assets of more than $43 million on the preceding December 31 ($40 million for 2011 and $36 million for 2007), have a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies are required to report HMDA data if they are for-profit institutions, had home purchase loan originations either a.)
include information about the location, dollar amount, and types of loans made, as well as race/ethnicity, income, and credit characteristics of all loan applicants. The data are available for home purchases, loan refines, and home improvement loans.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2007, 2011, and 2014. Although 2014 provides a more recent representation of the home mortgage market, the 2007 data represent a more complete data set from before the recent mortgage crisis. Many of the institutions that originated loans in 2007 were no longer in business by the 2014 reporting date for HMDA data. For example, in 2007, applications were distributed among 8,610 lenders nationwide, while in 2014 the number of lenders had fallen to 7,063. In addition, the percentage of government-insured loans, which the study team did not include in its analysis, increased dramatically between 2007 and 2014, decreasing the proportion of total loans that the study team analyzed in the 2014 data.

**Mortgage denials.** The study team examined mortgage denial rates on conventional loan applications made by high-income households. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income. Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.

Figure G-3 presents loan denial results for the Atlanta Metropolitan Area in 2007, 2011 and 2014. Data for 2007 show higher denial rates for all groups compared with 2014. African American, Asian American, Hispanic American, Native American, and Native Hawaiian and other Pacific Islander high-income applicants all exhibited higher loan denial rates compared with non-Hispanic white applicants in all three years (2007, 2011 and 2014).

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21 The median family income in 2014 was about $70,000 for the Atlanta-Sandy Springs-Marietta MSA (in 2014 dollars). Median family income for 2007 was $77,000 for the Atlanta-Sandy Springs-Marietta MSA (in 2014 dollars). Source: FFIEC HMDA data 2007, 2011, 2014.

22 For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.
In 2014, loan denial rates remained higher for all minority loan applicants relative to non-Hispanic white applicants:

- The denial rate in 2014 was particularly high among African American applicants, 16 percent of whom had their applications denied, and Native Hawaiian or other Pacific Islander applicants, with a 13 percent denial rate, compared to only 7 percent of non-Hispanic white applicants.
- Loan denial rates in 2014 were also higher for Hispanic Americans, (11%), Native Americans (10%), and Asian Americans (9%) compared with non-Hispanic white applicants.

Additional research. Several national studies have examined disparities in loan denial rates and loan amounts for minorities in the presence of other influences. For example:

- A study by the Federal Reserve Bank of Boston is one of the most cited studies of mortgage lending discrimination. It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination. The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.

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Using the Federal Reserve Board’s 1983 Survey of Consumer Finances and the 1980 Census of Population and Housing data, analyses revealed that minority households were one-third as likely to receive conventional loans as non-Hispanic white households after taking into account financial and demographic variables.\(^{26}\)

Findings from a Midwest study indicate a relationship between race and both the number and size of mortgage loans. Data matched on socioeconomic characteristics revealed that African American borrowers across 13 census tracts received significantly fewer loans and of smaller sizes compared to their white counterparts.\(^{27}\)

However, other studies have found that differences in preferences for Federal Housing Administration (FHA) loans — mortgage loans that the government insures — versus conventional loans among racial and ethnic groups may partially explain disparities found in conventional loan approvals between minorities and non-minorities.\(^{28}\) Several studies have found that, historically, minority borrowers are far more likely to seek FHA loans than comparable non-Hispanic white borrowers across different income and wealth levels. The insurance on FHA loans protects the lender, but the borrower can be disadvantaged by higher borrowing costs.\(^{29}\)

**Subprime lending.** Loan denial is only one of several ways minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.\(^{30}\)

Until recent years, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for $330 billion of U.S. mortgages in 2003, up from $35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.\(^{31}\) With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans also became available to homeowners who did not want to make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost above that for which they would qualify from a prime lender.\(^{32}\) Because of higher interest rates and additional costs, subprime loans affected homeowners’ ability to grow home equity and increased their risks of foreclosure.

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\(^{30}\) See definition of subprime loans discussed on the following page.


Although there is no standard definition of a subprime loan, there are several commonly-used approaches to examining rates of subprime lending. The study team used a “rate-spread method” — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2007, 2011, and 2014. Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans. Patterns in subprime lending did not differ substantially between the different types of loans.

Figure G-4 shows the percent of conventional home purchase loans that were subprime in the Atlanta Metropolitan Area, based on 2007, 2011, and 2014 HMDA data. The rates of subprime lending in 2011 and 2014 were dramatically lower overall than in 2007 due to the collapse of the mortgage lending market in the late 2000s.

In the Atlanta Metropolitan Area, African American and Hispanic American borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in all three years (2007, 2011, and 2014). Native Hawaiian or other Pacific Islanders were more likely than non-Hispanic whites to receive subprime loans in both 2007 and 2014; Native American borrowers were more likely than non-Hispanic whites to receive subprime loans in both 2007 and 2011; and Asian Americans were more likely than non-Hispanic whites to receive subprime loans in 2014.

33 Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.
Data for 2007 indicate substantial disparities for all minority groups except Asian Americans:

- About 8 percent of home purchase loans issued to non-Hispanic whites were subprime.
- By contrast, 29 percent of home purchase loans issued to African Americans were subprime.
- Over one-fifth (21%) of home purchase loans issued to Hispanic Americans were subprime.
- The percentage of home purchase loans issued to Native Americans (15%) and to Native Hawaiians or other Pacific Islanders (16%) that were subprime was approximately double that of non-Hispanic whites.

Although the overall volume of subprime loans dropped substantially between 2007 and 2014, racial/ethnic disparities in subprime lending persisted:

- In 2014, fewer than 2 percent of conventional home purchase loans issued to non-Hispanic white borrowers were subprime.
- Over 4 percent of home purchase loans issued to both Asian Americans and African Americans were subprime.

Figure G-5 presents the percentage of home refinance loans that were subprime in the Atlanta Metropolitan Area. As with home purchase loans, the rates of subprime lending for refinance loans in 2011 and 2014 were dramatically lower than in 2007 due to the collapse of the mortgage lending market in the late 2000s.

In the Atlanta Metropolitan Area, subprime trends for refinance loans were similar to subprime trends for home purchase loans. Compared to non-Hispanic white borrowers, African Americans and Hispanic Americans were more likely to receive subprime refinance loans in 2007, 2011, and 2014; Native American borrowers were more likely to receive subprime refinance loans in both 2007 and 2014; and Native Hawaiian or Other Pacific Islanders were more likely to receive subprime refinance loans in 2007.

In 2007, about 38 percent of refinance loans issued to African Americans, 26 percent of refinance loans issued to Hispanic Americans, 31 percent of refinance loans issued to Native Americans, and 25 percent of refinance loans to Native Hawaiian or other Pacific Islanders were subprime. In contrast, only 19 percent of refinance loans issued to non-Hispanic whites in 2007 were subprime.

By 2014, subprime loans made up a much smaller proportion of the total conventional home refinance loans issued in that year (in the Atlanta Metropolitan Area). The decrease in subprime refinance loans was evident for all racial/ethnic groups in the Atlanta Metropolitan Area, but most
minority households that received refinance loans in 2014 were still somewhat more likely than non-Hispanic whites to be issued subprime loans.

- Approximately 2 percent of conventional home refinance loans issued to Hispanic American and Native American borrowers were subprime, compared to 1 percent for non-Hispanic white borrowers.
- About 3 percent of home refinance loans issued to African American borrowers were subprime — the highest of any racial/ethnic group included in the analysis.

**Figure G-5.**
Percent of conventional refinance loans that were subprime, 2007, 2011 and 2014


**Additional research.** Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of “predatory lending.”34 Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.35 Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities. A 2001 HUD study using 1998 HMDA data found that subprime loans were disproportionately concentrated in African American neighborhoods compared with white neighborhoods, even after controlling for income.36 For example, borrowers in higher-income African American neighborhoods were six times more likely to refinance with subprime loans than borrowers in higher-income white neighborhoods.

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36 Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.
Implications of the recent mortgage lending crisis. The turmoil in the housing market starting late 2007 has been far-reaching, resulting in the loss of home equity, decreased demand for housing, and increased rates of foreclosure. Much of the blame has been placed on risky practices in the mortgage industry including substantial increases in subprime lending. As discussed above, the number of subprime mortgages increased at an extraordinary rate between the mid-1990s and mid-2000s. Those high-cost, high-interest loans increased from 8 percent of originations in 2003 to 20 percent in 2005 and 2006. The preponderance of subprime lending is important because households that are repaying subprime loans have a greater likelihood of delinquency or foreclosure. A 2008 study released from the Federal Reserve Bank of Boston found that “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”

Such problems substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses. That issue has been highlighted in statements made by members of the Board of Governors of the Federal Reserve System to the U.S. Senate and U.S. House of Representatives:

- On April 16, 2008, Frederic Mishkin informed the U.S. Senate Committee on Small Business and Entrepreneurship that “one of the most important concerns about the future prospects for small business access to credit is that many small businesses use real estate assets to secure their loans. Looking forward, continuing declines in the value of their real estate assets clearly have the potential to substantially affect the ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press.”

- On November 20, 2008, Randall Kroszner told the U.S. House of Representatives Committee on Small Business that “small business and household finances are, in practice, very closely intertwined. [T]he most recent Survey of Small Business Finances (SSBF) indicated that about 15 percent of the total value of small business loans in 2003 was collateralized by ‘personal’ real estate. Because the condition of household balance sheets can be relevant to the ability of some small businesses to obtain credit, the fact that declining house prices have weakened household balance-sheet positions suggests that the housing market crisis has likely had an adverse impact on the volume and price of credit that small businesses are able to raise over and above the effects of the broader credit market turmoil.”

38 Ibid.
40 Mishkin, Frederic. 2008. “Statement of Frederic S. Mishkin, Member, Board of Governors of the Federal Reserve System before the Committee on Small Business and Entrepreneurship, U.S. Senate on April 16.”
Federal Reserve Chairman Ben Bernanke recognized the reality of those concerns in a speech titled “Restoring the Flow of Credit to Small Businesses” on July 12, 2010. Bernanke indicated that small businesses have had difficulty accessing credit and pointed to the declining value of real estate as one of the primary obstacles.

Furthermore, the National Federation of Independent Business (NFIB) conducted a national survey of 751 small businesses in late-2009 to investigate how the recession impacted access to capital. NFIB concluded that “falling real estate values (residential and commercial) severely limit small business owner capacity to borrow and strains currently outstanding credit relationships.” Survey results indicated that 95 percent of small business employers owned real estate and 13 percent held “upside-down” property — that is, property for which the mortgage is worth more than its appraised value.

Another study analyzed the Survey of Consumer Finances to explore racial/ethnic disparities in wealth and how those disparities were impacted by the recession. The study showed that there are substantial wealth disparities between African Americans and whites as well as between Hispanics and whites and that those wealth disparities worsened between 1983 and 2010. In addition to growing over time, the wealth disparity also grows with age — whites are on a higher accumulation curve than African Americans or Hispanics. The study also reports that the 2007 through 2009 recession exacerbated wealth disparities, particularly for Hispanics.

Opportunities to obtain business capital through home mortgages appear to be limited especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

Even though housing markets have improved since the Great Recession, there may be long-lasting effects on current and potential business owners.

**Redlining.** Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. Those areas are often racially determined, such as African American or mixed-race neighborhoods. That practice can perpetuate problems in already poor neighborhoods. Most quantitative studies have failed to find strong evidence in support of geographic dimensions of lender decisions. Studies in Columbus, Ohio; Boston, Massachusetts; and

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43 The study defined a small business as a business employing no less than one individual in addition to the owner(s) and no more than 250 individuals.


Houston, Texas found that racial differences in loan denial had little to do with the racial composition of a neighborhood but rather with the individual characteristics of the borrower. Some studies found that the race of an applicant — but not the racial makeup of the neighborhood — to be a factor in loan denials.

Studies of redlining have primarily focused on the geographic aspect of lender decisions. However, redlining can also include the practice of restricting credit flows to minority neighborhoods through procedures that are not observable in actual loan decisions. Examples include branch placement, advertising and other pre-application procedures. Such practices can deter minorities from starting businesses. Locations of financial institutions are important to small business start-up because local banking sectors often finance local businesses. Redlining practices would deny that resource to minorities.

**Steering by real estate agents.** Historically, differences in the types of loans that are issued to minorities have also been attributed to “steering” by real estate agents, who serve as an information filter. Despite the fact that steering has been prohibited by law for many decades, some studies claim that real estate brokers provide different levels of assistance and different information on loans to minorities than they do to non-minorities. Such steering can affect the perception of minority borrowers about the availability of mortgage loans.

**Gender discrimination in mortgage lending.** Relatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. Perceived risks associated with granting loans to women of childbearing age and unmarried women resulted in “income discounting,” limiting the availability of loans to women.

The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets. For example, there is some past evidence that lenders under-appraised properties for female borrowers.

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50 Holloway. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”


Summary

There is evidence that minorities and women continue to face certain disadvantages in accessing capital that is necessary to start, operate, and expand businesses. Capital is required to start companies, so barriers accessing capital can affect the number of minorities and women who are able to start businesses. In addition, minorities and women start business with less capital (based on national data). A number of studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Key results included the following:

- Home equity is an important source of funds for business start-up and growth. Fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in the Atlanta Metropolitan Area own homes compared with non-Hispanic whites. African Americans, Hispanic Americans and Native Americans who do own homes tend to have lower home values.

- High income African American, Asian American, Hispanic American and Native American households applying for conventional home mortgages in the Atlanta Metropolitan Area were more likely than non-Hispanic whites to have their applications denied (in 2007, 2011 and 2014).

- African American and Hispanic American mortgage borrowers in the Atlanta Metropolitan Area were more likely than non-Hispanic whites to be issued subprime home purchase and refinance loans in 2007, 2011 and 2014. Native Americans and Native Hawaiians or other Pacific Islanders were also more likely to receive subprime loans during the study period.
APPENDIX H.
Success of Businesses in Construction, Professional Services, Goods and Other Services Industries in the Atlanta Housing Authority Market Area

The study team examined the success of minority- and women-owned business enterprises (MBE/WBEs) in the Atlanta Metropolitan Area construction, professional services, goods and other services industries. The study team assessed whether business outcomes for MBE/WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).

The study team examined outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Business closures, expansions, and contractions;
- Business receipts and earnings; and
- Potential barriers to starting or expanding businesses.

Business Closures, Expansions and Contractions

The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions, and contractions — for minority-owned businesses in Georgia and in the nation as a whole. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for all businesses.

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

Overall rates of business closures in Georgia. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau’s 1989-2006 Business Information Tracking Series, the SBA reported on business closure rates between 2002 and 2006 across different sectors of the economy.

1 The study team uses the terms “MBEs” and “WBEs” to refer to businesses that are owned and controlled by minorities or women, regardless of whether they are certified or meet the revenue and net worth requirements for DBE certification and regardless of whether they are certified as MBEs or WBEs.


3 Businesses classifiable by race/ethnicity exclude publicly traded companies. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans, and whites.
As shown in Figure H-1, 41 percent of African American-owned businesses operating in Georgia in 2002 had closed by the end of 2006, a higher rate than that of all other groups. Hispanic American- and Asian American-owned firms also had closure rates higher than for non-minority-owned businesses during this time period. Disparities in closure rates for minority-owned firms, compared to white-owned firms, appear to have been similar in Georgia and in the United States during the same time period.

Figure H-1.
Rates of business closure, 2002 through 2006, Georgia and the U.S.

<table>
<thead>
<tr>
<th></th>
<th>Georgia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>41%</td>
<td>39%</td>
</tr>
<tr>
<td>Asian American</td>
<td>34%</td>
<td>33%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>35%</td>
<td>34%</td>
</tr>
<tr>
<td>White</td>
<td>31%</td>
<td>29%</td>
</tr>
</tbody>
</table>

Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.


Rates of business closures by industry. The SBA report also examined business closure rates by race/ethnicity for 21 different industry classifications. Figure H-2 compares national rates of firm closure for construction; goods (wholesale trade); professional services (professional, scientific, and technical services and management of companies and enterprises); and other services (other services except public administration and administrative, support, waste management, and remediation). Figure H-2 also presents closure rates for all industries by race/ethnicity.

African American-owned businesses that were operating in the United States in 2002 had the highest rate of closure by 2006 among all racial/ethnic groups — including white-owned businesses — in construction (43%); wholesale trade (37%); professional, scientific, and technical services (39%); other services (39%); administrative, support, waste management, and remediation (43%); and all industries (39%). Hispanic American-owned businesses and Asian American-owned businesses that were operating in 2002 were also more likely to have closed by 2006 than white-owned businesses in all of the study industries, and all industries. The study team could not examine whether those differences also existed in the Atlanta Metropolitan Area or in Georgia as a whole, because the SBA analysis by industry was not available for individual states or metropolitan areas.
Figure H-2.
Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.

<table>
<thead>
<tr>
<th>Industry</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>43%</td>
</tr>
<tr>
<td>Asian American</td>
<td>31%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>35%</td>
</tr>
<tr>
<td>White</td>
<td>30%</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>37%</td>
</tr>
<tr>
<td>Asian American</td>
<td>31%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>34%</td>
</tr>
<tr>
<td>White</td>
<td>26%</td>
</tr>
<tr>
<td>Professional, scientific, and technical services</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>39%</td>
</tr>
<tr>
<td>Asian American</td>
<td>37%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>33%</td>
</tr>
<tr>
<td>White</td>
<td>28%</td>
</tr>
<tr>
<td>Management of companies and enterprises</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>28%</td>
</tr>
<tr>
<td>Asian American</td>
<td>25%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>33%</td>
</tr>
<tr>
<td>White</td>
<td>22%</td>
</tr>
<tr>
<td>Other services (except Public Administration)</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>39%</td>
</tr>
<tr>
<td>Asian American</td>
<td>37%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>35%</td>
</tr>
<tr>
<td>White</td>
<td>30%</td>
</tr>
<tr>
<td>Admin., support, waste management, and remediation</td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>43%</td>
</tr>
<tr>
<td>Asian American</td>
<td>36%</td>
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<tr>
<td>Hispanic American</td>
<td>41%</td>
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<td>White</td>
<td>34%</td>
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<tr>
<td>All industries</td>
<td></td>
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<tr>
<td>African American</td>
<td>39%</td>
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<tr>
<td>Asian American</td>
<td>33%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>34%</td>
</tr>
<tr>
<td>White</td>
<td>29%</td>
</tr>
</tbody>
</table>

Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Unsuccessful closures. Not all business closures can be interpreted as “unsuccessful closures.” Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent “successful closures.” The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets. The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, “Which item below describes the status of this business at the time the decision was made to cease operations?” Only the responses “successful” and “unsuccessful” were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Figure H-3 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction, wholesale trade, services, and all industries.

According to CBO data, African American-owned businesses were the most likely to report being “unsuccessful” at the time at which their businesses closed. About 77 percent of African American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by “other minority groups” (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

In the construction industry, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses (58%). Those trends were similar in the wholesale trade and services industries with one exception — women-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

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4 CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

5 All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, Thomas J. and James Schmitz. 1996. “Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey.” Journal of Business & Economic Statistics. 14(2): 231-241. This report does not include CBO data on overall business closure rates, because businesses not responding to the survey were found to be much more likely to have closed than ones that did.

6 This study includes CBO data on firm success because there is no compelling reason to believe that closed businesses responding to the survey would have reported different rates of success/failure than those closed businesses that did not respond to the survey. Headd, Brian. U.S. Small Business Administration, Office of Advocacy. 2000. Business Success: Factors leading to surviving and closing successfully. Washington D.C.: 12.

7 Data for firms operating in the management of companies and enterprises and administrative, support, waste management, and remediation industries were not available in the CBO survey.
Figure H-3.
Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S.

<table>
<thead>
<tr>
<th>Industry</th>
<th>African American</th>
<th>Hispanic American</th>
<th>Other Minority</th>
<th>Women</th>
<th>Non-minority men</th>
<th>All firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td>82%</td>
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<td></td>
<td></td>
<td>73%</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>82%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td>85%</td>
</tr>
<tr>
<td>Services</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>64%</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>52%</td>
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<td>59%</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>67%</td>
</tr>
<tr>
<td>All industries</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>72%</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>64%</td>
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<td></td>
<td></td>
<td>52%</td>
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<td>59%</td>
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<td>57%</td>
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<td></td>
<td>77%</td>
</tr>
<tr>
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<td>71%</td>
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<td>71%</td>
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<td></td>
<td>73%</td>
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<td>61%</td>
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<td></td>
<td></td>
<td></td>
<td>61%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>62%</td>
</tr>
</tbody>
</table>


Reasons for differences in unsuccessful closure rates. Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Unsuccessful business failures of minority-owned businesses are largely due to barriers in access to capital. Regression analyses have identified initial capitalization as a significant factor in determining firm viability. Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more liable to fail. Difficulty in accessing capital is found to be particularly acute for minority-owned businesses in the construction industry.  

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Prior work experience in a family member’s business or similar experiences are found to be strong determinants of business viability. Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.\(^9\) Similar research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.\(^10\)

Level of education is found to be a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and non-minority-owned businesses.\(^11\)

Non-minority business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.\(^12\)

The possession of greater initial capital and generally higher levels of education among Asian Americans are related to the relatively high rate of survival of Asian American-owned businesses compared to other minority-owned businesses.\(^13\)

**Expansions and contractions.** Comparing rates of expansion and contraction between minority-owned and white-owned businesses is also useful in assessing the success of minority-owned businesses. As with closure data, only some of the data on expansions and contractions that were available for the nation were also available at the state level, and none is available for the Atlanta Metropolitan Area.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of non-publicly-held Georgia businesses that expanded and contracted between 2002 and 2006. Figure H-4 presents the percentage of all businesses, by race/ethnicity of ownership, that increased their total employment between 2002 and 2006. Those data are presented for Georgia and for the nation as a whole.

---


\(^11\) Ibid. 24.


Approximately 29 percent of white-owned Georgia businesses expanded between 2002 and 2006, compared to 25 percent of African American-owned businesses, 30 percent of Asian American-owned businesses and 30 percent of Hispanic American-owned businesses. Expansion results were similar for the nation as a whole.

Figure H-4.
Percentage of businesses that expanded, 2002 through 2006, Georgia and the U.S.

<table>
<thead>
<tr>
<th>Region</th>
<th>African American</th>
<th>Asian American</th>
<th>Hispanic American</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>25%</td>
<td>30%</td>
<td>30%</td>
<td>29%</td>
</tr>
<tr>
<td>United States</td>
<td>26%</td>
<td>29%</td>
<td>30%</td>
<td>28%</td>
</tr>
</tbody>
</table>

Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.


Figure H-5 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific, and technical services; management of companies and enterprises; other services, administrative, support, waste management and remediation; and in all industries in the United States. The 2010 SBA study did not report results for businesses in individual industries at the state level.
Figure H-5.
Percentage of businesses that expanded, 2002 through 2006, relevant study industries and all industries in the U.S.

<table>
<thead>
<tr>
<th>Industry</th>
<th>African American</th>
<th>Asian American</th>
<th>Hispanic American</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>25%</td>
<td>35%</td>
<td>32%</td>
<td>30%</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>28%</td>
<td>30%</td>
<td>34%</td>
<td>30%</td>
</tr>
<tr>
<td>Professional, scientific, and technical services</td>
<td>24%</td>
<td>27%</td>
<td>29%</td>
<td>26%</td>
</tr>
<tr>
<td>Management of companies and enterprises</td>
<td>31%</td>
<td>31%</td>
<td>23%</td>
<td>32%</td>
</tr>
<tr>
<td>Other services (except Public Administration)</td>
<td>21%</td>
<td>24%</td>
<td>23%</td>
<td>25%</td>
</tr>
<tr>
<td>Admin., support, waste management, and remediation</td>
<td>27%</td>
<td>28%</td>
<td>27%</td>
<td>28%</td>
</tr>
<tr>
<td>All industries</td>
<td>26%</td>
<td>29%</td>
<td>30%</td>
<td>28%</td>
</tr>
</tbody>
</table>

Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

At the national level, the patterns evident for study industries were similar to those observed for all industries:

- African American-owned businesses in the relevant study industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Hispanic American- and Asian American-owned companies in the relevant study industries were about as likely as white-owned businesses to have expanded between 2002 and 2006.

**Contraction.** Figure H-6 shows the percentage of non-publicly held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Georgia and in the nation as a whole. In both Georgia and the United States as a whole, African American-, Asian American- and Hispanic American-owned businesses were less likely to have contracted during 2002 through 2006 than white-owned businesses.

**Figure H-6.** Percentage of businesses that contracted, 2002 through 2006, Georgia and the U.S.

<table>
<thead>
<tr>
<th></th>
<th>Georgia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>19%</td>
<td>20%</td>
</tr>
<tr>
<td>Asian American</td>
<td>21%</td>
<td>22%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>22%</td>
<td>21%</td>
</tr>
<tr>
<td>White</td>
<td>23%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.


The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-7 shows the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of African American-, Hispanic American- and Asian American-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.
Figure H-7.
Percentage of businesses that contracted, 2002 through 2006, relevant study industries and all industries in the U.S.

<table>
<thead>
<tr>
<th>Industry</th>
<th>African American</th>
<th>Asian American</th>
<th>Hispanic American</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>20%</td>
<td>20%</td>
<td>21%</td>
<td>24%</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>18%</td>
<td>22%</td>
<td>18%</td>
<td>30%</td>
</tr>
<tr>
<td>Professional, scientific, and technical services</td>
<td>20%</td>
<td>18%</td>
<td>19%</td>
<td>21%</td>
</tr>
<tr>
<td>Management of companies and enterprises</td>
<td>24%</td>
<td>30%</td>
<td>22%</td>
<td>30%</td>
</tr>
<tr>
<td>Other services (except Public Administration)</td>
<td>20%</td>
<td>20%</td>
<td>22%</td>
<td>25%</td>
</tr>
<tr>
<td>Admin., support, waste management, and remediation</td>
<td>19%</td>
<td>23%</td>
<td>19%</td>
<td>22%</td>
</tr>
<tr>
<td>All industries</td>
<td>20%</td>
<td>22%</td>
<td>21%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners;
- Business earnings data for business owners from the 2010-2014 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the Atlanta area that the study team collected as part of availability interviews.

Business receipts. The study team examined receipts for businesses in the Atlanta Metropolitan Statistical Area (MSA) and the United States using data from the 2012 SBO, conducted by the U.S. Census Bureau. The study team also analyzed receipts for businesses in individual industries. The SBO reports business receipts separately for employer businesses (i.e., those with paid employees other than the business owner and family members) and for all businesses.

Receipts for all businesses. Figure H-8 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender. Racial categories in the Atlanta MSA are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans. The SBO data for businesses across all industries in the Atlanta MSA indicate that average receipts for minority- and women-owned businesses were much lower than that for non-Hispanic-owned, white-owned or male-owned businesses, with some groups faring worse than others.

- Average receipts of African American-owned businesses ($40,000) were only 7 percent that of white-owned businesses ($558,000).
- Average receipts of Asian American-owned businesses ($343,000) were approximately two-thirds that of white-owned businesses.
- Average receipts of American Indian and Alaska Native-owned businesses ($87,000) were about 16 percent that of white-owned businesses.
- Hispanic-owned businesses ($125,000) exhibited revenues that were less than one-third of the average of non-Hispanic-owned businesses ($394,000).
- Average receipts for women-owned businesses ($130,000) were less than a quarter of the average for male-owned businesses ($569,000).

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14 The 2012 SBO data are not available at the same geographic level as Census and ACS data. For most marketplace analyses using Census and ACS data, results are presented for the 20-county “Atlanta metropolitan area” but analyses using the SBO data are conducted for the Atlanta MSA, which includes the Atlanta metropolitan area counties along with eight additional counties. The Atlanta MSA includes the following Georgia counties: Barrow, Bartow, Butts, Carroll, Cherokee, Clayton, Cobb, Coweta, Dawson, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Haralson, Heard, Henry, Jasper, Lamar, Meriwether, Newton, Paulding, Pickens, Pike, Rockdale, Spalding and Walton.

15 We use “all businesses” to denote SBO data used in this analysis. The data include incorporated and unincorporated businesses, but not publicly-traded companies or other businesses not classifiable by race/ethnicity and gender.
Disparities in business receipts for minority- and women-owned businesses compared to non-Hispanic white- and male-owned businesses in the Atlanta MSA are consistent with those seen in the United States as a whole. A 2007 SBA study identified differences similar to those presented in Figure H-8 when examining businesses in all industries across the U.S.\(^{16}\)

Figure H-8.
Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2012

Note: Includes employer and non-employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau’s 2012 Economic Census.

Figure H-9 presents average annual receipts in 2012 for only employer businesses in the Atlanta MSA and in the United States. (Employer businesses are those with paid employees.) Minority- and women-owned businesses had substantially lower average business receipts than non-Hispanic-, white- and male-owned employer businesses in the Atlanta MSA:

- Average receipts of Native Hawaiian-owned businesses ($268,000) were 11 percent of the average of white-owned businesses ($2.4 million).
- Average receipts of American Indian and Alaska Native-owned businesses ($620,000) were about one quarter that of the average of white-owned businesses.
- Average receipts of African American-owned businesses ($690,000) were less than 30 percent of the average for white-owned businesses.
- Asian American-owned businesses had average receipts ($1.2 million) that were half of the average of white-owned businesses.
- Hispanic American-owned businesses had average receipts ($1.5 million) that were about two-thirds that of non-Hispanic-owned businesses ($2.2 million).
- Average receipts for women-owned businesses ($1.3 million) were half the average of male-owned businesses ($2.6 million).
Figure H-9.
Mean annual receipts (thousands) for employer businesses, by race/ethnicity and gender of owners, 2012

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>2012 Atlanta MSA Receipts</th>
<th>2012 United States Receipts</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian and Alaska Native</td>
<td>$620</td>
<td>$1,209</td>
</tr>
<tr>
<td>Asian American</td>
<td>$1,190</td>
<td>$1,305</td>
</tr>
<tr>
<td>Black or African American</td>
<td>$690</td>
<td>$948</td>
</tr>
<tr>
<td>Native Hawaiian and Other Pacific Islander</td>
<td>$268</td>
<td>$1,375</td>
</tr>
<tr>
<td>Other Minority</td>
<td></td>
<td>$975</td>
</tr>
<tr>
<td>White</td>
<td>$1,391</td>
<td>$2,277</td>
</tr>
<tr>
<td>Hispanic</td>
<td>$1,451</td>
<td>$1,322</td>
</tr>
<tr>
<td>Non-Hispanic</td>
<td></td>
<td>$2,191</td>
</tr>
<tr>
<td>Female</td>
<td>$1,271</td>
<td>$1,150</td>
</tr>
<tr>
<td>Male</td>
<td></td>
<td>$2,642</td>
</tr>
</tbody>
</table>

Note: Includes only employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Receipts by industry. The study team also analyzed SBO receipts data separately for businesses in the relevant study industries. Figure H-10 and H-11 present mean annual receipts in 2012 for all (i.e., employer and non-employer businesses combined) businesses in the relevant study industries and for just employer businesses by racial, ethnic and gender group. Results are presented for the Atlanta MSA and for the nation as a whole. In, the disparities in revenue based on race, ethnicity and gender identified in aggregate persisted when broken down by industry.
**Figure H-10.** Mean annual receipts (thousands) for all firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

**Note:** Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A” indicates that estimates were suppressed by the SBO because publication standards were not met.

**Source:** 2012 Survey of Business Owners, part of the U.S. Census Bureau’s 2012 Economic Census.

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Gender</th>
<th>All firms</th>
<th>Atlanta MSA</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Female</td>
<td>Male</td>
<td></td>
<td></td>
</tr>
<tr>
<td>American Indian and Alaska Native</td>
<td>$142</td>
<td>$144</td>
<td>$15</td>
<td>$17</td>
</tr>
<tr>
<td>Asian</td>
<td>$365</td>
<td>$350</td>
<td>$2,555</td>
<td>$2,574</td>
</tr>
<tr>
<td>Black or African American</td>
<td>$58</td>
<td>$74</td>
<td>$529</td>
<td>$78</td>
</tr>
<tr>
<td>Native Hawaiian and Other Pacific Islander</td>
<td>$149</td>
<td>$155</td>
<td>$842</td>
<td>$1,029</td>
</tr>
<tr>
<td>Other Minority</td>
<td>$94</td>
<td>$86</td>
<td>$852</td>
<td>$1,438</td>
</tr>
<tr>
<td>White</td>
<td>$508</td>
<td>$512</td>
<td>$4,422</td>
<td>$3,668</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Gender</th>
<th>All firms</th>
<th>Atlanta MSA</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>$130</td>
<td>$144</td>
<td>$1,778</td>
</tr>
<tr>
<td>Male</td>
<td>$638</td>
<td>$634</td>
<td>$5,060</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Industry</th>
<th>All firms</th>
<th>Atlanta MSA</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>$434</td>
<td>$460</td>
<td>$1,029</td>
</tr>
<tr>
<td>Management</td>
<td>$459</td>
<td>$508</td>
<td>$842</td>
</tr>
<tr>
<td>Professional, scientific, &amp; technical services</td>
<td>$459</td>
<td>$515</td>
<td>$842</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>$468</td>
<td>$512</td>
<td>$842</td>
</tr>
<tr>
<td>Trade</td>
<td>$459</td>
<td>$508</td>
<td>$842</td>
</tr>
<tr>
<td>Administrative &amp; support services</td>
<td>$459</td>
<td>$515</td>
<td>$842</td>
</tr>
<tr>
<td>Educational services</td>
<td>$459</td>
<td>$515</td>
<td>$842</td>
</tr>
<tr>
<td>Health care &amp; social assistance</td>
<td>$459</td>
<td>$515</td>
<td>$842</td>
</tr>
<tr>
<td>Other services</td>
<td>$459</td>
<td>$515</td>
<td>$842</td>
</tr>
</tbody>
</table>

Mean annual receipts (thousands) for all firms in the relevant study industries, by race/ethnicity and gender of owners, 2012.
SBO data indicated that average receipts were higher for employer businesses than for all businesses (i.e., employer and non-employer businesses combined). In the Atlanta MSA, when considering only employer firms, average 2012 receipts for most minority and female-owned businesses were lower than the average for non-Hispanic, white- and male-owned businesses. Results for all employer firms indicate that:

- Average receipts of African American-owned businesses ($690,000) were only 29 percent that of white-owned businesses ($2,392,000).
- Average receipts of Asian American-owned businesses ($1,190,000) were half that of white-owned businesses.
- Average receipts of American Indian and Alaska Native-owned businesses ($620,000) were slightly more than one quarter that of white-owned businesses.
- Hispanic-owned businesses ($1,451,000) exhibited revenues that were approximately two-thirds that of the average of non-Hispanic-owned businesses ($2,152,000).
- Average receipts for women-owned businesses ($1,271,000) were slightly less than half that of the average for male-owned businesses ($2,587,000).

In general, these trends persisted when analyzing industry-specific data in the Atlanta MSA. Within the study industries, where data was available for specific minority groups and females, those groups generally earned less than non-Hispanic, white- and male-owned businesses. Results across all study industries for employer firms indicate that:

- Average receipts of African American-owned businesses were between 23 and 53 percent that of white-owned businesses.
- Average receipts of Asian American-owned businesses were between 50 and 116 percent that of white-owned businesses.
- Average receipts of American Indian and Alaska Native-owned businesses were around one-fourth that of white-owned businesses.\(^\text{17}\)
- Hispanic-owned businesses exhibited revenues between 34 and 119 percent that of the average of non-Hispanic-owned businesses.
- Average receipts for women-owned businesses varied between 40 and 248 percent that of the average for male-owned businesses.

\(^\text{17}\) This variation may be due to small sample sizes.
**Figure H-11.** Mean annual receipts (thousands) for employer firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau’s 2012 Economic Census

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Male</th>
<th>Female</th>
<th>All firms</th>
<th>All industries</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Gender</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Race</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>American Indian and Alaska Native</td>
<td>$1,209</td>
<td>$1,266</td>
<td>$5,167</td>
<td>$2,723</td>
</tr>
<tr>
<td>Asian</td>
<td>$1,305</td>
<td>$1,223</td>
<td>$5,061</td>
<td>$3,105</td>
</tr>
<tr>
<td>Black or African American</td>
<td>$948</td>
<td>$1,096</td>
<td>$5,134</td>
<td>$2,312</td>
</tr>
<tr>
<td>Native Hawaiian and Other Pacific Islander</td>
<td>$1,375</td>
<td>$1,732</td>
<td>$6,777</td>
<td>$1,468</td>
</tr>
<tr>
<td>Other Minority</td>
<td>$975</td>
<td>$839</td>
<td>$3,764</td>
<td>$1,438</td>
</tr>
<tr>
<td>White</td>
<td>$2,277</td>
<td>$1,730</td>
<td>$9,774</td>
<td>$3,668</td>
</tr>
<tr>
<td><strong>Ethnicity</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td>$1,451</td>
<td>$750</td>
<td>$10,024</td>
<td>N/A</td>
</tr>
<tr>
<td>Non-Hispanic</td>
<td>$2,152</td>
<td>$2,214</td>
<td>$8,454</td>
<td>$3,188</td>
</tr>
<tr>
<td><strong>Gender</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>$1,150</td>
<td>$1,561</td>
<td>$6,471</td>
<td>$2,574</td>
</tr>
<tr>
<td>Male</td>
<td>$2,642</td>
<td>$1,842</td>
<td>$10,421</td>
<td>$4,014</td>
</tr>
</tbody>
</table>

Note: All figures are in thousands of dollars.
Business earnings. To assess the success of self-employed minorities and women in the relevant study industries, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the ACS. The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. Because of the way that the U.S. Census Bureau conducts each year’s ACS, earnings for business owners reported in the 2011 through 2015 sample were for the previous 12 months between 2010 and 2014. However, all dollar amounts are presented in 2014 dollars.

Construction business owner earnings, 2010-2014. Figure H-12 shows earnings in 2010 through 2014 for business owners in the construction industry in the Atlanta Metropolitan Area and the nation as a whole. Again, due to sample sizes for individual minority groups, Asian-Pacific Americans, Subcontinent Asian Americans, Native Americans and other minorities were combined.

- On average, African American construction business owners in the Atlanta Metropolitan Area ($22,963) earned less in 2010-2014 than non-Hispanic white construction business owners ($29,807), a statistically significant difference.
- Hispanic American business owners ($20,610) also earned substantially less than non-Hispanic white business owners in 2010-2014, a statistically significant difference.
- Other minority business owners ($13,595) also earned substantially less than non-Hispanic white business owners in 2010-2014.
- Average earnings for female construction business owners ($23,895) were similar to those of male construction business owners ($25,769) in the Atlanta Metropolitan Area from 2010-2014.

Figure H-12.
Mean annual business owner earnings in the construction industry, 2010 through 2014, the Atlanta Metropolitan Area

Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars. *, ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

For example, if a business owner completed the survey on January 1, 2011, the figures for the previous 12 months would reference January 1, 2010 to December 31, 2010. Similarly, a business owner completing the survey December 31, 2014 would reference amounts since January 1, 2014.
Professional services business owner earnings, 2010-2014. As with earnings data for the construction industry, earnings for professional services business owners that were reported in the 2011-2015 ACS data were for the time period between 2010 and 2014. Results are presented in Figure H-13 for African Americans, other minorities and non-Hispanic white business owners.\textsuperscript{19}

- On average, earnings for African American ($42,217) and other minority ($52,365) business owners in the professional service industry were lower than the earnings of non-Hispanic white business owners ($76,067) in the Atlanta Metropolitan Area in 2010 through 2014.
- Average earnings for female professional services business owners ($44,098) were lower than for male business owners ($82,834) in the Atlanta Metropolitan Area.

Figure H-13.
Mean annual business owner earnings in the professional services industry, 2010 through 2014, the Atlanta Metropolitan Area

\[\text{Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars. ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.}
\]

Source: BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

Goods business owner earnings, 2010-2014. The study team also examined owners’ earnings for goods firms. Results are displayed in Figure H-14.

- Average earnings for minority business owners in the goods industry ($29,977) were not significantly different than non-Hispanic white business owners ($26,386).
- Average earnings for female business owners in the goods industry ($15,733) were about half of the earnings of male business owners ($33,655) in the Atlanta Metropolitan Area in 2010 through 2014.\textsuperscript{20}

\textsuperscript{19} For the professional services industry, the “Other Minority” group includes Hispanic Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Native Americans and other race minorities.

\textsuperscript{20} The sample sizes did not reach the minimum required (25 per group) to qualify for significance testing. Therefore, significance tests were not conducted for business earnings in the goods industry.
Figure H-14. Mean annual business owner earnings in the goods industry, 2010 through 2014, the Atlanta Metropolitan Area

Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars. ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Other services business owner earnings, 2010-2014. Due to small sample sizes, results for other services business owners are presented for African Americans, Hispanic Americans, other minorities and non-Hispanic white business owners.21 Those results are displayed in Figure H-15.

- African American other services business owners ($20,208) earned less in 2010-2014 than non-Hispanic white other services business owners ($28,285).
- Hispanic American business owners ($23,004) earned less than non-Hispanic white business owners.
- Female other services business owners ($23,526) earned slightly less than male business owners ($26,761), although this different was not statistically significant.

Figure H-15. Mean annual business owner earnings in the other services industry, 2010 through 2014, the Atlanta Metropolitan Area

Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars. *, ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

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21 For the other services industry, the “Other Minority” group includes Asian-Pacific Americans, Subcontinent Asian Americans, Native Americans and other race minorities.
Regression analyses of business earnings. Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status, and educational attainment. The study team performed regression analyses using 2010-2014 ACS data to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after statistically controlling for certain race- and gender-neutral factors.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies. The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race/ethnicity and gender of business owners, the model also included available measures from the data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

The study team developed models for business owner earnings in 2010 through 2014 for the Atlanta Metropolitan Area in the following industries:

- A model for business owner earnings in the construction industry that included 1,230 observations;
- A model for business owner earnings in the professional services industry that included 608 observations;
- A model for business owner earnings in the goods industry that included 71 observations; and
- A model for business owner earnings in the other services industry that included 990 observations.

---

Construction industry regression results, 2010 through 2014. Figure H-16 illustrates the results of the regression model for 2010 through 2014 earnings in the construction industry in the Atlanta Metropolitan Area. The model indicated that several race- and gender-neutral factors significantly predicted earnings of business owners in the construction industry in the Atlanta Metropolitan Area:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had lower earnings;
- Married business owners tended to have greater business earnings than unmarried business owners;
- Business owners with a disability tend to have lower business earnings than those without a disability; and
- Having a four-year college degree was associated with greater business earnings.

After statistically controlling for race- and gender-neutral factors, the model indicated a statistically significant disparity in earnings for other minorities and female business owners. Being Hispanic American was associated with higher business earnings.

Figure H-16.
Atlanta Metropolitan Area construction business owner earnings model, 2010-2014

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>7.334 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.088 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.001 **</td>
</tr>
<tr>
<td>Married</td>
<td>0.313 **</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>0.293</td>
</tr>
<tr>
<td>Disabled</td>
<td>-0.659 *</td>
</tr>
<tr>
<td>Less than high school</td>
<td>-0.257 **</td>
</tr>
<tr>
<td>Some college</td>
<td>-0.025</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>0.445 **</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>0.106</td>
</tr>
<tr>
<td>African American</td>
<td>-0.108</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>0.012</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>-0.629</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>0.310 **</td>
</tr>
<tr>
<td>Native American</td>
<td>-1.004</td>
</tr>
<tr>
<td>Other Minority</td>
<td>-1.971 **</td>
</tr>
<tr>
<td>Female</td>
<td>-0.504 **</td>
</tr>
</tbody>
</table>

Note: *, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:
BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).
Professional services industry regression results, 2010 through 2014. Figure H-17 presents the results of the regression model of business owner earnings specific to the Atlanta Metropolitan Area professional services-related industry for 2010 through 2014. The model indicated that several race- and gender-neutral factors significantly predicted earnings of business owners in the professional services industry in the Atlanta Metropolitan Area:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had lower earnings;
- Greater English-speaking abilities was associated with greater business earnings;
- Having a disability was associated with lower business earnings; and
- Having less than a high school education was associated with greater business earnings; however, having a four-year or advanced degree was also associated with greater business earnings.

After accounting for neutral factors, the model indicated a statistically significant disparity in earnings for Native American and female professional services business owners.

Figure H-17.
Atlanta Metropolitan Area professional services industry business owner earnings model, 2010-2014

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>6.317 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.094 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.001 **</td>
</tr>
<tr>
<td>Married</td>
<td>0.078</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>1.302 *</td>
</tr>
<tr>
<td>Disabled</td>
<td>-0.848 **</td>
</tr>
<tr>
<td>Less than high school</td>
<td>1.262 **</td>
</tr>
<tr>
<td>Some college</td>
<td>0.209</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>0.833 *</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>1.413 **</td>
</tr>
<tr>
<td>African American</td>
<td>-0.001</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>-0.454</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>0.299</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>-0.326</td>
</tr>
<tr>
<td>Native American</td>
<td>-2.653 **</td>
</tr>
<tr>
<td>Female</td>
<td>-0.820 **</td>
</tr>
</tbody>
</table>

Note:
*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.
"Other Minority" was omitted from the analysis due to small sample size.

Source:
BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: [http://usa.ipums.org/usa/](http://usa.ipums.org/usa/).

Goods industry regression results, 2010 through 2014. Figure H-18 presents the results of the regression model of business owner earnings specific to the Atlanta Metropolitan Area goods industry for 2010 through 2014. The model indicated that having some college was associated with higher business earnings. After accounting for race- and gender-neutral factors, there was no statistically significant disparity in earnings for any minority group.
Figure H-18.
Atlanta Metropolitan Area goods industry business owner earnings model, 2010-2014

Note:
*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.
*“Other Minority” and “Speaks English Well” were omitted from the analysis due to small sample size.

Source:
BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Other services industry regression results, 2010 through 2014. Figure H-19 presents the results of the regression model of business owner earnings specific to the Atlanta Metropolitan Area other services industry for 2010 through 2014. The model indicated that several race- and gender-neutral factors significantly predicted earnings of business owners in the other industry in the AHA’s market area:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had lower business earnings; and
- Business owners who had a less than high school education tended to have lower business earnings.

After accounting for neutral factors, the model indicated a statistically significant disparity in earnings for African American business owners.

Earnings for Hispanic American business owners were higher than other groups after controlling for other factors.
Figure H-19.
Atlanta Metropolitan Area other services industry business owner earnings model, 2010-2014

Note:
*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:
BBC Research & Consulting from 2010-2014 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>6.365 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.138 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.001 **</td>
</tr>
<tr>
<td>Married</td>
<td>0.051</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>-0.183</td>
</tr>
<tr>
<td>Disabled</td>
<td>-0.033</td>
</tr>
<tr>
<td>Less than high school</td>
<td>-0.774 **</td>
</tr>
<tr>
<td>Some college</td>
<td>0.112</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>-0.089</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>0.249</td>
</tr>
<tr>
<td>African American</td>
<td>-0.293 *</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>-0.301</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>-0.175</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>0.632 **</td>
</tr>
<tr>
<td>Native American</td>
<td>-0.443</td>
</tr>
<tr>
<td>Other Minority</td>
<td>-0.502</td>
</tr>
<tr>
<td>Female</td>
<td>-0.136</td>
</tr>
</tbody>
</table>
Gross revenue of firms from availability interviews. As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability telephone interviews that Keen Independent conducted (discussed in Appendix C), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous complete three years at the time of the survey: from 2014 through 2016. Only firms with locations in the Atlanta Metropolitan Area were included in the availability interviews. Results are for firms providing revenue information.

Construction. Figure H-20 presents the reported annual revenue for MBE, WBE and majority-owned construction businesses in the Atlanta availability interviews. Majority-owned construction firms were more likely to report higher average annual revenues relative to minority-owned construction firms in the Atlanta Metropolitan Area.

- About 88 percent of MBEs reported average revenue of less than $1 million per year compared to 60 percent of majority-owned firms.
- One percent of the MBEs and 9 percent of WBEs providing revenue information indicated annual revenue exceeding $5 million. A smaller percentage of MBEs and WBEs than majority-owned firms reported revenue of that level (combining the two highest revenue categories in Figure H-20).

Figure H-20.
Average annual gross revenue of company over previous three years, construction industry in the Atlanta Metropolitan Area

Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
Professional services. Figure H-21 presents the reported annual revenue for MBE, WBE and majority-owned professional services businesses in the Atlanta Metropolitan Area. In the professional services industry, MBEs and WBEs were more likely to report lower annual revenues compared to majority-owned businesses.

- A higher percentage of MBEs (84%) and WBEs (69%) reported average revenue of less than $1 million per year than majority-owned businesses (63%).

- Relatively few MBE firms (3%) reported average revenue of more than $15 million per year compared with majority-owned businesses (11%). About the same share of WBEs reported this level of revenue as majority-owned firms, as shown in Figure H-21.

Figure H-21.
Average annual gross revenue of company over previous three years, professional services industry in the Atlanta Metropolitan Area

![Bar chart showing revenue distribution for MBE, WBE, and majority-owned firms.](chart.png)

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
Goods and other services. Figure H-22 presents the reported annual revenue for MBE/WBEs and majority-owned goods and other services businesses in the Atlanta Metropolitan Area. Results for MBEs and WBEs are combined due to small sample sizes. As with construction and professional services, majority-owned firms reported greater annual revenues relative to MBEs and WBEs.

- The same share of MBE/WBEs and majority-owned firms reported annual revenue of less than $1 million.
- Only 3 percent of MBE/WBEs reported average revenue more than $5 million. Six percent of majority-owned firms reporting such revenue.

Figure H-22.
Average annual gross revenue of company over previous three years, goods and other services industry in the Atlanta Metropolitan Area

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.
Source: Keen Independent Research from 2017 availability interviews.

Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.\textsuperscript{23} Keen Independent directly measured bid capacity in its availability analysis.\textsuperscript{24}

\textsuperscript{23} For example, see the decision of the United States Court of appeals for the Federal Circuit in Rothe Development Corp. v. U.S. Department of Defense, 545 F.3d 1023 (Fed. Cir. 2008).
\textsuperscript{24} See Appendix C for details about the availability interview process.
Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

**Data.** The availability analysis produced a database of construction, professional services and other services businesses for which bid capacity could be examined. (Bid capacity is less relevant for the goods industry, and was not examined.) “Relative capacity” for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the five years preceding when Keen Independent interviewed it.

**Results.** Keen Independent found no disparities in bid capacity between MBEs, WBEs and majority-owned firms.

As shown in Figure H-23, there is little indication that MBEs in the construction and other services have lower bid capacity than majority-owned firms. In construction, for example, about 50 percent of MBEs had bid capacity greater than $100,000, about the same as majority-owned firms. At the other end of the spectrum, 4 percent of MBEs had bid capacity of more than $20 million, about the same as majority-owned firms.

On balance, minority-owned professional services firms had lower bid capacity than majority-owned firms. Only 12 percent of MBEs had been awarded or bid on contracts of at least $1 million compared with 17 percent of majority-owned professional services firms.

Across industries, WBEs were less likely than both MBEs and majority-owned firms to have bid capacity of less than $100,000. There was no evidence of disparities in bid capacity for WBEs.
Figure H-23.
Largest contract bid on or awarded (bid capacity) by industry for construction, professional services and other services firms in the Atlanta Metropolitan Area

<table>
<thead>
<tr>
<th>Industry</th>
<th>MBE (n=136)</th>
<th>WBE (n=34)</th>
<th>Majority-owned (n=161)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than $100k</td>
<td>50%</td>
<td>41%</td>
<td>49%</td>
</tr>
<tr>
<td>$100k up to $1 million</td>
<td>33%</td>
<td>41%</td>
<td>29%</td>
</tr>
<tr>
<td>$1 million to $20 million</td>
<td>13%</td>
<td>18%</td>
<td>19%</td>
</tr>
<tr>
<td>$20 million or more</td>
<td>4%</td>
<td>3%</td>
<td>0%</td>
</tr>
<tr>
<td>Professional services</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than $100k</td>
<td>64%</td>
<td>59%</td>
<td>67%</td>
</tr>
<tr>
<td>$100k up to $1 million</td>
<td>24%</td>
<td>25%</td>
<td>16%</td>
</tr>
<tr>
<td>$1 million to $20 million</td>
<td>10%</td>
<td>13%</td>
<td>16%</td>
</tr>
<tr>
<td>$20 million or more</td>
<td>2%</td>
<td>3%</td>
<td>1%</td>
</tr>
<tr>
<td>Other services</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than $100k</td>
<td>78%</td>
<td>67%</td>
<td>84%</td>
</tr>
<tr>
<td>$100k up to $1 million</td>
<td>16%</td>
<td>16%</td>
<td>13%</td>
</tr>
<tr>
<td>$1 million to $20 million</td>
<td>5%</td>
<td>20%</td>
<td>3%</td>
</tr>
<tr>
<td>$20 million or more</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
</tr>
</tbody>
</table>

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
Above median bid capacity. Subindustries such construction management and development tend to involve relatively large projects. Other subindustries, such as landscape maintenance, typically involve smaller contracts. Figure H-24 reports the median relative bid capacity among Atlanta Metropolitan Area businesses in 22 subindustries. Results categorized companies according to their primary line of business (which is why building construction appears as these firms may also perform other work).

Figure H-24.
Median relative capacity of Atlanta Metropolitan Area businesses by subindustry

<table>
<thead>
<tr>
<th>Subindustry</th>
<th>Median bid capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Construction</strong></td>
<td></td>
</tr>
<tr>
<td>Site preparation</td>
<td>$2 million to $5 million</td>
</tr>
<tr>
<td>Construction management for multifamily properties</td>
<td>$1 million to $2 million</td>
</tr>
<tr>
<td>Developer of multifamily properties</td>
<td>$1 million</td>
</tr>
<tr>
<td>Building construction or other general contractor for school properties</td>
<td>$500,000</td>
</tr>
<tr>
<td>Building construction or other general contractor for multifamily properties</td>
<td>$100,000 to $500,000</td>
</tr>
<tr>
<td>Electrical work</td>
<td>$100,000 to $500,000</td>
</tr>
<tr>
<td>Plaster and drywall work</td>
<td>$100,000 to $500,000</td>
</tr>
<tr>
<td>Water and sewerlines</td>
<td>$100,000 to $500,000</td>
</tr>
<tr>
<td>Concrete work</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Plumbing, heating or air conditioning</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Other - construction</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td><strong>Professional services</strong></td>
<td></td>
</tr>
<tr>
<td>Construction management</td>
<td>$100,000 to $500,000</td>
</tr>
<tr>
<td>Engineering, architecture and design services</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Environmental consulting</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Digital learning and business software</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>IT Infrastructure, installation, staffing and support</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Legal services</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Real estate consulting and appraisal services</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td><strong>Other services</strong></td>
<td></td>
</tr>
<tr>
<td>Guard and security services</td>
<td>$100,000 to $500,000</td>
</tr>
<tr>
<td>Landscape maintenance</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Property management</td>
<td>$100,000 or less</td>
</tr>
<tr>
<td>Other - services</td>
<td>$100,000 or less</td>
</tr>
</tbody>
</table>

Source: Keen Independent Research from 2017 availability interviews.
Comparison of above median bid capacity for MBEs, WBEs and majority-owned firms. Based on the median bid capacity figures identified in Figure H-24, Keen Independent classified firms into “above median bid capacity,” “at median bid capacity,” and “below median bid capacity” for their subindustry. About the same percentage of MBEs (34%) as majority-owned firms (31%) had above median bid capacity for their subindustry. The percentage was higher for WBEs: 44 percent.

Regression analysis. The study team developed a logistic regression model to determine whether the likelihood that a firm at above median bid capacity for its subindustry varied for MBEs and WBEs compared with majority-owned firms after accounting for age of businesses. After controlling for length of time in business, there was no evidence that minority- and women-owned firms had lower bid capacity than majority-owned firms.

Availability Interview Results Concerning Potential Barriers

As part of the availability interviews conducted with Atlanta area businesses, Keen Independent asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix C explains the survey process and provides the survey questions.

Results for interview questions are discussed within the context of the relevant study industry; some questions were industry-specific and not asked of all available businesses. The analysis is grouped into three groups for each study industry: barriers to learning about bid opportunities, barriers related to project requirements and barriers related to access to capital.

Construction. In the availability survey, construction firms were asked about obtaining financing and bonding, being prequalified for work, insurance requirements and whether project size was a barrier to bidding. Figure H-26 shows results.

- About 30 percent of MBE construction firms surveyed reported difficulties associated with obtaining lines of credit or loans compared with only 10 percent of majority-owned firms and 11 percent of WBEs.

- About one-half of MBE/WBE and majority-owned survey respondents had obtained or tried to obtain bonds. WBEs were more likely than MBEs and majority-owned firms to indicate difficulties obtaining bonds, however, there was a small number of responses for WBEs (only firms that had sought bonds were asked the barrier question).

- Very few firms reported difficulties being prequalified for work.
A larger percentage of MBEs (18%) than majority-owned firms (8%) reported that insurance requirements on contracts was a barrier to bidding.

MBEs (41%) and WBEs (35%) were more likely than majority-owned construction firms (22%) to indicate that large contract size presented a barrier to bidding.

Figure H-26.
Responses to availability interview questions concerning loans, bonding and insurance, prequalification and size of projects, Atlanta Metropolitan Area MBE, WBE and majority-owned construction firms

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
The survey also asked construction firms about any difficulties learning about bid opportunities.

- In general, relatively more MBEs than WBEs and majority-owned firms indicated difficulties learning about bid opportunities directly with AHA, other public agencies in the Atlanta, with property managers and developers of multifamily projects, and with prime contractors in general, as shown in Figure H-27.

- Results for the question about learning about bid opportunities with AHA (top of Figure H-27) were similar to questions concerning learning about bid opportunities with other organizations.

Figure H-27.
Responses to availability interview questions concerning learning about work, Atlanta Metropolitan Area MBE, WBE and majority-owned construction firms

<table>
<thead>
<tr>
<th></th>
<th>Majority-owned</th>
<th>WBE</th>
<th>MBE</th>
<th>MBE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning about bid opportunities directly with AHA</td>
<td>33%</td>
<td>15%</td>
<td>11%</td>
<td>28%</td>
</tr>
<tr>
<td>Other public agencies in Atlanta metro area</td>
<td>28%</td>
<td>13%</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>Property managers/developers of multifamily properties</td>
<td>28%</td>
<td>10%</td>
<td>12%</td>
<td>9%</td>
</tr>
<tr>
<td>Bid opportunities in the private sector in general in Atlanta metro area</td>
<td>24%</td>
<td>9%</td>
<td>9%</td>
<td>31%</td>
</tr>
<tr>
<td>Bid opportunities with Atlanta metro area prime contractors</td>
<td>31%</td>
<td>10%</td>
<td>8%</td>
<td>10%</td>
</tr>
</tbody>
</table>

Note:  "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
Keen Independent also examined the relative number of firms reporting difficulty receiving payments.

- Very few firms said that they experienced difficulties receiving payment from AHA.
- About one quarter of construction firms said that they had experienced difficulties receiving payment from property managers and developers, in general. Similar results were seen for payments from prime contractors. About one-third of respondents reported difficulties receiving payment from other customers in the private sector.

Figure H-28.
 Responses to availability interview questions concerning receipt of payments and approval of work, Atlanta Metropolitan Area MBE, WBE and majority-owned construction firms

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
**Professional services.** The study team asked similar questions about marketplace barriers in the availability interviews with professional services firms.

- Relatively more MBEs (22%) and WBEs (12%) reported difficulties obtaining lines of credit or loans than majority-owned firms (4%), and a greater share of WBEs reported difficulties being prequalified.

- MBEs (18%) and WBEs (16%) were more likely to report large project size as a barrier compared with majority-owned firms (9%).

Figure H-29.
Responses to availability interview questions concerning loans, insurance, prequalification and size of projects, Atlanta Metropolitan Area MBE, WBE and majority-owned professional services firms.

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
A larger proportion of MBE and WBE professional services firms reported difficulties learning about bid opportunities with AHA, other public agencies, property managers and developers, prime contractors and with private sector customers. For example, 34 percent of MBEs and 25 percent of WBEs indicated difficulties learning about bid opportunities directly with AHA compared with only 12 percent of majority-owned firms. As shown in Figure H-30, results for learning about AHA opportunities were similar to responses when firms were asked about learning about opportunities with other organizations.

**Figure H-30.**
Responses to availability interview questions concerning learning about work, Atlanta Metropolitan Area MBE, WBE and majority-owned professional services firms

<table>
<thead>
<tr>
<th></th>
<th>MBE (n=229)</th>
<th>WBE (n=57)</th>
<th>Majority-owned (n=238)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difficulties learning about bid opportunities directly with the Atlanta Housing Authority</td>
<td>34%</td>
<td>25%</td>
<td>12%</td>
</tr>
<tr>
<td>Difficulties learning about bid opportunities with other public agencies in Atlanta metro area</td>
<td>32%</td>
<td>23%</td>
<td>9%</td>
</tr>
<tr>
<td>Difficulties learning about bid opportunities from property managers/developers of multifamily properties</td>
<td>30%</td>
<td>23%</td>
<td>11%</td>
</tr>
<tr>
<td>Difficulties learning about bid opportunities in the private sector in general in Atlanta metro area</td>
<td>31%</td>
<td>23%</td>
<td>9%</td>
</tr>
<tr>
<td>Difficulties learning about subcontracting opportunities with Atlanta metro area prime contractors</td>
<td>27%</td>
<td>29%</td>
<td>7%</td>
</tr>
</tbody>
</table>

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
Very few professional firms reported difficulties receiving payment from AHA, but about one-quarter of firms indicated difficulties receiving payment from customers in the private sector. Very few firms said that they had difficulty obtaining final approvals on work.

Figure H-31.
Responses to availability interview questions concerning receipt of payments and approval of work, Atlanta Metropolitan Area MBE, WBE and majority-owned professional services firms

Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
**Goods and other services.** Because of the small number of WBE goods and other services firms in the survey data, Keen Independent combined responses with MBEs. As with construction and professional services firms, a greater share of MBE/WBE goods and other services companies reported difficulties obtaining lines of credit or loans compared with majority-owned firms. There were no major differences in responses for difficulties presented by insurance requirements or by large project size.

Figure H-32.
Responses to availability interview questions concerning loans, insurance and size of projects Atlanta Metropolitan Area MBE, WBE and majority-owned goods and other services firms

![Graph showing percent of firms responding "yes" to various difficulties]

Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
The availability survey asked goods and services firms about any difficulties learning about bid opportunities. MBE/WBEs (36%) were more likely than majority-owned firms (12%) to indicate difficulties learning about bid opportunities with AHA. Figure H-33 shows similar differences between MBE/WBEs and majority-owned firms for learning about other public agencies, property managers and developers, and bid opportunities in the private sector.

Figure H-33.
Responses to availability interview questions concerning learning about work, Atlanta Metropolitan Area MBE, WBE and majority-owned goods and other services firms

<table>
<thead>
<tr>
<th></th>
<th>MBE/WBE (n=61)</th>
<th>Majority-owned (n=52)</th>
<th>MBE/WBE (n=67)</th>
<th>Majority-owned (n=62)</th>
<th>MBE/WBE (n=70)</th>
<th>Majority-owned (n=60)</th>
<th>MBE/WBE (n=69)</th>
<th>Majority-owned (n=65)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difficulties learning about bid opportunities directly with the Atlanta Housing Authority</td>
<td>36%</td>
<td>12%</td>
<td>34%</td>
<td>10%</td>
<td>39%</td>
<td>12%</td>
<td>33%</td>
<td>5%</td>
</tr>
<tr>
<td>Difficulties learning about bid opportunities with other public agencies in Atlanta metro area</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Difficulties learning about bid opportunities from property managers/developers of multifamily properties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Difficulties learning about bid opportunities in the private sector in general in Atlanta metro area</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note:  “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.
As with construction and professional services firms, very few goods and other services companies reported difficulties receiving payments from AHA. More firms indicated difficulties receiving payment from property managers and developers and from other customers in the private sector. MBE/WBEs were more likely to report such difficulties than majority-owned firms.

Figure H-34.
Responses to availability interview questions concerning receipt of payments, Atlanta Metropolitan Area MBE, WBE and majority-owned goods and other services firms

Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.

Summary

The study team used the 2010 SBA study of minority business dynamics to examine business closures, expansions and contractions. That study found that, between 2002 and 2006, 29 percent of non-publicly held U.S. businesses had expanded their employment, 24 percent had contracted their employment, and 30 percent had closed. Results for Georgia are as follows.

- Among the racial/ethnic groups examined, African American-owned firms were the most likely to close and the least likely to expand. However, they were less likely to contract than white-owned businesses.

- Hispanic American-owned businesses were more likely to close than white-owned businesses. However, Hispanic American-owned businesses were slightly more likely to expand and slightly less likely to contract than white-owned businesses.
Asian American-owned businesses were more likely to close than non-Hispanic white firms. However, similar to Hispanic American-owned businesses, they were slightly more likely to expand and slightly less likely to contract than white-owned businesses.

The study team examined several different datasets to analyze business receipts and earnings for minority- and female-owned businesses.

Analysis of 2012 data indicated that, in the Atlanta MSA, average receipts for African American-, Asian American-, Hispanic American-, Native American- and women-owned businesses were lower compared to those of white-, non-Hispanic- and male-owned businesses in all industries together.

There were similar differences in revenue for MBEs and WBEs when analyzing data from the 2017 availability surveys.

Data from 2010-2014 ACS indicated that, in the Atlanta Metropolitan Area, minority- and women-owned businesses earned less than majority-owned businesses in many of the relevant study industries. This result was confirmed from analysis of availability survey data collected by the study team.

Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were statistically significant effects of race and gender on business earnings, after statistically controlling for certain gender-neutral factors:

- Being female was associated with lower business earnings in the Atlanta Metropolitan Area construction and professional services industries in 2010-2014;
- Being in the other minority group was associated with lower business earnings in the construction industry in the Atlanta Metropolitan Area in 2010-2014;
- Being Native American was associated with lower business earnings in the professional services industry in the Atlanta Metropolitan Area in 2010-2014; and
- Hispanic American business owners had higher business earnings than other groups in the construction and other services sectors, after controlling for other factors.

Keen Independent asked respondents in the 2017 availability interviews whether they had experienced certain types of barriers to doing business.

Minority-owned firms were much more likely than majority-owned firms to report difficulties obtaining lines of credit or loans and learning about bid opportunities. Relative to majority-owned firms, more MBEs indicated that the large size of projects presented a barrier to bidding. These patterns persisted across industries.

A similar pattern was evident for WBEs, except for obtaining lines of credit and loans for WBE construction firms.
APPENDIX I.
Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2010-2014 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;
- The 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its quantitative marketplace analyses.

U.S. Census Bureau PUMS Data

Focusing on the construction, professional services, goods and other services industries, the study team used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center’s Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.1 For the analyses contained in this report, the study team used the 2010-2014 five-year ACS sample.

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2010-2014 ACS. The study team examined 2010-2014 ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long-form. Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. (along with the District of Columbia and Puerto Rico). Currently, these surveys cover roughly 1 percent of the population per year. The 2010-2014 ACS five-year estimates represent average characteristics over the five-year period of time, and correspond to roughly 5 percent of the population. For the Atlanta Metropolitan Area, the 2010-2014 ACS dataset includes 230,263 observations which — according to person-level weights — represent 5,374,137 individuals.

Categorizing individual race/ethnicity. To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual’s race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. The study team used a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified multiple races was placed in the reported race category with the highest ranking in the study team’s ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified himself or herself as “Korean,” that person was placed in the Asian-Pacific American category. If the individual identified himself or herself as “Korean” in combination with “Black,” the individual was considered African American.

- The Asian-Pacific American category included the following race/ethnicity groups: Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Native Hawaiian, Samoan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.

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• The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani and Sri Lankan. Individuals who identified themselves as “Asian,” but were not clearly categorized as Subcontinent Asian were placed in the Asian-Pacific American group.

• American Indian, Alaska Native and Latin American Indian groups were considered Native American.

• If an individual was identified with any of the above groups and an “other race” group, the individual was categorized into the known category. Individuals identified as “other race” or “white and other race” were categorized as “Other Minority.”

**Education variables.** The study team used the variable indicating respondents’ highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate’s degree, and bachelor’s degree or higher.\(^3\)

**Home ownership and home value.** Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of household living in dwellings owned free and clear and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2010-2014 ACS, home value is a continuous variable (rounded to the nearest $1,000) and median estimation is straightforward.

**Definition of workers.** Analyses involving worker class, industry, and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation, or class include both employed persons and those who are unemployed but seeking work.

**Business ownership.** The study team used the Census detailed “class of worker” variable (CLASSWKD) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

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\(^3\) In the 1940-1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.
Figure I-1.
Class of worker variable code in the 2010-2014 ACS

Source: BBC study team from the IPUMS program: http://usa.ipums.org/usa/.

<table>
<thead>
<tr>
<th>Description</th>
<th>2010-2014 ACS CLASSWKRD codes</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>0</td>
</tr>
<tr>
<td>Self-employed, not incorporated</td>
<td>13</td>
</tr>
<tr>
<td>Self-employed, incorporated</td>
<td>14</td>
</tr>
<tr>
<td>Wage/salary, private</td>
<td>22</td>
</tr>
<tr>
<td>Wage/salary at non-profit</td>
<td>23</td>
</tr>
<tr>
<td>Federal government employee</td>
<td>25</td>
</tr>
<tr>
<td>State government employee</td>
<td>27</td>
</tr>
<tr>
<td>Local government employee</td>
<td>28</td>
</tr>
<tr>
<td>Unpaid family worker</td>
<td>29</td>
</tr>
</tbody>
</table>

Business earnings. The study team used the Census “business earnings” variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners aged 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on four study industries: construction, professional services, goods and other services. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Figure I-2.
2010-2014 Census industry codes used for construction, professional services, goods, and other services

<table>
<thead>
<tr>
<th>Study industry</th>
<th>2010-2014 ACS IND codes</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>0770</td>
<td>Construction industry</td>
</tr>
<tr>
<td>Professional Services</td>
<td>7270; 7290; 7390</td>
<td>Legal services; Architectural, engineering and related services; Management, scientific and technical consulting services</td>
</tr>
<tr>
<td>Goods</td>
<td>4195; 4265; 4770; 4780; 4795; 4870; 4880; 5480</td>
<td>Household appliances and electrical and electronic goods merchant wholesalers; Hardware, plumbing and heating equipment and supplies merchant wholesalers; Furniture and home furnishings stores; Household appliances retailers; Electronics stores; Building materials and supplies dealers; Hardware stores; Office supplies and stationery stores</td>
</tr>
<tr>
<td>Other Services</td>
<td>7070; 7580; 7770; 7680; 7690</td>
<td>Real estate; Employment services; Landscaping services; Investigation and security services; Services to buildings and dwellings (except cleaning during construction and immediately after construction)</td>
</tr>
</tbody>
</table>

Source: BBC study team from the IPUMS program: http://usa.ipums.org/usa/.
Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2010-2014 ACS OCC codes used in the study team’s analyses.

Figure I-3.
2010-2014 ACS occupation codes used to examine workers in construction

<table>
<thead>
<tr>
<th>2008-2012 ACS occupational title and code</th>
<th>Job description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction managers 2010-14 Code: 220</td>
<td>Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate, and supervise the construction process.</td>
</tr>
<tr>
<td>First-line supervisors of construction trades and extraction workers 2010-14 Code: 6200</td>
<td>Directly supervise and coordinate the activities of construction or extraction workers.</td>
</tr>
<tr>
<td>Brickmasons, blockmasons and stonemasons 2010-14 Code: 6220</td>
<td>Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block and terra-cotta block. Construct or repair walls, partitions, arches, sewers and other structures. Build stone structures, such as piers, walls, and abutments and lay walks, curbstones or special types of masonry for vats, tanks and floors.</td>
</tr>
<tr>
<td>Carpenters 2010-14 Code: 6230</td>
<td>Construct, erect, install, or repair structures and fixtures made of wood, such as concrete forms, building frameworks, including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.</td>
</tr>
<tr>
<td>Carpet, floor, and tile installers and finishers 2010-14 Code: 6240</td>
<td>Apply shock-absorbing, sound-deadening, or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings and roof decks.</td>
</tr>
</tbody>
</table>

### Figure I-3 (continued).

**2008-2012 ACS occupation codes used to examine workers in construction**

<table>
<thead>
<tr>
<th>2008-2012 ACS occupational title and code</th>
<th>Job description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cement masons, concrete finishers and terrazzo workers</strong>&lt;br&gt;2010-14 Code: 6250</td>
<td>Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways and cabinet fixtures.</td>
</tr>
<tr>
<td><strong>Construction laborers</strong>&lt;br&gt;2010-14 Code: 6260</td>
<td>Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under “Helpers, Construction Trades.”</td>
</tr>
<tr>
<td><strong>Paving, surfacing and tamping equipment operators</strong>&lt;br&gt;2010-14 Code: 6300</td>
<td>Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or airport runways and taxiways, or equipment used for tamping gravel, dirt, or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators and stone spreader operators.</td>
</tr>
<tr>
<td><strong>Miscellaneous construction equipment operators, including pile-driver operators</strong>&lt;br&gt;2010-14 Code: 6320</td>
<td>Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors or front-end loaders to excavate, move and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads or locomotive cranes to drive pilings for retaining walls, bulkheads and foundations of structures, such as buildings, bridges, and piers.</td>
</tr>
<tr>
<td><strong>Drywall installers, ceiling tile installers and tapers</strong>&lt;br&gt;2010-14 Code: 6330</td>
<td>Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips, or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.</td>
</tr>
</tbody>
</table>

Source: ACS occupational titles and codes at [https://usa.ipums.org/usa/volii/occ_acs.shtml](https://usa.ipums.org/usa/volii/occ_acs.shtml)
Figure I-3 (continued).
2008-2012 ACS occupation codes used to examine workers in construction

<table>
<thead>
<tr>
<th>2008-2012 ACS occupational title and code</th>
<th>Job description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electricians</td>
<td>Install, maintain, and repair electrical wiring, equipment and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems or electrical control systems. Exclude “Security and Fire Alarm Systems Installers.”</td>
</tr>
<tr>
<td>2010-14 Code: 6355</td>
<td></td>
</tr>
<tr>
<td>Glaziers</td>
<td>Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings and tabletops.</td>
</tr>
<tr>
<td>2010-14 Code: 6360</td>
<td></td>
</tr>
<tr>
<td>Painters, construction and maintenance</td>
<td>Paint walls, equipment, buildings, bridges and other structural surfaces, using brushes, rollers and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.</td>
</tr>
<tr>
<td>2010-14 Code: 6420</td>
<td></td>
</tr>
<tr>
<td>Pipelayers, plumbers, pipefitters and steamfitters</td>
<td>Lay pipe for storm or sanitation sewers, drains and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe or seal joints. Excludes “Welders, Cutters, Solderers, and Brazers.” Assemble, install, alter and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.</td>
</tr>
<tr>
<td>2010-14 Code: 6440</td>
<td></td>
</tr>
<tr>
<td>Plasterers and stucco masons</td>
<td>Apply interior or exterior plaster, cement, stucco or similar materials and set ornamental plaster.</td>
</tr>
<tr>
<td>2010-14 Code: 6460</td>
<td></td>
</tr>
<tr>
<td>Roofers</td>
<td>Cover roofs of structures with shingles, slate, asphalt, aluminum and wood. Spray roofs, sidings and walls with material to bind, seal, insulate, or soundproof sections of structures</td>
</tr>
<tr>
<td>2010-14 Code: 6515</td>
<td></td>
</tr>
<tr>
<td>Iron and steel workers, including reinforcing iron and rebar workers</td>
<td><strong>Iron and steel workers</strong> raise, place, and unite iron or steel girders, columns and other structural members to form completed structures or structural frameworks. <strong>Reinforcing iron and rebar workers</strong> position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches and hand tools. Include rod busters.</td>
</tr>
<tr>
<td>2010-14 Code: 6530</td>
<td></td>
</tr>
<tr>
<td>Helpers, construction trades</td>
<td>All construction trades helpers not listed separately.</td>
</tr>
<tr>
<td>2010-14 Code: 6600</td>
<td></td>
</tr>
</tbody>
</table>

2008-2012 ACS occupation codes used to examine workers in construction

<table>
<thead>
<tr>
<th>2008-2012 ACS occupational title and code</th>
<th>Job description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Driver/sales workers and truck drivers</strong> 2010-14 Code: 9130</td>
<td><em>Driver/sales workers</em> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <em>Truck drivers (heavy)</em> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW to transport and deliver goods, livestock or materials in liquid, loose or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers’ license. <em>Truck drivers (light)</em> drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Exclude “Couriers and Messengers.”</td>
</tr>
<tr>
<td><strong>Crane and tower operators</strong> 2010-14 Code: 9150</td>
<td>Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines or products in many directions. Exclude “Excavating and Loading Machine and Dragline Operators.”</td>
</tr>
<tr>
<td><strong>Dredge, excavating and loading machine operators</strong> 2010-14 Code: 9520</td>
<td><em>Dredge operators</em> operate dredge to remove sand, gravel or other materials from lakes, rivers or streams; and to excavate and maintain navigable channels in waterways. <em>Excavating and loading machine and dragline operators</em> operate or tend machinery equipped with scoops, shovels or buckets to excavate and load loose materials. <em>Loading machine operators, underground mining</em> operate underground loading machine to load coal, ore or rock into shuttle or mine car or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scraper or scoop, or machines equipped with gathering arms and conveyor.</td>
</tr>
</tbody>
</table>


Note: Codes 6300, 6320, 9510, and 9520 were combined to form the “Miscellaneous construction equipment operators” category.
Survey of Business Owners (SBO)

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, professional services, goods, and other services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as female-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Americans, Hispanic Americans, Native Americans or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership. Racial categories in the Atlanta Metropolitan Area are not available by both race and ethnicity, so race and ethnicity were analyzed independently. The study team reported business receipts for the following racial, ethnic and gender groups:

- Racial groups — African Americans, Asian Americans, Native Americans and whites;
- Ethnic groups — Hispanic Americans and non-Hispanics; and
- Gender groups — men and women.

Home Mortgage Disclosure Act (HMDA) Data

The study team analyzed mortgage lending in the Atlanta Metropolitan Area using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income, and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2014 HMDA data if they had assets of more than $43 million on the preceding December 31 ($36 million for 2007 and $40 million for 2011), had a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations either (a) exceeding 10 percent of all loan obligations in the past year or (b) exceeding $25 million, were located in an MSA (or originated five or more home purchase loans in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.
The study team used those data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2007, 2011 and 2014. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.
APPENDIX J.
Qualitative Information from In-Depth Personal Interviews and Availability Survey

Appendix J presents qualitative information that Keen Independent analyzed including anecdotal information collected for Holland & Knight LLP by Griffin & Strong PC and information collected through open-ended responses from the availability survey. Thirty-one business, trade association and developer firm representatives provided input analyzed for this Appendix. Appendix J includes eight parts:

A. Introduction describes the process for gathering and analyzing the information summarized in Appendix J.

B. Background on the Businesses in the Atlanta Area summarizes information about how businesses, organizations and agencies become established and how companies change over time.

C. Current Marketplace Conditions summarizes information about how the economic environment and current marketplace conditions have affected local companies.

D. Keys to Business Success and Any Barriers in the Way discusses certain barriers to doing business and keys to success, including access to financing, bonding and insurance.

E. Allegations of Unfair Treatment presents information about any experiences with unfair treatment such as bid shopping, treatment during performance of work, stereotypical attitudes about minorities and women and allegations of a “good ol’ boy” network that adversely affects opportunities for MBE/WBEs in Atlanta.

F. Information Regarding Any Racial-, Ethnic- or Gender-based Discrimination discusses factors that specifically affect industry entry and advancement for minorities and women and minority- and women-owned firms.

G. Experience Doing Business with Public Agencies Including the Atlanta Housing Authority discusses barriers such as access to capital, bonding, insurance and prompt payment that may limit firms’ ability to work with public agencies such as AHA. Interviewees also discussed other issues related to working for public agencies.

H. Insights Regarding Improving Work with AHA, summarizes information about businesses’ experiences working with AHA and how AHA could specifically improve its business practices regarding minority- and women-owned business participation.
A. Introduction

Holland & Knight engaged Griffin & Strong to conduct in-depth personal interviews. Business owners and managers had the opportunity to discuss their experiences working in the local marketplace as well as with AHA and other public agencies. They could also discuss local business assistance programs, certification and other topics important to them.

Keen Independent analyzed the Griffin & Strong interviews and authored this Appendix J. Keen Independent also obtained 455 comments from Atlanta area construction, professional services, goods and other services business representatives collected as part of the availability survey.

In-depth personal interviews. The study team conducted in-depth personal interviews and focus groups with 31 Atlanta businesses and trade associations. The interviews included discussions about interviewees’ perceptions and anecdotes regarding opportunities related to construction, operation and maintenance of multifamily housing, as well as other goods and services that an agency such as AHA would purchase.

Interviewees included individuals representing construction-related businesses, architecture and engineering (A&E) firms, other professional services firms, other goods and services firms and trade associations. The study team identified a number of interview participants from a cross-section of firms that had worked with AHA, PMDs or developers. The study team conducted most of the interviews with the owner, president, chief executive officer, or other officer of the business or association. Of the businesses that the study team interviewed, some work exclusively or primarily as prime contractors or subcontractors, and many work as both. All of the businesses conduct work in the Atlanta area. All interviewees are identified in Appendix J by interviewee numbers (i.e., #I-1, #I-2, #I-3, etc.). Results of developer interviews are indicated as “#DI” and trade association interviews are labeled as “#ORG.”

Interviewees were often quite specific in their comments. As a result, in many cases, the study team has reported them in more general form to minimize the chance that readers could readily identify interviewees or other individuals or businesses that were mentioned in the interviews. The study team reports whether each interviewee represents an MBE-, WBE-, or DBE-certified business or other certified status and also reports the race/ethnicity and gender of the business owner.¹

Availability interviews. In the 2017 availability survey, the study team asked firm owners and managers to provide comments at the end of the telephone interview. Businesses were asked, “Do any other barriers come to mind about winning work as a prime or subcontractor in the Atlanta metro area? Also, do you have any general thoughts or insights on starting and expanding a business in your field?” A total of 455 individuals provided responses. The study team analyzed responses to these questions and provided examples of different types of comments in Appendix J. Availability survey comments are referenced as “#S.”

¹ Note that “male” or “white” are sometimes not included as identifiers to simplify the written descriptions of business owners.
B. Background on the Businesses in Atlanta Area

Interviewees and respondents of the availability survey reported on their business histories or the histories of the businesses they represent. Part B summarizes information related to:

- Business start-up history;
- Work types;
- Changes in types of work performed;
- Business expansion or contraction;
- Types and sizes of contracts;
- Work performed in the private or public sector;
- Differences between working in the private and public sectors, if any;
- Work as a prime or subcontractor/subconsultant, or both;
- Types and sizes of properties, and work performed;
- Challenges to starting, sustaining or growing a business; and
- Knowledge of business assistance programs.

Business start-up history. Interviewees representing small businesses, developers, consultants, contracting services, management firms and other goods and services in Atlanta reported when and how they started or purchased their companies. Many interviewees reported that their companies were started (or purchased) by individuals with prior experience in their respective industries. This pattern demonstrates that any race or gender barriers to entering and advancing within the Atlanta construction, professional services, goods and other services industries would affect the relative number of firms started by minorities and women in Atlanta.

Most interviewees reported that they had worked in or had some other connection to the industry prior to starting their own firms. [e.g., #I-20, #I-21, #I-22, #I-23, #I-25, #DI-3] Additional examples from the in-depth interviews include:

- The female African American owner of a specialty contracting firm commented that she had gained experience in a related field while going to college. [#I-17]

- An African American female representative of a minority-owned contracting firm reported having worked for two related public sector agencies serving the housing industry. He explained, “I used to work [in the field] ... as an employee ... for eight or nine years ... then kind of set out on my own.” [#I-6a]
The African American female president of a woman-owned certified specialty contracting firm reported that she worked in the industry for 17 years before starting her own firm. [#I-14]

For an African American owner of a specialty consulting firm, working in the field and building relationships fostered the decision to start his own firm on a bigger scale. He remarked that he got “the bug to do something on a global level … and [found] appeal [in] doing large contracts ….” [#I-16]

The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented that prior to launching the business the owners “had both been involved in affordable housing and … both had high-level positions in [industry-related public sector agencies] ….” [#I-5a]

A female African American owner of a DBE-certified specialty services firm reported that she started her business with the help of a mentor who was already in the industry. [#I-12]

For an African American owner of a DBE- and SBE-certified construction firm, having had parents involved in the real estate industry led to him start his business. He explained, “That’s how [I] got the idea.” [#I-8]

Some business representatives indicated that they started their firms to fill a need or enter an open or specialized “niche” in the marketplace. For instance:

The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm reported that the firm was started “to meet a need.” [#I-5]

An African American president of an MBE- and DBE-certified supply firm reported, “We became a quicker way to get what ‘they’ needed.” [#I-13]

After working for government agency, the African American owner of an MBE-certified contracting and consulting firm identified a need for minority consulting services in estimating and contract negotiations for minority contractors. [#I-10]

An African American CEO of a DBE-, MBE- and SBE-certified specialty services firm reported, “I started the firm on the basis [of] just being able to perform technology services as an independent contractor … I saw the need for qualified, technical people … and decided that instead of companies hiring IT people, we would hire the IT people for your company ….” [#I-15]

The African American female president of a DBE-certified goods firm reported that she was unable to find a job using her “unique skillset … [that] doesn’t fit into boxes.” She launched her business on the premise that “somebody needs to buy what I sell.” [#I-11]

**Work types.** Business owners and representatives discussed the types of work that their firms perform. Work types included businesses performing construction, architecture and engineering (A&E), legal and IT services, as well as goods and other services.
Many businesses interviewed performed work in the construction arena. These business owners reported working in construction or contracting, specialty contracting, development, construction management and other construction-related arenas. Many expanded specializations over time. For example:

- A non-Hispanic white male representative of an African American male-owned development firm stated that the firm started as a development firm and then branched out into construction. [#DI-1]

- An African American owner of a DBE- and SBE-certified construction firm reported that his firm performs construction management, interior, ground-up, concrete and roadwork. [#I-8]

- The African American female representative of a minority-owned contracting firm commented, “We do it all.” [#I-6a]

- For an African American female representative of a minority-owned construction firm, the firm performs construction contracting for public housing agencies [AHA and Fulton County Housing Authority] and commercial apartments. This owner indicated that work spans many construction-related tasks. [#I-3]

- An African American owner of a specialty contracting firm reported that his firm performs high and low voltage wiring for commercial buildings, retail facilities and tented buildings for a diverse clientele. [#I-1]

- The African American owner of an MBE-certified contracting and consulting firm stated that his firm performs utility and construction work and consulting. [#I-10]

- The African American female co-owner of a minority-owned development firm reported that the firm performs commercial real estate, construction and property management. [#DI-2]

Some business owners and representatives reported conducting several types of professional services. Areas of work ranged from architectural and engineering services to appraisals and other professional services:

- The majority owner of a specialty consulting firm reported that his firm performs “all manner of public relations, some marketing, both strategic and tactical, including all … video production, website development and management, which is where almost the entirety of [his] AHA relationship has been … and [they] are a full-service PR company.” [#I-7]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm reported that the firm performs management services for AHA’s Housing Choice Voucher Program (Housing Choice) and with various agencies throughout the country. [#I-5]
A number of business owners indicated that they conducted a broad range of IT-related work, communications cabling and security systems, and other related services. These included, for example:

- The African American owner of an MBE-certified IT-related firm indicated that his firm performs IT development and dataset management. [#I-21]

- For an African American female owner of a DBE-certified goods firm, her firm offers full service communications consulting including technical and creative divisions. [#I-11]

- The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm said, “The motto of our company is to be able to take networks from the infrastructure stage … to … working on installing fiber or cabling infrastructure ….” [#I-15]

**Changes in types of work performed.** Interviewees reported on whether or not their firms had changes in work type or services over time.

Many interviewees reported no changes in the type of work or services the firm performs. [e.g., #I-7, #I-8, #I-11, #I-16, #I-23, #I-24]

A number of other business owners and representatives indicated that they have made changes in the types of work they perform, have expanded their services, or are attempting to enter new service areas. Examples follow:

- One African American female representative of a minority-owned contracting firm reported that the company started out doing roofing, structural and painting and then “just kept branching out.” [#I-6a]

- The female African American owner of a DBE-certified janitorial firm reported that she started in commercial cleaning and expanded into residential cleaning services. [#I-12]

- An African American owner of an MBE-certified contracting and consulting firm started as a consultant and grew into construction. [#I-10]

- The African American female president of a woman-owned certified specialty contracting firm stated that her firm, in order to expand into another market, has been marketing [specialty] inspections. [#I-14]

- An African American owner of a DBE- and MBE-certified development firm conveyed that he added public sector work to his mostly private-sector business. He said that his work had changed to include public sector assignments; he had formerly worked in private sector without “… any government interaction ….” [#I-3]
Several business representatives and owners indicated that industry trends had impacted the work they perform and how they operate their business. Examples follow:

- The African American owner of a services firm reported, “The apartment housing industry is where we used to make our ‘bread and butter.’ People are staying put, the apartment housing industry’s budgets are not the same. They do a lot more in house. We used to have a lot of work that is not there anymore. So, what we had to do is go more to the public [sector] and more to the home management outfits ….” [#I-19]

- For the African American female co-owner of a minority-owned development firm, industry trends influence her decision-making. For example, when the bulk of real estate development was construction-related work, the company branched into construction. Over time the firm got into property management, investment management and now commercial real estate. She added that the core mission now is housing development and “creating healthy, sustainable communities.” [#DI-2]

- A non-Hispanic white male representative of an African American-owned development firm reported that his firm expanded into property management to avoid third party management. [#DI-1]

**Business expansion or contraction.** Business owners were asked to comment on any changes in the size of their companies over time. Many firms reported no change, some reported growth over time and other businesses experienced periods of expansion and contraction. [e.g., #I-7, #I-9, #I-16, #I-22, #I-25]

For varied reasons, some business owners and representatives reported “stable” or “consistent” business size or no change in business size. Some explained their reasons for sustaining a steady business size:

- For the African American owner of a specialty services firm, his company is a one-man operation. He stated, “Right now there is no working capital for [expansion].” [#I-24]

- The African American female president of a woman-owned certified specialty contracting firm reported, “I’m just stable right now … if you grow too fast you can grow yourself out of business … you have to be comfortable with where you are and get that down to a science before you try to go forward.” [#I-14]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm reported that although changes in firm size typically depend on contract specifications, their size has been consistent for the past few years. [#I-5]

A number of business owners reported growth in the size of their company over time. For a few of these businesses interviewed, growth was substantial. Examples included:

- For an African American owner of an MBE-certified transportation related firm, his business started small. As demand increased, he increased the size of his firm. [#I-18]
An African American owner of an MBE-certified specialty contracting firm indicated that the firm’s workforce has grown along with the business. [#I-23]

The African American female owner of a DBE-certified goods firm reported that she has eleven employees and plans to add 20 more. [#I-11]

One African American president of an MBE- and DBE-certified supply firm reported that his firm has grown 300 percent every year since 2013. [#I-13]

When reporting changes in firm size, the Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm stated, “We have grown to be one of the largest providers of specialty consulting services in the country.” [#I-5a]

Some interviewees reported that variability in size of contracts or changes in market conditions resulted in expansion and contraction of their companies. [e.g., #I-12, #I-15, #I-18, #I-19, #I-20, #I-21, #DI-3] Examples of interviewee comments included:

- A representative of an African American-owned development firm stated that his firm changes size based on contracts and market conditions. [#DI-1]

- The African American owner of an MBE-certified general contracting and consulting firm reported that his firm expands and contracts based on project size. [#I-10]

- A representative of an African American minority-owned contracting firm reported, “I’m always looking for expansion, if you’re not looking for growth you need to get out of the business.” [#S-2]

To accommodate sudden increases in workload, a few of the business representatives or owners interviewed reported temporary expansion through “1099s” (i.e., individuals working on contract). For instance:

- The African American owner of a contracting firm reported that most of his staff are “1099” workers, and that his firm’s size varies depending on the workload. [#I-6]

- An African American owner of an MBE- and WBE-certified specialty consulting firm reported that she performs most work by herself, but when necessary, hires contract consultants and “1099s everybody.” [#I-1]

**Types and sizes of contracts.** The study team also asked about the sizes of contracts and subcontracts companies typically perform. Some business owners and representatives also described what determines the type and size of contract or subcontract they pursue.
For a few business owners or business representatives, size of contracts was relatively consistent, within $5,000 to $30,000. Comments included:

- A majority owner of a specialty consulting firm reported that his work consists of project-based engagements that last six months to one year. He commented that they are sometimes retainer-based, but mostly project-based and that a typical engagement might be $10,000 to $15,000. He added that he typically has six clients at once. [#I-7]

- The African American owner of a services firm reported that his contracts range from $20,000 to $50,000 depending on the wealth of a neighborhood. [#I-19]

For many companies, contract sizes varied. Some of the businesses had a relatively limited range of contract sizes. For a few firms, the range of contract sizes was substantial. Examples follow:

- The African American owner of an MBE-certified specialty contracting firm reported that he has large private commercial contracts and smaller contracts with the City of Atlanta. [#I-23]

- An African American female president of a woman-owned certified specialty contracting firm stated, “It can go anywhere from a couple hundred dollars to $35,000 to $40,000.” [#I-14]

- The African American owner of an MBE-certified contracting and consulting firm reported that his largest project was $1,000,000 and the smallest was $500,000. [#I-10]

- For an African American president of an MBE- and DBE-certified supply firm the needs of the client determined the size of a contract. He explained, “Usually when we make a prototype it is anywhere from $1,000 to $5,000, but when you go to mass produce … you may spend up to a $1 million.” [#I-13]

- An African American female owner of a DBE-certified goods firm reported that her largest contract is $6.5 million and her smallest is $20,000. [#I-11]

- The African American owner of a specialty consulting firm reported that the sizes of his contracts are in “numbers [that] approach the ‘millions and trillions of dollars.” [#I-16]

Some of the business owners and representatives interviewed recounted taking on contracts of varied sizes in order to not miss any opportunities for work, or that they had never had a contract size they could not handle. For these interviewees, contract size varied by work scope:

- An African American CEO of a DBE-, MBE- and SBE-certified specialty services firm said, “Some [contracts] are small and some are really large. The [most] massive one that I have seen is going to be three- to four-hundred thousand dollars … a small company [has] to be diverse. You can’t really turn down opportunity, because any opportunity could lead to another opportunity.” [#I-15]
The same business representative reported, “Scope of work definitely determines [contract size] … it’s about the scope of work, everything is about the scope of work and what kind of scope of work you are actually trying to prepare.” [#I-15]

- For the female African American owner of a DBE-certified specialty services firm, she has not “had a job that was too big yet ….” [#I-12]

- The African American owner of an MBE-certified IT-related firm reported work where the scope of services determined the size of the contract. [#I-21]

**Work performed in the private or public sector.** Business owners and representatives reported on whether their firms worked in the public sector, private sector of both sectors. [e.g., #I-12, #I-16]

For the most part, business owners and representatives interviewed reported working in both the public and private sectors. [e.g., #I-6, #I-8, #I-9, #I-10, #I-11, #I-13, #I-14, #I-17, #I-18, #I-19, #I-20, #I-21, #I-22, #I-23, #I-25, #DI-2, #DI-3, #ORG-1, #ORG-2, #ORG-3] Examples included:

- The non-Hispanic white male principal of a specialty consulting firm reported that his firm works 70 percent in the public sector and 30 percent in the private sector. [#I-2]

- An African American female representative of a minority-owned construction firm reported that the firm works in both public and private sectors. [#I-3]

- The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm reported that his company works in both sectors and that both sectors are difficult to enter. [#I-15]

- The female African American president of an MBE- and WBE-certified specialty consulting firm reported that her firm’s work varies from working in public housing resident work to an 18-month contract recently completed that included a program for 7,200 people for diversity and inclusion for a large private sector entity. [#I-4]

- One Hispanic American female business co-owner recounted experience with public-private partnerships. This business leader, a co-owner of a minority- and woman-owned specialty consulting firm, indicated that the firm’s work is concentrated in the affordable housing industry, and primarily involves public-private partnerships. [#I-5]

An African American business owner reported working solely in the private sector. For example, when asked what sectors his firm works in, this owner of a specialty contracting firm answered that his firm works in the private sector. [#I-1]

**Differences between working in the private and public sectors, if any.** A number of business owners and representatives expounded on what they perceived as the fundamental differences between private sector work and public sector work in Atlanta.
Some of these business owners and representatives reported on differences ranging from timing, cost and “process” differences to higher levels of paperwork in the public-sector arena. For example:

- The African American female owner of a specialty contracting firm reported regarding the public sector, “It takes a long time to get something done … a long time to get to the person you need … once you get to the right person things move quickly.” [#I-17]

- An African American owner of a contracting firm stated that public sector projects have on-the-job pay requirements and guidelines. In contrast, he reported that “in the private sector, it’s the ‘bottom line,’ whatever they can get the job for.” This business owner further distinguished public from private sector assignments by commenting that there is more paperwork in public sector work. [#AI-6]

- One African American owner of a services firm reported on process differences between sectors stating, “Attention to detail in the private sector. If you want to get that repeat customer, you have to do what is necessary to make them happy. On the public sector [side] it’s going to be repetition, where you know you’re going to come back again ….” [#I-19]

One African American female co-owner of a minority-owned development firm reported specifically on how public-private partnerships are distinguished. She stated, “When you work in public-private partnerships and highly regulated agencies, there’s a ‘process’ you have to work through … we learned it ….” [#DI-2]

**Work as a prime or subcontractor/subconsultant, or both.** A number of business owners and representatives reported whether they worked primarily as a prime contractor/prime consultant, typically as a subcontractor/subconsultant or as both a prime and a sub.

Most business owners and representatives reported working as both primes and subs. For some of these businesses, the size of the contract drove whether or not they could act as a prime. [e.g., #I-7, #I-8, #I-13, #I-18, #I-19, #I-25] For instance:

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm reported working as both a prime and subcontractor. [#I-5a]

- A female African American owner of a DBE-certified specialty services firm indicated working as both a prime and a sub. As a subsidiary of a larger firm, she explained that her firm serves as a subcontractor on large contracts. However, she added that on private sector accounts, she acts as the prime. [#I-12]

- An African American female president of a woman-owned certified specialty contracting firm reported, “I’m pretty much a subcontractor when it comes to the commercial and governmental …. [We’re] not large enough to be a prime yet … with smaller … then I am the prime. [#I-14]
A number of interviewees reported primarily working as prime contractors or prime consultants. [e.g., #I-11, #I-22, #I-23] For example, businesses serving as primes included:

- The African American owner of a specialty contracting firm reported that his firm always works as a prime contractor. He commented that this results from not needing a “middleman.” [#I-1]

- A non-Hispanic white male principal of a specialty consulting firm reported that his firm works as a prime consultant directly with AHA. He explained that the firm does not work through property managers or developers. [#I-2]

- An African American MBE-certified general contractor and consultant reported that only 2 percent of his work is subcontracting. [#I-10]

A few business leaders reported working primarily as subcontractors or subconsultants. [e.g., #I-20, #DI-3]

When asked about how primes primarily find subs to work with, several industry and trade associations reported that primes look to the associations where they are members to find subcontractors and subconsultants [e.g., #ORG-3]. Examples include:

- A male representative of a housing industry trade association commented, “Our members prefer to use other members; they’re a big believer in it … you support the people who support your industry ….” [#ORG-1]

- The female representative of a housing industry trade association reported that there is networking in the organization. At meetings and conferences “everybody’s in the hallway chatting …. People join to be in meetings together with like-minded people.” [#ORG-2]

**Types and sizes of properties, and work performed.** The study team also asked about the sizes and types of properties with which the firm works, and the work typically performed for each property type.

One business owner reported a focus on building new communities and performing capital improvements for AHA high-rises and other AHA communities. The representative of an African American-owned development firm commented that the firm is building new small and large housing communities from the ground up that are both conventional apartments with small set-asides for affordable housing market and tax credit communities. [#DI-1]

The same business representative indicated that his firm specifies a “wish list” of capital improvements for AHA properties including multiple high-rise communities. He added that those improvements range from energy needs to gate repairs to concrete work. [#DI-1]
For an African American female owner of an MBE- and WBE-certified specialty consulting firm, training related to public housing communities was a focus of her work. For example, she reported that her firm designs and facilitates specialty consulting services for training residents of public housing properties. She added that, for AHA, her firm assists public housing residents and senior residents. [#I-4]

This business owner also reported that the firm’s work with AHA included a diverse population of more than ten public housing projects. [#I-4]

**Challenges to starting, sustaining or growing a business.** Business owners commented that they faced challenges when starting their businesses, including those challenges that may be race- or gender-based. [e.g., #I-25]

Some business owners and representatives reported “hard work,” growing pains,” or a “learning curve” at business start-up. Examples included:

- When asked if he faced challenges when starting or growing his business, the African American owner of a contracting firm responded, “… just hard work.” [#I-6]

- The African American owner of a DBE- and SBE-certified construction firm stated that there were “growing pains … trying to do it all.” [#I-8]

- An African American female owner of a specialty contracting firm reported, “It’s the ‘learning curve.’ There is a lot to learn once you are in business. Even if you went to school for entrepreneurship and business, once you own [a business] it’s different ….” [#I-17]

- The female African American owner of a DBE-certified specialty services firm reported that gaining confidence in and understanding of finances, bidding, pricing, equipment and employees was challenging for her at start-up. [#I-12]

A number of business owners and representatives indicated that networking difficulties and finding opportunities for work were challenges they faced at start-up and beyond. For example:

- The African American owner of a specialty consulting firm reported that, “The time it takes to build a network of people who will work with you without looking for something in return [was challenging].” [#I-16]

- An African American general contractor reported that limited availability of opportunities at start-up was challenging. [#I-22]

- A representative of a white woman-owned professional services firm indicated having difficulty getting in the door to work with architects she had not already teamed with on previous jobs. [#S-123]

- The African American owner of an MBE-certified specialty contracting firm concluded that although he did not experience many difficulties starting his firm, acquiring new customers was a challenge. [#I-23]
For one Subcontinent Asian American representative of a women-owned DBE- and MBE-certified supply firm, at the start of her business, getting people to talk with her and engage her business was particularly challenging as a minority business owner. This business representative said, “If you asked me now to start again, I wouldn’t do it … being a minority, people will not talk to you, people will not give you business.” [#I-9]

A number of businesses reported that access to capital, finances and securing loans and credit were and continue to be a challenge. For example:

- An African American owner of a contracting firm reported that access to capital was an issue for him. He explained, “… if you have the capital you can do more advertising … and then they can bid a little lower because they can get the job done a little bit faster based on having the kind of capital to move it.” [#I-6]

- One African American general contractor reported that “finances” were challenging. [#I-22]

- For the African American owner of an MBE-certified IT-related business, “money and financials” are challenges to starting and growing a business. [#I-21]

- The African American president of an MBE- and DBE-certified supply firm reported that starting a firm is “cash intensive.” He commented, “If you don’t have the right connections you are going to need a ton of money.” He added that to avoid accruing extensive overhead costs over time, he made his customers pre-pay for his work to cover his capital needs. [#I-13]

- For the African American CEO of a DBE-, MBE- and SBE-certified specialty services firm credit for materials was an on-going challenge. He stated, “Most minority businesses, or most minority people … do not have good credit … it is a fact. If we use statistical data, we will find that is a fact that the amount of [minorities] who go [into business] do not have good credit … they can do great work …. They have great skill … they have great talent! They just need a ‘fair chance.”’ [#I-15]

For one minority business owner, mortgaging a home was his only opportunity for financing the business. For another, not having enough assets made securing a loan difficult. Comments included:

- The African American owner of an MBE-certified transportation-related firm reported, “The basic challenge in starting a business is finance. I couldn’t get a loan, so I mortgaged my house … and I was able to work from there ….” [#I-18]

- A representative of an African American minority-owned A&E firm reported, “… funding could be a problem. Start-up cost could be a problem, upfront money …. We are a new entity.” [#S-150]
An African American owner of a services firm commented, “Money, and getting enough of it from one institution [can be a problem]. The traditional lending institutions will not lend you enough because you may not have the assets ….” [#I-19]

An African American CEO of a DBE-, MBE- and SBE-certified specialty services firm described his experience regarding revenue problems and predatory lending practices. He remarked, “… money and revenue [can be problems] ….” He added, regarding predatory lending practices, “They offer you funding, but they actually take away money daily that will kill their small business just as well as it will start it. It will kill it immediately.” [#I-15]

Several business representatives and owners recounted difficulty with cash flow at start-up and beyond. Examples include:

- The African American female owner of a specialty contracting firm reported, “… cash flow operative as you grow is … a challenge.” [#I-17]

- An African American female president of a woman-owned certified specialty contracting firm reported, “With any small business it’s cash flow, just having enough cash to sustain as you build the business … you have to purchase equipment to do your installations and to do your work.” [#I-14]

- The African American female president of an MBE-certified specialty contracting firm reported, “Financials. Years ago, you could say, “OK, you can pay me in thirty days.” You can’t do that anymore; now you have to get your money up front or get a deposit.” [#I-20]

- The African American female president of a woman-owned certified specialty contracting firm commented, “[The] ability to … have the cash flow. It … is a little harder for minorities to gain to build their businesses. 'It’s an issue, it’s not a secret.’” [#I-14]

One business owner specifically mentioned that smaller newer businesses are at a disadvantage when it comes to getting financing for equipment. He reported, “Depending on your vendors, some people who have more capacity or who have more business, they give a lower percentage rate as far as purchasing different equipment. As a smaller or newer business, it leaves you at a disadvantage, especially when you are bidding on jobs.” [#I-14]

Knowledge of business assistance programs. Business owners and representatives, that responded, gave insights on their awareness and use of and experiences with area business assistance programs. Some received business assistance from industry associations, SBA, SCORE and others. None specifically reported any awareness of AHA’s outreach efforts for minority- or women-owned businesses. For instance:

- The African American owner of a specialty contracting firm reported that he is a member of an industry association that provides apprenticeships and industry certification. [#I-1]
The African American general contractor reported that he had worked with a Veteran trade program in the past, but not recently. [#I-22]

An African American owner of a contracting firm reported that he is familiar with them, but has not had to use any assistance programs. He added that he knows of contractors who used credit to complete a job and got themselves behind; if credit assistance was offered, the interest would be “too” high. [#I-6]

The African American female owner of an MBE-certified contracting firm said, “I have gone to a lot of seminars dealing with the SBA. I have to do stuff at night because during the day, I am working, but I really enjoyed SBA. They had a lot of stuff to teach about doing contracts with the government and stuff. I really enjoyed it.” [#I-20]

A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm said, “Yes, the SBA, a while back … it was ok … if somebody gives you advice for free, it’s always good.” [#I-9]

The African American president of an MBE- and DBE-certified supply firm commented, “Well we are in the Georgia Tech innovate program, the Governor’s mentor-protégé program …. I need contracts.” [#I-13]

An African American MBE-certified general contractor and consultant reported, in the past the SBA and it was “very successful.” He commented that he reached the threshold of $10 million going through that process, so “it does work.” [#I-10]

The African American female owner of a DBE-certified goods firm reported knowledge of SCORE, SBA and GTPAC. She said that she received “… a flood of information … you don’t know what to do with it all … there is no practicality … it is a hope and a dream, but no plan.” [#I-11]

The female African American owner of a DBE-certified specialty services firm reported that she has attended DBE webinars, but typically does not have the time to attend in-person classes. However, on one occasion, she sought the help of Georgia Department of Transportation to write a business plan, commenting that it required in-person interaction and could not be developed by phone or email, “[I needed] to have someone sit down with me.” [#I-12]

C. Current Marketplace Conditions

The study team asked businesses what are the current market conditions in the field. Part C includes:

- Reports on the outcomes of an improving economy both positive and negative;
- Perceived challenges in the current marketplace;
- Other factors impacting marketplace conditions in Atlanta; and
- Marketplace conditions specifically impacting minority- and women-owned firms.
Reports on the outcomes of an improving economy, both positive and negative. [e.g., #I-18, #I-23] Some stated that improved market conditions caused new challenges, or that the economy was “not good.”

Many business owners said that they are currently working and finding opportunities in the Atlanta marketplace. These business owners reported on a rebounding upward economy. Comments from the in-depth interviews included:

- An African American owner of a contracting firm reported, “As the housing market continues to improve I can only go up ….” [AI-19]

- The Subcontinent Asian American representative of a women-owned DBE- and MBE-certified vendor stated, “We have a very steady customer base.” [#I-9]

- For the African American owner of a specialty consulting firm, potential for business is “highly favorable.” [#I-16]

- The representative of a majority-owned construction materials and supply firm reported, “The market is good now.” [#S-16]

- An African American female owner of a specialty contracting firm commented, “It’s growing. I’ve never seen growth like this.” [#I-17]

- As the housing market “rebounds,” an African American owner of a DBE- and MBE-certified development firm commented that opportunities for business expansion are good. He stated that his upcoming projects “won’t let him fail.” [#DI-3]

- The African American female representative of a minority-owned construction firm commented that “now that the economy has picked up,” larger firms do not want small projects, so work goes to “small black contractors.” [#I-3]

- A male representative of a housing industry trade association reported that, in general, firms are doing well; rents have increased. He added that rent growth means firms are re-capitalizing back inside communities, and “… if there’s growth in any part of the rent sector, there’s growth in all parts.” [#ORG-1]

  The same representative reported that older communities, in order to compete, are in redevelopment or torn down, which is a “great thing … because the stock is refreshed.” [#ORG-1]

A female representative of a housing industry trade association reported on a good lending environment. She indicated that the “economy and lending environment are good.” She explained, “We use a federal credit, but Georgia also has a state credit which mirrors the federal credit and so we’re very keen to support both of those.” [#ORG-2]
However, several business owners and representatives of trade associations spoke on some of the challenges presented by positive economic conditions. For example, some indicated that a positive marketplace can expose new industry challenges, such as competition for land and a limited pool of trained workers to support the “boom.” These interviewees included:

- A female representative of a housing industry trade association reported, “The economy is good; the market is crazy in Atlanta, its crazy booming in Atlanta. Consequently, it’s difficult to buy land to build housing in Atlanta because it’s so competitive ….” [#ORG-2]

- An African American general contractor said, “It could be a boom if we can get these young people and even people of age trained to work under these projects.” [#I-22]

- The African American female president of a woman-owned certified specialty contracting firm commented, “… the industry is good, as a whole, [but] we are finding in our industry … that getting people and getting them trained in the industry [is a problem]. As a technician, you have to have some understanding of [the industry], basic understanding of different labor type work. Getting people to come in and willing to accept ‘x’ amount of dollars to get trained in order to get up to par, it’s a problem.” [#I-14]

Some business owners and other representatives reported that despite improved economic conditions in Atlanta, closed networks or “cliques” kept businesses outside the networks from finding opportunities in the industry.

- An African American owner of a HUD- and SBE-certified specialty services firm commented, “… there can appear to be opportunities … there is an underlying issue … either you are part of the ‘clique’ or you are not …. If you are part of the ‘clique’ … the bids seem to be done outside of the bid process.” [AI-25]

- The female African American owner of a DBE-certified specialty services firm reported that there is plenty of work but it is very competitive. She said, “A lot of people are getting in it, some have been in it for years … a lot is ‘who you know.’” She added, “[The industry is] cliquey … I’m a female, I’m small, I’ve gotten ‘side-eyed’ … it’s a male-dominated field.” [#I-12]

- The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm reported, “It’s a lot. There is a lot of work going on with our services …. If you don’t know … who to communicate with and who to talk to, you’re just there, just existing but not really existing.” [#I-15]

- The female African American representative of a minority contractors’ trade organization said, “You don’t even have to go outside of Atlanta, there’s so many billions of dollars of construction here … you’re right here in this city and you struggle. And why is that?” [#ORG-3]
Perceived challenges in the current marketplace. Some reported depressed economic conditions.

Several other business owners or representatives indicated that economic conditions were poor, finding new work was difficult, or opportunities with AHA were slowing. For example:

- When asked what the current economic conditions in the industry are, an African American business owner of a contracting firm responded, “Not good.” [#I-6]

- A representative of an African American minority-owned engineering firm reported, “There’s appearance that there’s a lot of opportunities and there isn’t.” [#S-160]

- The African American president of an MBE- and DBE-certified supply and consulting firm reported, “It’s been hard to get in the door, so we have not been able to solidify ourselves where we can charge for the consulting.” [#I-13]

- A representative of a majority-owned IT-related firm indicated, “It’s been extremely difficult for small businesses to generate new revenue. It’s been rough years in the IT industry. A lot of companies have gone out of business. Not a lot of people need [specified services].” [#S-34]

- The representative of an African American minority-owned IT-related business reported, “It’s a challenge winning and identifying work in the Atlanta metro area.” [#S-33]

- An African American female representative of a minority-owned construction firm commented that work on AHA housing properties, Georgia Avenue/Martin Street and Ainsley Park, has slowed. [#I-3]

Other factors impacting marketplace conditions in Atlanta. Business owners and representatives reported on emerging factors that impacted the housing industry in Atlanta.

Several business owners and representatives reported emerging trends having an impact on the health of the companies they represent or the broader housing industry marketplace. A number of examples include:

- The African American female president of a woman-owned certified specialty contracting firm commented, “… the industry is good. The issue we are having on the residential side is that … ‘AT&Ts and Comcasts are jumping into residential … that brings a lot of competition …. Smaller companies do not have the marketing to go out and market. We cannot ‘bundle’ [services] as they can. So, it’s an issue.” [#I-14]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm reported, “Because there have been so many regulatory changes and so much pressure on the federal government to reduce budgets and to operate more efficiently, there has been a lot of ‘stress and strain.’ For example, traditional public housing has a severe shortfall for capital improvement projects throughout the country
so our development side is working very hard on finding creative solutions and using things like the rental assistance demonstration project … to leverage private resources.” [#I-5a]

She added, “… the public housing sector as a whole is facing a severe shortfall of funding from the federal government, however we … provide a lot of value to our customers and … the services that we provide to them … helps them in the long run to leverage the most out of the resources that they have available. So, I don’t know that it’s a rich field, but there is a tremendous need for the type of services that we provide.” [AI-5a]

The African American female owner of a DBE-certified goods firm commented, “At the level we’re playing now, things are still pretty consistent, there are boutique agencies and contractors … changes in way people are hiring … traditional methods of communication with clients isn’t working as much because there are too many new fresh ideas. We aren’t suffering but ‘older’ companies are.” She added that a lack of diversity and representation is also negatively affecting some firms. [#I-11]

**Marketplace conditions specifically impacting minority- and women-owned firms.** Interviewees had contrasting insights on whether or not, in the current economy, minority- and women-owned businesses encountered any greater challenges than majority-owned firms faced.

- The female African American representative of a minority contractors’ trade organization reported that there are challenges in the current economy that affect minority contractors. She said, “It is very difficult for African Americans to get bonding and even the few that were bonded, since the recession they’ve lost a large majority of their assets.” [#ORG-3]

- The representative of a housing industry trade association commented that he “assumed” the boom is across the board because, “… so many of our companies are small businesses …. We know that they’re owned by minorities or women … and everybody's doing well …. ” [#ORG-1]

- One African American owner of a DBE- and MBE-certified development firm reported on the lack of mandated minority participation among housing authorities, and how this unfairly disadvantages minority-owned firms by benefitting majority-owned firms. She stated, “It’s mandated [minority participation in the private sector] in certain areas. The State, the housing authorities do not have [minority participation] mandated …. ” [#DI-3]

This business owner explained, “You have public property (predominantly poor African American communities). You move everybody out, come back in with developers and spruce it up … AHA carried the note, carried the debt on the actual land. In the recession, most developers, home developers were going out of business because your biggest cost was to carry the land even in a down market …. If you had to deal with AHA, you didn’t have to because you weren’t paying AHA for that land until after the house was built and … sold. You got a white dude over there who rides the wave, files
for bankruptcy, stays in the project, now that the economy has come back around he’s selling houses at $350,000 and above.” [#DI-3]

D. Keys to Business Success and Any Barriers in the Way

The study team asked firm owners and managers about the keys to their business success, and any barriers they faced to doing business. [e.g., #I-2, #I-10, #I-15] Discussions focused on:

- Relationship building;
- Employees;
- Equipment;
- Access to materials including good pricing and credit;
- Bidding process;
- Permitting and licensing;
- Financing and bonding;
- Insurance;
- Timely payment;
- Other keys to business success; and
- One firm’s advantage over another.

Interviewees described many keys to their success including a strong work ethic among leadership and staff, good customer service, innovation and other factors. Other business owners reported on the barriers that get in the way of their and others business success.

**Relationship building.** Many business owners or representatives identified relationship-building as key components to the success of their businesses. [e.g., #I-1-3, #I-1-5, #I-1-13, #I-1-16, #I-1-19, #I-1-20, #I-1-22, #I-1-23, #I-1-24, #I-1-25, #DI-1-2, #DI-1-3]

Several business owners or representatives reported that networking was an important factor to business success. Examples of these businesses included:

- The African American female president of a woman-owned certified specialty contracting firm commented, “I network a lot … I get a lot of referrals. That really is key. I get out in the community and talk to people about what I provide and what kind of services I provide.” [#I-1-14]

- A majority owner of a specialty consulting firm commented, “Relationships … a history of satisfaction … with the vast majority of new customers coming through referrals and network connections ….” [#I-1-7]
One African American owner of a specialty contracting firm remarked that the key to his success is “… knowing how to choose who you work for … and building networks.” [#I-1]

Many business owners reported that quality work and customer service are important factors in relationship-building and to business success. [e.g., #I-1, #I-6, #I-23] For instance, business responses included:

- An African American female owner of a DBE-certified goods firm reported, “Do good work, be good to people.” [#I-11]

- A female African American specialty contractor commented, “Just listening to your client. You’d be amazed how many firms don’t listen ….” [#I-17]

- The African American president of an MBE- and DBE-certified supply firm reported, “Doing a good damn job! Every single time! Under promise and over deliver, every time.” [#I-13]

- The African American owner of an MBE-certified transportation related firm commented, “… giving people your word and living up to it, whether it’s in a contract or wherever … the basic thing is ‘dependability.’” [#I-18]

- An African American owner of a DBE- and SBE construction firm said, “We try to do everything right, be as perfect as we can, because we know we’re being judged harder.” [#I-8]

- One African American female owner of a DBE-certified goods firm remarked, “It’s always going to be your brand reputation … make the client happy and do the best you can.” [#I-11]

Employees. Some business owners and managers discussed the importance of highly motivated leadership and experienced employees. [e.g., #I-8, #I-21] Some reported difficulty finding good employees. Comments from the in-depth interviews reported included:

- An African American owner of a specialty contracting firm reported that he has “loyal employees … customers see the same faces” which builds trust. [#I-1]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented on the need for experienced employees in her line of work. She said, “… the owners are very involved and all of our senior management team has a lot of experience and we are very hands on. Our motto is that we bring people with a lot of experience to the engagement and I think that is what has helped us a lot.” [#I-5a]

- A non-Hispanic white principal of a specialty consulting firm commented on quality employees stating that women “work harder and more diligently than many of their male counterparts.” He added that he plans to hire more women to add to the one woman who works with him now. [#I-2]
The African American female president of a woman-owned certified specialty contracting firm repeated the need for qualified workers, she said, “… sometimes we find ourselves with a shortage of laborers … the more experienced technician can’t find someone to [complete] … the easier tasks. So, he spends time doing that, which slows the job down, which will delay him or her from getting to another job.” [#I-14]

The representative of a majority-owned construction materials and supply firm reported on the importance of qualified staff, “I have the hardest time finding qualified people to do these types of jobs.” [#S-9]

**Equipment.** Business owners and managers discussed the importance of having the right equipment and materials for operating their businesses, and keeping it operational. For instance, the African American owner of an MBE-certified trucker reported, “Equipment, not everyone is on the same playing field. For example, if you have got equipment with satellites and Wi-Fi and plugins with all of your equipment … this [is] something new that came around in the past three or four years where some groups want satellite and all of them want Wi-Fi. If your equipment is equipped … your chances are better when a customer needs equipment, especially asking for satellite.” [#I-18]

**Access to materials including good pricing and credit.** Some business owners and representatives reported the importance of access to fair pricing and credit for materials. Some faced challenges, for example, the African American CEO of a DBE-, MBE- and SBE-certified specialty services firm who commented, “I can never get anything! Either it is ‘out of stock, or it is not there.’ Or the quantity amount is not enough … ‘we will give you, but we will not give you.’ Even if I am going to pay cash, ‘we will give you but we will not give you.’ That’s not right.” He added, “It’s unfair. You have to give small businesses a chance to prove they can do the work and that they can be responsible.” [#I-15]

**Bidding process.** Some business owners and representatives reported on the pros and cons of the bidding process. (See Part G for additional experiences related to procurement processes and bidding in Atlanta.)

One majority owner of a specialty consulting firm reported the bidding process as “objective.” For example, he stated, “It depends on how the RFP is written. If it is written with very specific requirements, then naturally being able to demonstrate prior experience and success with those criteria … is very important. There is a scoring system; there is a panel of people judging the responses. I’ve found it as far as I can tell to be a very objective and fair process.” [#I-7]

On the other hand, an African American president of an MBE- and DBE-certified supply firm reported challenges when responding to a request for qualifications. He stated, “We don’t get any ‘love’ in the bid process. We answered a $2 million RFQ and withdrew because … they want us to quote something … we could have done it better and cheaper … nobody wants to listen to the little ‘black boy’ raising his hand.” [#I-13]

A representative of an African American minority-owned professional services firm perceived bid announcements as “insular” in Atlanta. This representative reported, “I believe that Atlanta announcement of bid opportunities [is] ‘insular’ which [prevents] us from knowing and offering [bids].” [#S-210]
For some business owners, lack of know-how made bidding very difficult. For example, the representative of an African American minority-owned specialty contracting firm stated, “I wish there was more understanding on the bidding process. I would like to know more.” [#S-373]

Others reported that requiring certain levels of experience unfairly advantages some firms over others. For instance, some small businesses or emerging businesses find it difficult to gain the “experience” that is required to compete with more established firms in Atlanta:

- A representative of an African American minority-owned legal services firm experienced restrictive barriers to bidding. He reported that bidding specifications, for many agencies, include a requirement for prior experience (specific agency-awarded contracts) and proof of ability to perform on those contracts. A firm that has no prior experience with that agency is immediately disadvantaged. [#S-334]

- The representative of an African American minority-owned IT firm expressed, “I think my barrier is when a small company submits a bid the ‘rules of engagement’ are against us, they have a set of rules that they go by [that] won’t give us an opportunity to show what we are made of … it’s like showing up to an interview [right] out of college and them telling you, ‘You don’t have experience.’” [#S-214]

- A representative of an African American minority-owned IT firm expressed a need for a designated entrée for small businesses. He stated, it would be nice if someone could help small business … jobs for just new businesses.” [#S-222]

**Permitting and licensing.** Some business representatives reported difficulty with securing permits or licenses. For example:

- A representative of a white women-owned IT-related firm expressed difficulty getting a business license. She reported, “Getting a City of Atlanta business license, it’s very difficult, the paperwork was never handled correctly.” [#S-63]

- A representative of a white women-owned IT-related firm reported, “Atlanta makes it difficult to own your own business with reporting and business license. Doesn’t feel like a friendly environment.” [#S-64]

**Financing and bonding.** Many business owners reported that obtaining financing and bonding was an important factor in establishing and growing their businesses, particularly when seeking certain types of work. [e.g., #I-8, #I-16, #I-19]

Many businesses owners and representatives reported financing as key to business success; however, some could not secure the loans they needed to grow their businesses. Examples included:

- An African American owner of a contracting firm reported that access to capital was an important issue for him. He explained, “… if you have the capital you can do more … get the job done a little bit faster ….” [#I-6]
An African American owner of a HUD- and SBE-certified specialty services firm commented that access to capital and limited resources are challenges for minorities. [#I-25]

The African American owner of an MBE-certified IT-related business reported “money and finances” as key to starting and growing a business. [#I-21]

For the African American CEO of a DBE-, MBE- and SBE-certified specialty services, the success of minority-owned firms is impaired by a lack of available financing and credit and predatory lending. [#I-15]

A representative of an African American minority-owned specialty contracting firm reported, “Actually it’s that our company is so small, we don’t have the manpower. If we had the financing to expand we could go after the larger bids, to go after the work. We are limited to what we can do.” [#S-366]

For a representative of an African American minority-owned IT firm “getting a loan for expansion purposes was a barrier.” [#S-269]

Several minority-owned firms indicated that obtaining bonding was and continued to be a barrier for businesses. Comments included:

One female African American representative of a minority contractors’ trade organization reported, “It is very difficult for African Americans to get bonding and even the few that were bonded, since the recession they’ve lost a large majority of their assets.” [#ORG-3]

The African American owner of a specialty contracting firm reported that although bonding is not typical in his industry, an AHA property management firm required him to purchase a bond. [#I-1]

A representative of a white women-owned specialty contracting firm reported, “the biggest hurdle is size of contract and bonding.” [#S-99]

The African American female representative of a minority-owned construction firm stated that there are minority contractors who are trying to “break into building themselves up to be bondable” but “there’s a difficulty in bridging that gap.” [#DI-2]

An African American MBE-certified general contractor and consultant remarked that bonding for MWBEs is a barrier to working with entities, such as AHA, because it limits opportunity for firms to be primes because they lack access to the required bonding.

An African American owner of a DBE- and MBE-certified development firm reported that AHA bonding requirements are a barrier to firms. He added that primes may hold minority firm’s bonding insurance after completion of a project delaying the subs ability to bid on another project. [#DI-3]
The African American owner of a contracting firm commented, “… if a minority contractor is bidding on that [AHA work or a similar job] and we know we have to have a bond, that’s part of what goes into a package” but when the bond costs $25,000 “that’s a problem.” [#I-6]

The African American female co-owner of a minority-owned development firm stated that bonding affects the diversity of her contractor base and as a developer; she must know that a contractor is bondable. She said, “… if that contractor can’t complete the work, you’re in terrible shape if you don’t have a bonding company to go to get it done and cover the additional cost because you signed [a] guarantee to the lender and that contractor issue is not their problem so it makes it difficult for some contractors to get that level of work. It’s not that you don’t care but you have to protect your guarantee interests and who you select to be your general contractor.” [#DI-2]

Insurance. The study team asked business owners and managers whether insurance requirements or obtaining insurance was a key requirement for conducting business. Meeting those requirements can be a challenge for some.

- The African American owner of an MBE- and WBE-certified specialty consulting firm reported that her line of business requires insurance especially for larger contracts. [#I-4]
- When asked if his firm is required to secure insurance, the non-Hispanic white principal of a specialty consulting firm reported that the firm holds an “Errors & Omissions” policy. [#I-2]
- The African American female owner of a DBE-certified goods firm reported that there was a “large technical contract” and she was told that the company needed a $2 million umbrella insurance policy. She commented that agencies “push these policies on small businesses to convince them they can’t handle the business.” [#I-11]
- The African American female owner of an MBE-certified specialty contracting firm commented that insurance requirements [imposed by AHA and others] could be challenging, for some, since prices are “exorbitant.” [#I-20]

Timely payment. A few business owners reported on the importance of timely payment. One specifically stated that untimely payments unfairly burden minority- and women-owned businesses. For example:

- A female African American owner of a DBE-certified specialty services firm reported on issues of timely payment by stating, “My tenacity … there is no money … no profit … some people do not pay when they are supposed to [pay].” [#I-12]
- The African American owner of a HUD and SBE-certified specialty services firm reported that slow payment is a huge problem and believes it is to push minorities and women out of the industry. [#I-25]
An African American owner of a DBE- and MBE-certified development firm reported that larger firms will pay minority subs slowly or hold minority firm’s bonding insurance after completion of a project delaying their ability to bid on other projects. [#DI-3]

Other keys to business success. Some business owners and representatives reported additional factors impacting business success.

Some business owners and representatives reported other keys to their business success such as money management skills, hard work, creativity and commitment to a project. Comments included.

- The African American owner of a specialty contracting firm reported that a key to his success is that he is a good money manager and he does not live extravagantly. [#I-1]

- An African American owner of a specialty consulting firm reported that “you have to work hard and you have to keep on working.” [#I-16]

- A representative of a white woman-owned IT-related firm expressed, “It takes a lot of persistence and hard work.” [#S-32]

- The African American female co-owner of a minority-owned development firm remarked, “I think it’s the quality of our mission and our commitment to it, it’s the quality of our creativity and innovation ….” [#DI-2]

- The African American female owner of a specialty contracting firm reported that her creativity is above others and that the firm has “product experts.” [#I-17]

Two minority business owners and representatives identified a reliance on minority participation for work, as a barrier to business success. For example:

- One African American owner of a DBE- and MBE-certified development firm remarked that for business success it is important to “not be dependent upon minority participation ….” [#DI-3]

- The Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported that being a minority does not help or hinder. Minority certification “doesn’t make the bid” anymore, he said, “if you have it or if you don’t.” [#I-9]

One firm’s advantage over another. Business owners expressed advantages that one business may have over another firm. Some factors mentioned included marketing capabilities, and business longevity, knowledge and experience, as well as local participation and competitive pricing. [e.g., #DI-3]
Several business owners and representatives reported on the advantages of strong business operations such as marketing and competitive pricing. For example:

- When asked what gives one firm advantage over another in the industry, the African American owner of an MBE- and WBE-certified specialty consulting firm commented that she does not market her firm, but relies on her training sessions and word-of-mouth for business opportunities. She added that her firm has a website for marketing purposes. [#I-4]

- The African American female owner of an MBE-certified specialty contracting firm reported, “Websites and advertising ….” [#I-20]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm said advantages are competitive pricing and the quality of the product. [AI-9]

Some mentioned longevity and business experience as contributing factors to competitive advantage. For instance:

- An African American owner of a specialty consulting firm reported that a history of previously doing business with an agency or other entity, and long length of time in business gives a firm a competitive advantage over another. [#I-16]

- The African American female representative of a minority-owned construction firm reported that “new” developers “don’t have a chance” by themselves, but can “team up” to hear about new opportunities and gain some competitive advantage. [#DI-2]

- An African American female co-owner of a minority-owned development firm stated that “it’s all about your experience” and how it is relayed. For example, HUD is very clear and prescriptive about their procurement process. “That’s the first barrier that you have to get through” and then it is team members and communicating your vision in the interviews. She said, “There is a first portal that everybody has to go through which is ‘how do you line up with our criteria.’” She added, “Who knows what goes on in the minds of those who score.” [#DI-2]

Several business owners also reported on the need to know the right people to be advantaged, have an “inside hookup.” These included:

- The African American female co-owner of a minority-owned development firm commented that there is a small group that does the work and does it well and understands the complexity of the deals, “has market permission” to do the deals. “People do business with people. They may have someone with the technical skills but if it doesn’t go well the first time or the second time or the third time, they may change the dynamics about who they partner with.” [#DI-2]
An African American president of an MBE- and DBE-certified supply firm reported, “Having the right contacts. Having a ‘friendly’ … someone who is going to take the time to stop what they are doing and be in the moment and listen as opposed to … the ‘good ol’ boy’ system.” [#I-13]

A female African American owner of a DBE-certified specialty services firm reported, “Inside hookup.” [#I-12]

Two business owners and representatives reported that competitive advantage required a level playing field where knowledge equals advantage and where there are opportunities for local participation. These examples include:

- The African American owner of a DBE- and SBE-certified construction firm said, “It depends if the field is level. If it’s level, it’s who is the most knowledgeable ….” [#I-8]

- An African American general contractor remarked that use of local firms on projects helps alleviate displacement, giving a local firm advantage over others not local. [#I-22]

E. Allegations of Unfair Treatment

Business owners and representatives reported on any allegations of unfair treatment, challenges to bidding, stereotyping, closed networks and other evidence of unfair treatment. Interview topics covered included:

- Whether there is a level playing field for minority- and women-owned firms;
- Denial of opportunity to bid;
- Bid shopping and bid manipulation;
- Double standards for women- or minority-owned firms when performing work;
- Unfair treatment of businesses when pursuing opportunities in the Atlanta area;
- Unfair treatment or disadvantages specifically experienced by minority- and women-owned businesses in the Atlanta area; and
- Experience with “good ol’ boy” networks or other closed networks.

**Whether there is a level playing field for minority- and woman-owned firms.** Most business owners and representatives reported that the field is not level.
Those interviewees who reported an unlevel playing field experienced limited opportunities for work and greater challenges for minority- and women-owned firms. For instance:

- When asked if there is a level playing field for minority- and women-owned firms in the Atlanta Metro Area, the African American owner of a specialty contracting firm remarked, “Absolutely not. It’s very lopsided.” He added that majority firms want minority-owned firms certified because, “They need you to have something that will benefit them in order to work with you.” [#I-1]

- An African American president of an MBE- and DBE-certified supply firm commented, “No, because we don’t have the resources. It was illegal for minorities to own businesses 100 years ago. So ‘how the hell’ can it be level? They [majority owners] have six generations of information and wealth coming down; we have got one or two. It is not fair ….” [#I-13]

- The African American owner of a DBE- and SBE-certified construction firm commented, “I hear guys talking and we compare war stories.” He added, “If you don’t level the playing field at the top, you can’t expect a change at the bottom.” He further added that inclusion and diversity among decision-makers is important. [#I-8]

- The African American owner of an MBE-certified specialty contracting firm commented that there is no level playing field because minority firms do not get enough of the available work. [#I-23]

- An African American owner of a DBE- and SBE-certified construction firm reported that there is not a level playing field for minority and women-owned firms. He reported that minorities and women face challenges not faced by other businesses. He added that he has “gone through it and lived it.” [#I-8]

- The female African American owner of a DBE-certified specialty services firm reported, “… there is an ‘elitist attitude’ in Atlanta, if you are not on a particular level they don’t do business with you.” She added that African Americans that “can afford [her services]” do not do business with her, and others, who do, “don’t pay.” [#I-12]

- One African American owner of a contracting firm commented that AHA should be looking at what management firm uses what contractors, because “the playing table is not fair at all.” [#I-6]

- The African American female representative of a minority-owned construction firm reported that she believes that due to AHA regulations, she does not know if the issue is addressable. She said, “They would have a hard time standing up in the face of public scrutiny and saying … [that] we paid ‘x’ amount of dollars more for having more minority and small business participation.”
She added, “[People might not understand] why they should do it [and] that would be a difficult decision for them to make … like cities are struggling with that same issue … what can they mandate, how they mandate it. If there is a premium, why is there a premium and how much of a premium can you justify? And if you are not going to give some incentives to someone to pay that premium or to do that extra step, how much can you hold their feet to the fire to do it if you are not going to put skin in the game to try to make it happen?” [#DI-2]

- The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm commented, “Not in my field. They do not want women in my field and I hate it. That is why I will hire them [women] every time I get a chance.” [#I-15]

Some business owners and representatives reported other factors that contributed to an unlevel playing field. For instance:

- The African American general contractor commented that lack of knowledge about how the system works is a barrier to minority-owned firms. [#I-22]

- In reference to a level playing field, the African American female representative of a minority-owned construction firm commented, “It seems off balance for the smaller contractors.” She added that she attributes this to housing authorities and their management, “trying to get the best price … being tied to budgets … and not always getting the best quality.” [#I-3]

- An African American female representative of a minority-owned construction firm remarked, “I know it’s a struggle, we’re a minority-owned firm regardless of the size.” She stated with the construction company, which is now doing more third-party contracts, she finds it “difficult to get contracts.” In addition, she said that those that develop their own projects “take on quite a bit of risk … timeline, and project guarantees … means, methods and quality ….” She added, “[I understand the difficulty to] go with someone new … maybe it’s the risk of what might happen if the performance isn’t there.” She went on to comment that it also comes down to “dollar and cents.” She added, “You win some, you lose some ….” [#DI-2]

Only a few business owners and representatives reported the playing field as level. One indicated that the playing field is level, with limitations. For example:

- The African American MBE-certified general contractor and consultant reported, “One of the things that inspired me to return to … Atlanta is … they have language in their contract provisions that says it’s not just good faith effort we’re looking for, we’re not going to give you a way out.” He added, “Atlanta was really progressive in saying we want to have full discretion to manage our federal funds.” [#I-10]
The African American female president of a woman-owned certified specialty contracting firm commented, “No … everything comes down to dollars and cents …. You bid on a job and the lowest bidder wins, unless there is some networking going on you do not know about. But most times the lowest bidder wins, and sometimes you can’t provide that lowest bid when you are an up and coming firm, because you have more overhead because you’re building.” [#I-14]

**Denial of the opportunity to bid.** The study team asked business owners and managers if they were denied the opportunity to bid.

Some interviewees could not recall any experience where they were denied an opportunity to bid. [e.g., #I-8, #I-14, #I-16, #I-19, #I-23, #I-25]

However, a number of other interviewees recounted experiences where they were denied opportunity to bid. [e.g., #I-15, #I-21] For example:

- The African American owner of a contracting firm recounted getting calls to perform jobs that “nobody else wants” citing, for example, a bedbug extermination job that other firms had refused. He then went on to explain that his firm does not get “the opportunity to bid” or is not made aware of opportunities on more attractive jobs, but “once they run into something that they don’t want,” his firm will get a call. [#I-6]

- The African American president of an MBE- and DBE-certified supply firm commented, “You don’t know if it’s a denial of an opportunity; they just don’t get back with you.” [#I-13]

- The African American female owner of an MBE-certified specialty contracting firm reported, “They say they ‘try to give you an opportunity,’ but I haven’t seen any. You can bid all day long but they won’t give you an opportunity to show what you can do.” [#I-20]

- A representative of an African American minority-owned specialty contracting firm reported, “Of course I want to expand, but minority-owned businesses such as mine should be able to get more bids. We shouldn’t be limited to certain jobs.” [#S-391]

**Bid shopping and bid manipulation.** Many business owners and representatives reported being concerned about bid shopping and bid manipulation or having related experiences. Several reported no experiences with bid shopping and bid manipulation.

**Bid shopping and bid manipulation experiences were a common part of business for many interviewed.** [e.g. #I-2, #I-11, #I-19, #I-23, #I-25] For example:

- The African American owner of a DBE- and SBE-certified construction firm commented, “I’ve seen that, but I can’t prove it …. That’s happened.” [#I-8]
Regarding bid shopping, the African American president of an MBE- and DBE-certified supply firm commented, “Yes, they do that all the time but it’s their job to find the lowest price. They can use their pick and blame it on anything.” [#I-13]

The African American owner of an MBE-certified specialty consulting firm reported being the winner of a bid “with an entity of the City [Atlanta].” However, later his firm heard that the bid was miscalculated and a firm outside of Atlanta received the contract. [#I-23]

Concerning bid manipulation, the African American owner of a contracting firm stated that “if a manager likes a certain contractor, that’s where it’s going.” [#I-6]

A few interviewees indicated that they were not concerned about bid shopping or bid manipulation. [e.g., #I-14, #I-16] For example, the African American owner of a specialty contracting firm reported no knowledge of bid shopping; he said that “better price” wins. [#I-1]

Double standards for minority- and women-owned firms when performing work. The study team asked companies about other unfair treatment or double standards for minority- and women-owned firms in Atlanta.

Several business owners and representatives reported experience with unfair treatment, in general, or with double standards for minority- and women-owned firms. Examples from the in-depth interviews included:

- An African American owner of a DBE- and SBE-certified construction firm commented, “Yes, I’m sure.” She stated, “We try to do everything right, be as perfect as we can … we know we’re being judged harder.” [#I-8]

- The African American president of an MBE- and DBE-certified supply firm commented, “… we’ve got to get certifications and other nonsense just to prove that we are worthy to do business. Why do [we] have to get DBE or MBE certified? A white firm doesn’t have to do that.” [#I-13]

- The African American female president of a woman-owned certified specialty contracting firm commented, “… in my industry when it comes to purchasing equipment … I know this vendor will give you [a majority contractor] a 15 percent [greater] discount on equipment [than given to] me, then I’m already at a disadvantage.” [#I-14]

- The African American female owner of a DBE-certified goods firm commented, “Yes, large companies can mess up several times, we can’t. We get one time to get it all the way right.” [#I-11]

- The African American MBE-certified general contractor and consultant reported, “When it comes to inspection, definitely unfavorable conditions. Quality issues are “forgiven more” for majority firms than MWBEs.” [#I-10]
When asked about any double standards, the African American owner of a HUD and SBE-certified specialty services firm reported that slow payment of minority subs is a huge problem designed to push minorities and women out of the industry. [#I-25]

An African American owner of a DBE- and MBE-certified development firm commented that minorities and women are used for their relationships in the minority community. He said, “When they call, they want our relationships ….” [#DI-3]

Some interviewees reported no experience with double standards. [e.g., #I-5, #I-5a, #I-7, #I-9, #I-16, #DI-1, #DI-2]

Unfair treatment of businesses when pursuing opportunities in the Atlanta area. Businesses were asked if they experienced any unfair treatment securing work in Atlanta.

Several business owners and representatives had experienced unfair treatment or reported on specific challenges they encountered while pursuing work in Atlanta including examples of payment problems, “blackballing” and earmarked contracts. For instance:

- The African American owner of a DBE- and SBE-certified construction firm emphasized that it is “difficult” to get a foot in the door as a minority; instances where the treatment of his firm is unfair when pursuing work in the Atlanta area. [#I-8]

- The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm said, “Yes I have. When I first started, I got gypped out of money … because they knew I was a ‘novice’ to the business side of it, not the actual work side, but the business side of it, absolutely.” [#I-15]

- The African American owner of a contracting firm responded, “Oh yes” when asked if he has experienced unfair treatment when pursuing opportunities in Atlanta. He added that he would not have taken the job [discussed above by his colleague, #I-6a] had he known that he would need to pay back $13,000. [#I-6]

- The African American female representative of a minority-owned contracting firm reported the firm having had an experience where after working for six months on a job, a property management firm came back one year later to say that they had underpaid their workers and owed $13,000 though they were turning in their payroll every week during the job. She added that they were not aware that they had to pay “fringe benefits” and so, it ended up being “… a free job we gave them.” [#I-6a]

This same business representative added that the project manager is now “blackballing” the firm with other contractors, saying “don’t do work with [them].” She remarked not knowing why the firm is still “blackballed” because “we are fixing it.” [#I-6a]

- An African American owner of an MBE-certified specialty consulting firm reported that “with an entity of the City [Atlanta]” his firm was a bid winner; however, the firm later heard that the bid was miscalculated and awarded to a firm outside of Atlanta. [#I-23]
The African American female owner of a DBE-certified specialty contracting firm remarked, “Sometimes people have purposefully withheld information and used relationships to edge us out ….” She added, “… they have bid on projects that shouldn’t have been out for bid because they knew who they were going to award it to.” [#A1-11]

A representative of a majority-owned IT firm expressed, “We would love to do more business with AHA …. The RFI was constructed with assistance from a primary vendor. Our perception is that another solution provider has crafted [the RFI] to meet their needs, that it contains specific attributes for that vendor. It makes it difficult for others to bid. In general, I would love to see more opportunities for small business to be invited to participate in pre-sales solution development and design (specifically non-minority- and non-woman-owned small businesses).” [#S-283]

Several businesses seeking work in Atlanta reported on issues related to bidding challenges including limited pre-bid communications and post-bid feedback. Examples included:

- An African American owner of an MBE-certified vendor commented, “In a sense ‘yes.’ Well, some of your major contracts, when they are really coming out, when we find out that they are coming out somebody has already signed the contract.” [#I-18]

- The African American female president of a woman-owned certified specialty contracting firm commented, “… I’m not going to say I’ve had any experience other than I had bid on some projects and when I had gone back to say, ‘I wasn’t chosen, where do I come in?’ I can’t get an answer that will help me understand why I wasn’t chosen or to help me do better the next time.” [#I-14]

A number of small business owners reported unfair treatment or opportunities for work limited by business size and capacity. These small business owners and representatives reported on their experiences working in the Atlanta area, for example:

- A representative of a Subcontinent Asian American minority-owned goods vendor indicated that “AHA and other agencies tend to go with larger firms and do not give smaller firms an opportunity; [thus, these agencies] are being overcharged because of the unnecessary hours billed [by larger firms with more overhead].” [#S-349]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented, “Of course, it depends on the size of the engagement. A small firm may not be eligible ….” [#I-5]

- A female African American owner of a DBE-certified specialty services firm reported that larger companies usually get the work because they have more of a financial advantage.” [#I-12]

- One Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented, “I think there’s just a capacity issue with projects … the firm has to be scaled to the size of the project ….” [#I-5a]
A representative of an African American minority-owned IT firm stated, “We are a small minority-owned firm, and we are fully capable of providing the same level of service as the larger firms, but are overlooked because we are small ….” [#S-278]

An African American female president of a woman-owned certified specialty contracting firm commented, “You [small businesses] do run into those issues but a lot of it has to do with having that infrastructure, a good supportive infrastructure to run a business. It does not matter what field you are in …. You have to have that in place to be able to compete.” [#I-14]

The African American owner of a DBE- and MBE-certified development firm commented that small businesses endure the same hardships as minority and women-owned firms. For example, access to capital and ability to establish relationships. [#DI-3]

A representative of an African American minority-owned small specialty contracting business stated that his company is “so small” it can’t compete, and doesn’t have access to the financing he would need to expand. [#S-366]

The African American female owner of a DBE-certified goods reported that they “push these [insurance] policies on small businesses to convince them they can’t handle the business.” [#I-11]

Unfair treatment or disadvantages specifically experienced by minority- or woman-owned firms in the Atlanta area. Business owners and representatives reported on any unfair treatment and other disadvantages specific to minority- or woman-owned firms in the Atlanta.

Some minority and women business owners stated that disparities in payment, access to capital and work opportunities existed in the Atlanta area. These included:

- An African American owner of an MBE- and WBE-certified specialty consulting firm commented that she has experienced disparity in pay when compared with “Caucasian firms.” She reported that despite the fact that she offers a superior product, getting pay on par with that of bigger firms continues to be difficult. She added that government agencies, “where they ought to be more general and open to the public” are not that way and it’s “disheartening.” [#I-4]

  The same business owner added, “It’s really a ‘woman and black’ kind of game, it’s crazy …. I would love for women and minorities in the future to be able to stand on their own merit. Now, where is the black woman who runs a company like that … nowhere?” [#I-4]

- The African American owner of a DBE- and MBE-certified development firm commented that minority- and women-owned firms face challenges accessing capital and building needed relationships. [#DI-3]
An African American general contractor reported that small and minority-owned firms are often restricted from large contracts. He said, “… it is ‘real’ different down here. Up north they are really focused on the minority piece.” [I-22]

The African American owner of a contracting firm reported that when AHA was doing remodeling “the small minority contractors couldn’t touch it because the requirements were too high.” He stated that even with the demolition of the low rises, “minorities couldn’t touch it because of the requirements,” specifically the capital required. “Say we bid at $100,000, after the first so much of the project is complete, it’s not where it’s allowed for the first $20,000 to come out quick so that these guys don’t bankrupt themselves trying to do a job.” He added that with AHA having fewer low-rises and high-rises “going privatized,” there is a lack of opportunity for minority businesses. “The private management is dictating what can and what won’t be done.” [I-6]

An African American owner of a services firm reported, “… I’ve heard stuff. I know what happens with us [African Americans] but other businesses I cannot speak to …. [however] I hear stuff ….” [I-19]

The Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported that he tried to sell a specialty product to AHA that other school districts purchased from him. AHA would not buy his product. [I-9]

The same business representative said, “If they [AHA] tell that ‘we support minorities’ that’s not true. That is not true … I can call right now and I guarantee you that nobody will pick up the phone because they have caller ID, they can see who is calling. If you are ‘buddy-buddies,’ probably, but otherwise … with us being a minority, we should have gotten some orders in the last five years.” He added, “We never get a call back.” [I-9]

He further added, “To get your foot in the business is difficult.” He speculated that some of this could be due to “a lot of competition” because “demand is the same” but there are a lot of MBEs in the marketplace. He stated that he does not know “on what grounds” one MBE is selected over another, “it could be preference or favor or something else, I have no idea.” [I-9]

When asked if there are unfair standards for minorities or women, the African American female president of woman-owned certified specialty contracting firm responded, “Probably.” [I-14]

The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm indicated that predatory lending unfairly disadvantages minority-owned firms. [I-15]

A non-Hispanic white male principal of a specialty consulting firm commented that in Atlanta, there is a “minority of women in the field.” [I-2]
Few interviewees reported no experience with unfair treatment of minority- and women-owned firms in Atlanta. Examples included:

- A majority owner of a specialty consulting firm reported, “I’ve not experienced, or witnessed, or been aware of unfair treatment as a part of the RFP process.” [#I-7]

- The female representative of an MBE- and WBE-certified specialty consulting firm reported that the firm has not experienced any unfair treatment. She commented that it is definitely not a problem for AHA as she has been “embedded” in the organization as a 1099 worker, and “they [AHA] had their t’s crossed and i’s dotted … they did the right thing.” [#I-4a]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented, “This field in particular there are a lot of women and minorities that are in leadership roles” [AI-5a]

Her co-owner expounded, “We only work in the housing industry, so we don’t feel a disadvantage. We’re not involved in the Atlanta area in anything else.” [#I-5]

**Experience with “Good ol’ boy” networks or other closed networks.** Many interviewees had experience with closed networks and reported that they exist in Atlanta. [e.g., #I-8, #I-15, #I-18, #I-19, #I-23, #I-25]

Many business owners had experiences with closed networks, and reported how that impacted them and their businesses. For instance, closed networks made finding opportunities for work more difficult for many:

- An African American general contractor reported, “It [closed networks] is immediately negative and it clearly exists.” [#I-22]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm indicated that local agencies have their “favorites.” [#I-9]

- The African American president of an MBE- and DBE-certified supply firm reported, “It’s especially hard for us because we aren’t penetrating that ‘good ol’ boy’ network.” [#I-13]

- A representative of an African American specialty contracting firm reported, “Work is closed to new start-ups unless you know someone. General contractors say that they stick with preferred vendors.” [#S-104]

- The African American female owner of a DBE-certified goods firm commented, “Yeah, the ‘good ol’ boy’ network. You’ve got to get on the golf course with them … we don’t fit the archetype.” She added that this could be discouraging to some. [#I-11]
When asked about any barriers to doing business in the Atlanta area, the representative of an African American minority-owned professional services firm reported, “Good old boys’ system in the South. Yes. Go to the small business administration and win contracts from there ....” [#S-174]

When asked about any barriers the firm faces, a representative of an Asian Pacific American A&E firm reported, “Getting in the ‘circles,’ filling out 255 forms.” [#S-111]

A representative of an African American minority-owned firm expressed, “It’s very cliquish and about who you know … certain companies ‘low ball’ … say the price is low [get the contracts] … then the price in the end is more than what they say.” [#S-223]

The African American owner of a contracting firm recounted that bids were once advertised in the paper, or vendors would be reached out to by contractors. But currently, he reported, “Nobody knows because it’s not being put out there.” He added, “If you’re not in the ‘clique, you’re just not … you’re not in it …. It really never has been fair but it’s more obvious now that it’s not fair,” because there are fewer opportunities. [#I-6]

The representative of a majority-owned engineering firm reported, “[In the Atlanta area], it’s sometimes the doors are open, but it’s full of people already there. There seems to be a lot of ‘back-scratching’ going on, and I don’t even bother because I don’t think I’ll get the jobs.” [#S-184]

A representative of an African American minority-owned professional services firm reported in the Atlanta area there is “a lot of association in [cliques], hard to penetrate.” [#S-200]

The African American female president of a woman-owned certified specialty contracting firm commented, “… it’s no secret, especially in the construction industry that that exists. They just had a study released a short time ago showing federal dollars that had gone into projects across the City of Atlanta and how minorities had 5 percent. That’s shameful.” [#I-14]

The female African American owner of an MBE- and WBE-certified specialty consulting firm commented, “… the establishment folks have a value for … if you’re a white male and you walk in, there’s credibility ….” [#I-4]

She further reported that she has privilege as a ‘lighter skinned black person with a doctorate,’ but finds that the playing field is not “anywhere near equitable” even with consulting groups where “you can be in business 30 years and this guy has been in [business] five years, but he likes golf or he knows somebody.” [#I-4]

This owner went on to report, “The more that people who are multicultural are looking for competence versus ‘competence and you look like me,’ the more that will shift. That is many, many years away. The ‘network’ is still alive and kicking.” She added that there is no distinction in this between the private and public sectors. [#I-4]
Regarding closed networks, the same business owner added, “Navigating is really a challenge for people who don’t have privilege …. You live in a white world and you live in a black world. Whereas when you are white, the only sea is the sea that you are in. And that’s always a challenge for people of color.” [#I-4]

- An African American female representative of a minority-owned construction firm reported that when there are changes at public housing agencies or their property management firms, there is “disparity.” She said, “… just in the field … that goes along with that work … [whoever] comes in brings the people that they dealt with prior … kind of standard.” [#I-3]

- The African American owner of an MBE-certified IT-related firm reported that a “good ol’ boy” network [of white males] exists and causes challenges for small minority-owned firms that do not have closed networks. [#I-21]

- The African American female co-owner of a minority-owned development firm, when asked about the “good ol’ boy networks,” stated that that is “just business.” She added, “some of it is buying power.” She explained that a general contractor receives lower quotes from subcontractors who have worked with them for generations (as part of relationships passed down from father to son, for example). She added that when a competing minority contractor’s bid comes in, it reflects the “lack of discount.” [#DI-2]

- As expressed, the African American female owner of a DBE-certified goods firm remarked that the “good ol’ boy” network is challenging for some small firms. [#I-11]

- A representative of an African American minority-owned IT firm reported, “[the] market is so hard, unless you ‘know’ someone to get in.” [#S-232]

- A representative of an African American majority-owned legal services firm reported, “You’ve got to go to the ‘network.’” [#S-345]

- The female African American representative of a minority contractors’ trade organization reported, “I know we’re talking about Atlanta Housing Authority, but it’s the same situation with all of them ….” She added, “This is a racist business it’s the ‘good ol’ boy’ system, period. They will cover each other, they will bond [with] each other, they will do whatever they need to do with each other, but that keeps us out.” [#ORG-3]

Some minority business owners reported on the politics, corruption and nepotism that foster closed networks in the Atlanta area. Examples included:

- A representative of a white woman-owned A&E firm expressed that in the State of Georgia there are too many … big businesses giving politicians money; … it’s hard on small businesses and it’s slowing growth. [#S-120]

- A representative of a majority-owned legal services company reported, “The ‘scenery’ is corrupt.” [#S-337]
The African American owner of a specialty consulting firm reported that closed networks exist and have a negative effect on minority- and women-owned firms. He said, “We talk about the disparities. I think it is not having a ‘seat at the table.’ Is that intentional? Sometimes ‘yes,’ sometimes ‘no.’ We just aren’t there; we don’t have a political seat.” [#I-16]

An African American owner of a specialty consulting firm reported, “The city government … it’s the ‘select few’ who had the relationships and supported the politicians who get these deals ….” [#I-16]

When asked about any barriers to work in the Atlanta area, the representative of a Hispanic minority-owned legal services firm reported, “… politics and corruption ….” [#S-333]

A representative of a white woman-owned IT firm reported “nepotism” as a barrier to doing work in Atlanta. [#S-235]

Few interviewees indicated no experience with closed networks or did not consider them a problem. [#I-17] The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented, “We don’t feel that there is.” She added, “Unless there’s something we don’t know about. We’ve never felt that” [#I-5]

F. Information Regarding Any Racial-, Ethnic- or Gender-based Discrimination

Business owners and representatives commented on issues of racial-, ethnic- and gender-based discrimination. For some, discrimination was overt. For others, discrimination meant entry and advancement issues. Interviewees reported on:

- Examples of overt and/or covert discrimination; and
- Entry and advancement barriers for minority and women in Atlanta.

Examples of overt and/or covert discrimination. The study team asked interviewees about any evidence of discrimination.

Many minority business owners reported examples of blatant and/or hidden discrimination. For instance:

- The African American president of an MBE- and DBE-certified supply firm reported that his stature and appearance as a larger African American man is intimidating in the business arena and that plays a part in business opportunity. “My wife and I own this business …. When she shows up to an event they are not threatened by the woman and everything goes good … as soon as my ‘big black ass’ shows up they want to call security. I’m the owner!” [#I-13]

- A representative of a Native American minority-owned services firm indicated, “I’ve had difficulties with people dealing with me due to my race. I’ve been rejected for jobs based solely on skin color or my hair length.” [#S-297]
For a female representative of an African American minority-owned development firm, “It’s really difficult getting a contract as a female, even getting a bid ….” [#S-433]

An African American owner of a services firm reported, “… it is here and there ….” He added, “Yeah, yeah. I really think that has happened in the apartment housing industry. Because some of the things you have to do in order to get to the right folks, you have to know somebody that knows somebody. That hasn’t been an area where I have been real successful. Or there [is] some ‘shady stuff’ going on that’s going to keep me [an African American business owner] out anyway, some stuff you just aren’t going to do.” [#I-19]

A female African American owner of an MBE- and WBE-certified specialty consulting firm stated, “… if you’re a white male and you walk in, there’s credibility ….” [#I-4]

The African American president of an MBE- and DBE-certified supply firm reported, “… not getting the opportunity. If I’m being told that [there are] not many minority manufacturers, and I’m telling these companies I can save them money, and I can show them reports where I’m saving billion-dollar companies millions of dollars, why won’t these other firms give me a [look]? The lack of activity shows something.” [#I-13]

An African American owner of a DBE- and SBE-certified construction firm commented, “They’ll say they [minority-owned firms] aren’t qualified, but those firms can’t get their toe in the door to get the experience.” [#I-8]

One African American owner of a specialty consulting firm reported that although it has not been overt, he has experienced discrimination. He added, “It happens, it’s just cut throat.” [#I-16]

The African American owner of a DBE- and MBE-certified development firm reported, “If you do not demand diversity … there is not going to be [any].” [#DI-3]

A representative of an African American minority-owned IT-related business reported on barriers, “One of the main barriers is more so, discrimination to an extent …” [#S-51]

Some majority-owned firms reported disadvantages, because they lacked minority-owned business status. [e.g., #S-110, #S-151, #S-156, #S-164, #S-187] For example, the representative of a majority-owned A&E business reported, “There is a perception, the fact that we are not a minority firm makes a barrier for work.” [#S-159]

**Entry and advancement barriers for minority and women in Atlanta.** Many business owners and representatives reported barriers in access to training, capital and other resources that limited entry and advancement opportunities for minorities and women seeking industry entry or advancement. The bulk of the answers referred to business-related entry and advancement issues:

- The African American owner of a services firm reported, “I would certainly say ‘yeah,’ because you don’t see a lot of African American companies operating as an entity themselves. They are usually working for somebody else. So, I would say ‘yeah.’” [#I-19]
- A representative of an African American minority-owned IT firm expressed, “Of course those who are on in the ‘inside’ do not like letting new people [enter], because they do not want to share the work and money … that is the nature of the beast. [#S-261]

- The African American female co-owner of a minority-owned development firm reported that there is “always this disparity” of experience. She stated that you have to have certain experience to get opportunities but asked, “How do you get that experience? … That’s one of the hard and fast screens that you must pass through to make it to the next realm?” She went on to add that small and minority-owned businesses “just have to deal” with this barrier, and that it may take time “for the experience … so that one can ‘show up at the table.’” [#DI-2]

The same business owner added that the experience problem is an “inherent reality” of gaining entry into business for a “sector of the population that has been excluded for so long.” This challenge also applies to “financial wherewithal” and that it has been “built into the system to some degree” but that “more and more we are breaking through that,” although “it [still] exists.” [#DI-2]

- An African American owner of a HUD and SBE-certified specialty services firm commented that access to capital and limited resources are challenges for minorities interested in starting and growing businesses in Atlanta. [#I-25]

- The African American female owner of an MBE-certified specialty contracting firm reported that there are similar experiences for minority, women and small businesses across the city. She said, “They say they try to give you an opportunity [for entry], but I haven’t seen any. You can bid all day long but they won’t give you an opportunity to show what you can do.” [#I-20]

- An African American female president of a woman-owned certified specialty contracting reported on industry entry barriers for minority- and women-owned businesses. She identified the need to address the lack of business “know-how” at up-start, for some business owners, and how it particularly affects women and minority businesses. She commented, “I don’t think they have enough to support the people who go into business.” [#I-14]

- The African American president of an MBE- and DBE-certified supply firm reported that there are difficulties with the training, mentoring and bid process. He made the assertion that while there are several programs for small businesses and MBEs, he questions the effectiveness and motivation of non-minority firms to do business with minority- and women-owned firms. He indicated that many times majority-owned firms only engage minority- or women-owned businesses to fulfill a requirement to do so. [#I-13]
A representative of a majority-owned legal services firm reported, “I think that the City of Atlanta and DeKalb County, currently provide barriers to predominantly white or male-owned firms. The barrier of entry, comes frankly in DeKalb and Atlanta, specifically. It may simply be a perception, but it does feel like DeKalb and Atlanta tend to reject those types of firms [majority-owned businesses]. [#S-318]

G. Experience Doing Business with Public Agencies including the Atlanta Housing Authority

The study team asked business owners and representatives about their experience working with public housing agencies in Atlanta, including AHA. Topics discussed included:

- Motivations for pursuing opportunities with public agencies or with AHA;
- Challenges learning about opportunities to work with AHA property managers and/or developers;
- Pros and cons of working with AHA or public housing authority managers and/or developers;
- Barriers faced by businesses, in general, when working with AHA or public housing authority managers and/or developers;
- Barriers faced by minority- and women-owned firms when working with AHA or public housing authority managers and/or developers;
- Protocols for procurement and contract selection employed by AHA and property managers and developers in Atlanta;
- Efforts to include MBEs and WBEs in public housing authority work or work in general;
- Challenges when working with minority- or woman-owned businesses; and
- Insights on certification (MWBE, SBE, other).

Motivations for pursuing opportunities with public agencies or with AHA. Many businesses owners and representatives responded.

Several business owners and representatives reported seeking out public sector opportunities, in general, or prospects with other housing authorities. For some, this expanded to working with AHA. A few of these interviewees conducted their own research, while others were prompted by colleagues, for example:

To build his portfolio and experience, the African American owner of a specialty services firm commented that he researched the opportunities to get involved and felt that bidding for “low hanging fruit” at the state level would probably be best for his firm. [#I-24]

The African American owner of a services firm commented, “Just networking is how I learned about it. Through a few individuals, I was able to talk to who I needed to talk to with the Decatur Housing Authority. Then I started thinking, if there is a Decatur Housing Authority, there is probably an ‘Atlanta Housing Authority’ and all surrounding counties. So, we started soliciting our services to the various housing authorities, because we thought it was stable money, that was the attraction.” [#I-19]

A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported working with other housing authorities and then decided to contact AHA. [#I-9]

Many other interviewees reported direct interest in AHA, and described how they went about pursuing work with the Housing Authority. For instance:

An African American owner of a specialty contracting firm reported that a property manager of another AHA site recommended his firm to the property management firm where he currently works. [#I-1]

The African American owner of a DBE- and SBE-certified construction firm stated that he was looking for prospects for work and heard about an opportunity with AHA from an AHA employee who “liked and believed in me.” [#I-8]

A female African American owner of a DBE-certified specialty services firm reported that she met someone at MARTA who assured her that there were vendors like her firm [working on Section 8 and public housing] with AHA; she decided to pursue similar opportunities. [#I-12]

For an African American female president of a woman-owned certified specialty contracting firm, attending a networking event, peaked her interest in AHA. She recounted, “I learned about the AHA, I was at this women’s program. It was a networking event. This woman was there, she was there sharing with the ladies about how to go on the website and get on their network so that when they do have certain jobs. You will have an opportunity to bid on it.” [#I-14]

The same business owner reported, “… recently they [AHA] have really been trying to get the word out that we are small-business friendly. Please sign up so that when these projects come open you will at least have an opportunity to know about them, bid on them if it is something you are interested in …. It seems they are trying to be more proactive with that.” [#I-14]
An African American female co-owner of a minority-owned development firm reported that the firm knew that the AHA had a HUD grant and her business, along with a firm out of [state], came up with a plan for implementation. They submitted a plan that laid out their vision … and were selected.” [#DI-2]

The non-Hispanic white principal of a specialty consulting firm reported that a former principal had developed a relationship with AHA as a non-certified veteran-owned firm. He commented that the “veteran business ownership probably bought him [the former principal] into some better status as far as procuring work.” [#I-2]

The African American female owner of a DBE-certified goods firm reported that she sells goods that are used on construction projects; and therefore, she looked into working with AHA. [#I-11]

An African American owner of a DBE- and MBE-certified development firm decided to pursue opportunities with AHA because he thought most developers working with AHA were “old.” [#DI-3]

A few business owners having had experience with AHA assignments as subs to a prime contractor or prime consultant, then worked directly with AHA. These included:

- The majority owner of a specialty consulting firm reported, “I arrived at AHA because I was an employee of [named firm that was working with AHA]. But when I went independent in 2007, I continued to work as a subcontractor for [named firm] and eventually took over [specified management services] directly.” [#I-7]

- The African American owner of an MBE- and WBE-certified specialty consulting firm reported that she was a subcontractor to another firm and then remained on the AHA project independently afterward. [#I-4]

- The representative of an African American-owned development firm reported that the firm inherited an AHA contract upon starting the job. [#DI-1]

One business owner had previous experience as an employee with AHA, then returned to work with them as a contractor. For example, the African American female representative of a minority-owned construction firm reported that her husband had worked for AHA as an employee and that experience led him to pursue opportunities with AHA property managers. [#I-3]

**Challenges learning about opportunities to work with AHA property managers and/or developers.** Many business owners and representatives reported challenges. Very few reported not facing any obstacles when seeking opportunities with AHA.
Many business owners reported challenges to learning about contract opportunities with AHA. For instance, some identified ineffective communications regarding opportunities for work, paperwork, limited relevant work and other challenges:

- A representative of an African American minority-owned IT firm reported, “I had no idea that those contracts were available. Yes. I’m very interested in doing some contracts with AHA, that would be a great expansion to my business.” [#S-227]

- The representative of a white woman-owned A&E firm expressed, “I don’t know where the procurement is [at AHA].” [#S-126]

- An African American owner of an MBE- and WBE-certified specialty consulting firm reported that AHA and the developers should communicate more with small firms that have previously worked with AHA and make them aware of opportunities. [#I-4]

- The African American female owner of a contracting firm reported that previously property managers would send notices of bids and “sometimes you got them and sometimes you didn’t ….” She added that she tried to get in touch with one and never received a call back. She said, “They don’t realize that it’s still government-funded … it should be open to bid.” [#I-6]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported that he recalled calling AHA multiple times and never hearing back. He stated that it is hard to hear about contracts, which he says are not advertised on his RFP subscription service from AHA. [#I-9]

- The African American female owner of a DBE-certified goods firm reported that the application process was confusing and she could not reach people at the Authority. She commented that she still does not know, two-years later, if she is a registered vendor. [#I-11]

- When asked about challenges learning about AHA opportunities, the African American owner of a specialty services firm commented that, “Getting information, whether it was on the question and answer page. I don’t think it was very accurate.” [#I-24]

- An African American owner of a services firm reported that there is a lot to read to get a contract with AHA and being in the field, reading is a challenge for him. [#I-19]

- The African American owner of an MBE-certified IT-related firm commented that he is registered with AHA and searches the websites for job postings. He reported that his opportunities to bid are limited because of the lack of relevant jobs AHA posts. [#I-21]

The same business owner reported, “I don’t think they have anything [work] that has to do with Information Technology … I go to the website all the time and there is nothing for me to bid for. I know they have studies going on all the time that have to do with housing prices and appraisals, but they must give it to their own people.” [#I-21]
A female African American owner of a DBE-certified specialty services firm reported, “When you talk to people, it’s very ‘cliquey’ ….” She added that she is concerned she will not be considered [for work with AHA developers or managers] because she is Section 8. [#I-12]

The African American owner of an MBE-certified specialty contracting firm reported, “Other than getting involved with the bids, which is the biggest thing, we do not know what to expect if we are not able to participate.” [#I-23]

His partner added, “I know for a fact that we were told we would receive information for opportunities … but we do not receive those emails ….” [#I-23a]

The female African American representative of a minority contractors’ trade organization also reported negatively on AHA communications and follow-through. She indicated that AHA reached out to her organization, requested their member information and promised that they would provide their prequalification form for her review and dissemination to her members. She said, “That never happened.” [#ORG-3]

Only a few business owners reported being entirely comfortable with AHA’s process for learning about contracting, consulting or vending opportunities. [e.g., #I-5, #I-5a] For instance, the African American female co-owner of a minority-owned development firm reported no challenges learning about opportunities with AHA because “everything is so public and you can just watch their website.” [#DI-2]

Pros and cons of working with AHA or public housing authority managers and/or developers. Some business owners and representatives reported their experiences working with AHA and other public housing authority managers and/or developers.

Some interviewees expressed frustration, when working with AHA or other public housing authority entities. Examples included:

- An African American owner of a DBE- and SBE-certified construction firm commented, “It was not great. Some were good, some weren’t.” [#I-8]

- The Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported, regarding working with AHA, “We had to call and call and call.” [#I-9]

- One Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented, “[AHA is a] highly demanding client …. I’m not putting it as a negative, I’m just saying they were a demanding client.” [#I-5]

- The African American owner of an MBE- and WBE-certified specialty consulting firm reported that working with AHA was a positive experience while working in the housing programming. However, she added that when she approached the property managers for work they did not have an interest, which she found “disappointing.” [#I-4]
A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported that contracts are difficult to find; and this affects other small firms as well as his firm. [#I-9]

Some other business owners reported positively when having long-term relationships with AHA and area property managers. [e.g., #A1-6a, #A1-17] These businesses included:

- A non-Hispanic white principal of a specialty consulting firm commented that working with AHA is “great” and that the agency pays on time. [#I-2]

- The African American female representative of a minority-owned construction firm reported that their experience with an AHA property management firm has been good because there are large jobs that go out to bid. She added that the property management firm awards small jobs via “relationships” and that payment is timely. [#I-3]

- The African American owner of an MBE-certified transportation related firm reported, “It’s been real[ly] good working with the AHA. I have been working with the AHA about 17 years off and on. Once I sign a contract with them, wherever their needs are, I never have had any problem with being paid or, when they send me a schedule to meet, they do not cancel at the last minute. It always goes through. I enjoy working with people like that.” [#I-18]

- The African American owner of a specialty contracting firm reported that the property management firm that he works for is “awesome … good and they pay on time.” [#I-1]

Barriers faced by businesses, in general, when working with AHA or public housing authority managers and/or developers. Many business representatives described barriers they and others faced.

Many businesses identified barriers that made it more difficult to work with public housing authorities and AHA. For instance, barriers included too many regulations and time-consuming steps, restrictive bidding and reporting specifications, and others:

- The African American female representative of a minority-owned construction firm commented, “It’s so regulated … it takes a lot longer to incubate these deals … and that just means a lot more cost of overhead to get to the profit side.” [#DI-2]

- The African American owner of a DBE- and MBE-certified development firm reported, “It takes too long to do the deal [with AHA].” [#DI-3]

- The African American owner of a HUD- and SBE-certified specialty services firm reported that there have been instances where AHA engaged in a practice, which he found to be “exclusionary” and “discouraging.” He commented that he was working on a proposal, but that the way it was specified required the bidder to get [a specific product] from a provider that already had the necessary product. He found this problematic on multiple fronts … bidders with better relationships with the suppliers would be able to leverage … for [a] better price ….” He stated that in the RFP it stated
that AHA “reserved the right” to not award the bid. He found this bid, and this practice, to be “collusive.” [#I-25]

- The representative of an African American owned development firm reported that HUD and AHA reporting requirements could be prohibitive when bidding. He remarked, “We have to take them [smaller firms] by the hand sometimes …. They’re fine meeting the offer package requirements [E-verify, non-collusive affidavits] but when it comes to certified payroll and some closeout documents for them to get … final payment plus retainage … we have to walk them through several times so that they understand the requirements.” He added, “… and assist them in how they’re supposed to complete your certified payroll form and what you are doing when you complete it.” That is the “majority of the reason that contractors refuse to bid.” [#DI-1]

- The African American female representative of a minority-owned construction firm reported that the bidding process causes challenges when all a public housing authority wants is a “quote” because they really plan to give the job to another firm. She added that her husband is often called to correct a job performed poorly by the low-bidder. [#I-3]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm commented, “No. There were requirements for the work that were more than what we would expect from other clients … I think that was only because they were very specific about what they wanted.” [AI-5a]

- The African American female owner of a DBE-certified goods firm reported that not understanding the process and not knowing that the opportunity exists causes barriers. [#I-11]

Many business owners and representatives reported that requirements for bonding, insurance and issues with prompt payment and prequalification created barriers for firms seeking work with AHA or public housing authority managers and/or developers. [e.g., #A1-6, #I-8, #I-12] These interviewees noted that small businesses experienced these barriers even more so:

- The African American female representative of a minority-owned contracting firm reported that high performance bonds could be a problem. She said, “A half-million-dollar job might want $50,000 up front.” She remarked that these issues are “universal to small firms.” [#I-6a]

- A representative of a majority-owned professional services department reported issues with prompt payment, “If it’s 90 to 100 days … that’s a problem.” [#S-120]

- The African American female owner of an MBE-certified specialty contracting firm commented that insurance requirements, for AHA and others, could be challenging since prices are “exorbitant.” [#I-20]
The African American owner of a DBE- and SBE-certified construction firm reported that insurance requirements are “ridiculous.” He stated that the AHA wanted him to obtain umbrella insurance and “wanted more coverage than the federal government did” and “additional insured for every building” rather than adding the AHA as a whole as an additional insured entity. [#I-8]

The African American owner of a services firm commented, “They pay terrible. 30, 60, 90 [days] you are waiting on your money. The managers are great, but they only have so much control …. [It is] the biggest challenge. If you don’t keep something in the pipeline with them, it’s going to be a long time before you see it ….” [#I-19]

Regarding bidding as a small firm, the representative of an African American male-owned development firm stated, “It’s a combination of size of firms … traditionally there are fairly large insurance requirements which some of your smaller vendors do not meet … to cover both the managing agent and AHA.” [#DI-1]

The same representative of an African American male-owned development firm commented, “It is difficult, if not impossible, to get contractors paid in 30 days. There is an extensive process of filing paperwork on the contractor’s end, review by the managing agent, review by AHA, and approval and processing by AHA that can take up to five weeks depending on how long it takes contractors to get the correct and accurate paperwork to [the managing agent]. Smaller companies get tapped out on their expendable cash or credit lines and there’s nothing I can do to get your money any faster.” [#DI-1]

The representative of an African American minority-owned business reported, “Prequalifications keep growing and [there is] too much paperwork.” [#S-5]

A small number of interviewees indicated no barriers when working with AHA or public housing authority managers and/or developers. [e.g., #I-4, #I-7, #I-17, #I-18]

**Barriers faced by minority- and women-owned firms when working with AHA or public housing authority managers and/or developers.** Some business owners and representatives described barriers specifically faced by women- and minority-owned businesses while working with AHA and others. These included:

- When asked about barriers faced by minority- and women-owned businesses, the African American owner of a DBE- and MBE-certified development firm reported, “If you do not demand diversity … there is not going to be [any].” [#DI-3]

- The African American owner of a DBE- and MBE-certified development firm commented that the lack of minority usage goals associated with AHA procurement practices supported primes working without utilizing minority firms. [#DI-3]
When AHA went to private management, the African American owner of a contracting firm reported that the firm’s “bulk load” of work dropped by 50 percent. He explained that property management firms brought their own contractors in and “that meant that minority participation … went out the window.” [#I-6]

The African American MBE-certified general contractor and consultant remarked that bonding for MWBEs is a barrier to working with AHA because it limits opportunity for firms to be general contractors, when they do not have the ability to secure the required bonding. He added that he knew of examples in public agency contracting where a firm was not required to secure bonding as long as it met certain other standards. [#I-10]

The African American owner of an MBE- and WBE-certified firm commented that a lack of transparency regarding minority- and woman-owned firms and not “knowing what’s going on” in terms of contracts and bids is challenging. [#I-4]

The African American owner of a specialty contracting firm perceived certification as a barrier. He reported that majority firms he tried to do work with wanted minority-owned firms to be certified. [#I-1]

A non-Hispanic white principal of a specialty consulting firm indicated that, as evidence of existing barriers specific to women working with AHA, there are “few women” in the housing industry in Atlanta. [#I-2]

Some business representative reported no knowledge of such barriers. [e.g., #I-7]

Protocols for procurement and contract selection employed by AHA and property managers and developers in Atlanta. Interviewees were asked to discuss the contract selection process and protocols that property managers and developers implemented, and if they had any suggestions for improvements. Others discussed their methods for outreach to small and minority- and women-owned businesses.

Several business owners and representatives reported having issues with exclusivity and unfair practices in contract selection executed by AHA and property managers and developers in Atlanta. These comments included:

- The African American owner of an MBE- and WBE-certified specialty consulting firm reported that, “Everyone should be invited to the opportunities that are there, without bias … we all have bias … if they were to just be more inclusive.” [#I-4]

  The same business owner added that she does not probe into the reasons behind rejections, but she can ‘speculate.’ [#I-4]

- The African American owner of a DBE- and SBE-certified construction firm commented, “Make the insurance policy thing fairer and ‘share the wealth’ … give us an opportunity.” [#I-8]
The Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported, “If they are fair and open, open in the sense that they consider ‘each’ and ‘every’ one of them, and of course they can consider the bottom line if the price is right. [Many] times, they have decided ‘who’ to give orders … that is not fair. I think it would help small businesses so they don’t waste their time.” [#I-9]

A number of business owners and representatives, that had issues with the contract selection and procurement practices and protocols, recommended strategies for improvement. For instance:

- The African American female owner of a DBE-certified goods firm remarked that the people who are making the decision should be very clear about companies they would like to do business with so that people have a “fair shot.” They should say, “This is what we’re looking for” and give instruction on how to become qualified. [#I-11]

- The female African American owner of a DBE-certified specialty services firm reported, “It would be nice to be able to place a bid and know that no one has to know that you’re on Section 8 when you go in.” She added that she would love to have some training on how to place a bid. [#I-12]

- The female African American specialty contractor remarked, “I think just [related] to the relationship, let us know what you need, even if you don’t know what you need, let us know you don’t know what you need. Just open up the conversation …. If you have a need and you see a vendor in your system, reach out to us. Ask us some questions. I would say from the AHA perspective, qualify us. Ask us if we know our industry … if we do then give us a shot. But you have to be the one to open up that communication ….” [#I-17]

- The African American MBE-certified general contractor and consultant remarked that a lot of agencies have annual procurement opportunities meetings where contractors can meet purchasing officers and directors, and describe their services as well as resolving issues with application process “and walk through the steps.” He indicated not knowing if AHA has had annual procurement opportunity sessions but “it would improve services.” [#I-10]

A representative of a white woman-owned IT-related company expressed that there is little “contract price oversight.” She indicated that she sees government contracts awarded to bids too low to get the job done and to bids that are “over bid.” She reported, “We don’t get a lot of contracts because we do accurate bids.” [#S-31]

A majority owner of a specialty consulting firm reported on a canceled bid and another bid never awarded, but remained positive on the overall process. For example, he said, “I’ve had the opportunity to bid … respond to two RFP’s and even though one was canceled and the other was not awarded, there was nothing problematic about the process that I could discern.” [#I-7]
Property managers, developers and others described the methods of selecting contractors, vendors, consultants and suppliers to work on public housing properties or developments for the major types of work they contract for on public housing projects. [e.g., #DI-1, #DI-2] For example:

- The representative of an African American male-owned development firm reported, “It’s harder and harder to get some of the smaller, minority-owned (firms) to bid.” He added that that is why they reach out to organizations like the Georgia Black Constructors Association, that post procurement packages and email their membership. [#DI-1]

  The same business representative said, “We have lots of small projects and I want to get my vendor database even larger for minority- and woman-owned firms. We had a few that hit all of the checks, woman-owned and minority, and their bid package was good and they bid two, three or four for us but did not win them because of the evaluation criteria. Because of that, they stopped bidding for us, because they did not win. Which I understand … but we provided, here is exactly how you are being evaluated. It’s not a mystery.” [#DI-1]

Many developers, project managers and others first tapped a pool of contractors or subcontractors they had history with only expanding the search, when required. These businesses comments included:

- An African American owner of a DBE- and MBE-certified development firm commented, “… first I go to ‘my pool of resources’ to see who can execute … if someone cannot execute … I go outside of my pool. It is going to be based off the experience and the people I have been working with.” [#DI-3]

- The Hispanic American female co-owner of a minority- and women-owned specialty consulting firm reported that they hire subcontractors with whom they have worked or are referred by others they know. She commented, “It depends on the project and the scale and scope of the needs” [#I-5a]

- The African American owner of a specialty contracting firm reported that he hires subcontractors with whom he has a prior relationship. [#I-1]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm indicated that he subcontracts … services to those with whom he has a prior relationship. [AI-9]

- An African American female president of a woman-owned certified specialty contracting firm reported, “I’m part of the [specified] association … ‘everybody knows everybody’ … I know certain people who work as subcontractors or have their own company. Like all they do are installations … so I’ll tap them to do some of my work.” [#I-14]
- The African American owner of a contracting firm reported that subs are hired if they are licensed, insured and have three references. He added that some subs are referred to him, but “a lot of them started up with me” and they have a standing relationship. [#I-6]

- An African American owner of a DBE- and SBE-certified construction firm commented, “I vet my guys.” He added that he ensures that there is a project manager and superintendent from his firm to oversee their work. He finds firms through his “networks and relationships”; they are typically firms he has used in the past. [#I-8]

- The African American female representative of a minority-owned construction firm reported that they are not required to go through a full, HUD, formal bidding process. They have a civil engineer they would use every single time if they could. “He knows the city, he thinks like a developer, his price is right … that’s who we pick.” [#DI-2]

- A majority owner of a specialty consulting firm reported that he originally found subs through industry associations. He now has “a couple of local contractors” referred to him ten years ago that he has utilized ever since. He added, “Frankly, it has been rare lately that I’ve had to reach out for any new talent or vendors. “I've had the same crew for a long, long time and I arrived at them through referrals.” [#I-7]

Some businesses hiring contractors or subcontractors described the outreach methods they used to secure contractors and subcontractors, that were new to them. For instance:

- The African American MBE-certified general contractor and consultant remarked that he would contact a number of people and reach out, look in the phone book and google different trades. If the required work required more specialty, he looked for licensed subcontractors with good references. [#I-10]

- The non-Hispanic white principal of a specialty consulting firm reported that his firm rarely hires subcontractors, but when they do, the company hires subs with special experience [#I-2]

- The African American female representative of a minority-owned construction firm reported that on infrastructure work they have to do a competitive bid. It is governed by the source of funds; there is a public bid process for infrastructure work. [#DI-2]

- The African American female representative of a minority-owned construction firm reported that the firm hires subs with special expertise. [#I-3]

- A representative of an African American male-owned development firm reported that his firm first searches for Section 3 firms that can complete the work. He added that his firm attends trade shows and symposiums to gather additional MWBE and Section 3 businesses. [#DI-1]
He continued that the firm’s practices are “not necessarily” low bid. “Cost factors are always going to be a driving force … I establish an internal cost estimate, and we do the standard bell curve … if you are within 10 percent, high or low, you are a qualified vendor for us. We do not necessarily go low bid. I don’t want to ever go low bid” [#DI-1]

The same business representative added, “In our evaluation criteria I have a section that is solely devoted to how you are going to be evaluated for this project” with required paperwork [non-collusive affidavit, etc.].” [#DI-1]

He added, “I hold an optional pre-bid meeting where I go over the scope of work for this project” and will sometimes host it on-site, and allow all firms interested in bidding to come to see the site after the meeting. At the pre-bid, he also goes over all the required documentation that needs to be completed and notarized and goes through “step-by-step” how they are going to be evaluated. No contractor is allowed to contact the interviewee after the pre-bid meeting and any questions are responded to as an addendum made available to all bidders. Unsuccessful bidders may request to see evaluation scores and review with the managing agent “to show there is no favoritism.” He added that he tries to make it “logical and fair.” “We get a lot of participation that way.” The evaluation team is made up of five individuals. [#DI-1]

This same representative added that the firm would sometimes operate as an “umbrella firm” and bring in firms with specific experience, which allowed smaller companies to bid with work that may otherwise be prohibitive because of the paperwork and insurance requirements. [#DI-1]

**Efforts to include MBES and WBEs in public housing authority work or work in general.** Some business representatives reported making efforts to hire minorities and women.

A number of business owners and representatives conveyed that they had made efforts to include minority- and women-owned businesses in work. [e.g., #I-14, #I-16, #I-23, #I-25, #DI-3]

Comments from the in-depth interviews included:

- An African American owner of an MBE- and WBE-certified firm reported that she makes an effort to bring on diverse subcontractors and train them, because some primes require it, and she prefers to have diverse people working with her firm. [#I-4]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm reported that he does make an explicit effort. His long-time technician is a minority but he “never looked at it that way, if they are qualified and they want to work, we’ll give the work to anybody.” [#I-9]

- The African American MBE-certified general contractor and consultant remarked that he has an all-African American staff and works with MBES, WBEs and majority firms. [#I-10]
A representative of an African American male-owned development firm reported, “Our procurements are fairly straightforward. If it is a large one we advertise to follow the HUD guidelines in “AJC.com” and post at multiple different organizations such as the Georgia Black Constructors Association. We have attempted but have not had much success reaching into the Hispanic community.” He added, “I actually met representatives from the Hispanic Chamber of Commerce for the City of Atlanta and gave them information and we did provide them different offer requests for procurement packages but did not receive any response from any of their members and they did not give us the member list to be able to reach directly to them ….” [#DI-1]

The same business representative remarked, “I want to be able to give minority- and woman-owned businesses a fair chance to get work, because that’s how they make their living.” [#DI-1]

The Hispanic American female co-owner of a minority- and women-owned specialty consulting firm commented, “I think we prefer minorities but we do everybody, as long as they’re doing a good job.” [AI-5]

An African American owner of a DBE- and SBE-certified construction firm reported, “If I have to [include MWBEs] … it’s not required for AHA.” He stated that he has “a lot of mix anyway” in his employees and subcontractors, meaning that his team is diverse. He also recalled working with Hispanic and women-owned businesses. [#I-8]

Some interviewees reported that race or gender did not factor into their decision-making, when including a contractor or subcontractor in their work. For example:

The African American owner of a specialty contracting firm reported that he hires subcontractors based on their capabilities and race or gender does not factor into his decisions to hire subs. He said, “I work with anyone, no matter the race or gender.” [#I-1]

The non-Hispanic white principal of a specialty consulting firm commented that MBE or DBE certifications or ownership do not influence their selection of subcontractors. He said, “We work with good people. It doesn’t matter who they are or what they are.” [#I-2]

Challenges when working with minority- or woman-owned businesses. Some interviewees expressed challenges they faced while others expressed no challenges.

Some interviewees reported issues related to limitations in capacity, experience, financing, bonding and insurance, when engaging minority- and women-owned businesses, and if and how they addressed them. These comments included:

An African American female representative of a minority-owned construction firm reported that although the firm makes an effort to include minority and women subs, “it gets back to … if you put an RFP out and you get responses so it’s the dollars that drives it often, are they bondable or not, and do they have the specific experience in that
scope of work?” She added that often, they do not get many bids in some scopes from minority contractors, and when they do sometimes, the cost of services is “not competitive.” She does not know why the cost models would be different, but indicated that “it’s hard to justify paying a premium” just to hire a minority, small, or woman-owned business “unless that is a requirement” which would “justify asking a public agency to spend ‘x’ amount of dollars more than they otherwise could have for the same work.” [#DI-2]

- A representative of an African American male-owned development firm reported that they had a few minority-owned firms interested in a concrete project [that required performance, payment and bid bonding] because it exceeded $100,000. He said, “We had a lot of people that communicated back to us that they were not prepared to bond.” The firm’s response was to revamp the bid bond portion where they could take certified funds, which were returned after unsuccessful proposal “so they weren’t out money just to bid … if they win, it just becomes part of the contract.” I know that’s challenging in this economy because you have to be very aggressive … bid on very tight margins. It is tough out there. This is not 6, 7, 8 years ago where there was so much construction going on all around the city that a contractor could keep all of their crews working full time. Now they have to be very aggressive in their bidding.” [#DI-1]

He added, “MWBE firms don’t always get certified, so they are difficult to find.” [#DI-1]

- The African American MBE-certified general contractor and consultant commented, “A lot of times when you try to reach out and extend a hand, you don’t necessarily come back with quality … not foundation of decision to work with them.” He added that he has to make sure they can do what they say they’re going to do, and can finance the work.” [#I-10]

- The African American owner of a DBE- and MBE-certified development firm described challenges as lack of experience, capacity and exposure to large projects. [#DI-3]

- The African American owner of a contracting firm reported that some subcontractors, not just MWBEs could not make their own payroll so “they want draws before they get to 25 or 50 percent, and some are tardy.” He added that he had to terminate subcontractors in the past because of these difficulties. [#I-6]

- The African American owner of a specialty consulting firm commented, “Qualification, experience … there is a difference though. You can be qualified educationally but still not have the [practical] experience. You can have all the academics and credentials, for example, if you can’t deal with people nobody is going to hire you.” [#I-16]
Several reported that there are no challenges when engaging minority- and women-owned businesses, or that any challenges were not unique to their engagement with minority- and women-owned businesses. For example:

- The Hispanic American female co-owner of a minority- and women-owned specialty consulting firm reported no challenges when hiring minority- or woman-owned subcontractors. She said, “People are people … this industry is very diverse.” [#I-5]

- An African American owner of a DBE- and SBE-certified construction firm commented, “That’s [challenges] with everything … that’s why I have oversight.” He added that the challenges he experiences are global, not specific to his engaging minority- or woman-owned firms. [#I-8]

 Insights on certification (MWBE, SBE, other). Interviewees reported on knowledge of certification programs, ease/difficulty in certification process and usefulness of certification for their firms or others serving as subs.

 Some business owners and representatives reported that their firms had certifications (e.g., MWBE, SBE, other), but had not seen any work as an outcome. For example:

- The African American owner of an MBE- and WBE-certified specialty consulting firm reported that the firm is certified with the City of Atlanta and has been involved in the Georgia Minority Supplier Development Council, but that nothing has come of either affiliation, “From time to time, I’ll show up at a big Georgia event for minorities, but it has never produced anything.” [#I-4]

- The African American owner of a HUD- and SBE-certified specialty services firm reported that certification would be more beneficial if he could see a direct correlation to gaining access to work. [#I-25]

- The African American owner of a contracting firm commented that he has talked to other contractors about certification who have said that it does not open up opportunities for them. He added, “The playing field is still uneven … It’s not about fair play.” [#I-6]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm said certification did not help the business win any bids in the City of Atlanta. [#I-9]

 Several business owners and representatives indicated that they saw no benefit to certifying their firms, or that there was a negative stigma associated with being certified. For instance:

- An African American general contractor reported that he sees no benefit to certification. [#I-22]
The African American owner of a specialty consulting firm commented that he does not believe certification should be necessary for minority- and women-owned businesses seeking opportunities. [#I-16]

The African American owner of a specialty contracting firm reported awareness of certification, but never became certified due to “a pride thing.” He added that he never wanted to build his business based on his “minority status.” [#I-1]

An African American owner of an MBE-certified specialty contracting firm commented that certification is not beneficial to his firm. He added, “I think minority companies in regards to certification … are put in a box … I do not think we are taken as seriously as we should ….” [#I-23]

The African American owner of an MBE-certified IT-related firm reported that the certification process was “very difficult.” He added, “I think it is a barrier that keeps people out.” [AI-21]

A few business owners, who knew about certain certification programs, found it extremely difficult to get certified, chose not to seek any certifications or could not qualify. For example:

- A representative of a white woman-owned A&E firm reported, “We sought certification in the City of Atlanta as a woman-owned business and they made it very, very difficult; [they were] very hard to work with, it discouraged us very much.” [#S-167]

- The majority owner of a specialty consulting firm reported no knowledge of small business certifications, but is familiar with the SBA, however he has “… never engaged them [SBA] directly.” [#I-7]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm report that they are MBE- and WBE-certified in Florida, but that “size and revenue precludes [them]” in the Atlanta Metro area. [#I-5a]

Two business representatives reported “brownie points” as a benefit of having certification, which incentivized bidding on certain projects. These include:

- The African American female president of a woman-owned certified specialty contracting firm commented, “… you have to do more certifications to do business with the City, and you don’t have to be certified to do business, but you get so called ‘brownie points’ and you need all the help you can get to help you get in the door to get contracting.” [#I-14]

- The African American female representative of a minority-owned construction firm reported that they have considered applying for MBE certification because [named property management firm] provides “points” to certified firms on project bids. She added that if she were an officer of the firm, they could use her to pursue WBE status as well. [#I-3]
A representative of a majority-owned professional services firm reported, “Sometimes the local nature, you get extra points on bid. On bids, it’s a very saturated market.” [#S-188]

Many reported that the certification process was “intimidating,” “difficult,” or “overwhelming” and required heavy paperwork and tax information. Comments included:

- An African American CEO of a DBE-, MBE- and SBE-certified specialty services firm reported that certification is an intimidating process with a lot of paperwork. [#I-15]

- The African American MBE-certified general contractor and consultant reported, “[Certification was] difficult, I understand why … in terms of them making sure of legitimacy and minority firm is in full control and managing the day-to-day operations, it has to be difficult …” [#I-10]

- One African American female president of a woman-owned certified specialty contracting firm commented, “The process for many can be overwhelming.” [#I-14]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm said that certification from GDOT was a lot of paperwork but City of Atlanta was easier. [#I-9]

- For the African American owner of an MBE-certified transportation related firm, the process was “beneficial,” but she stated, “I think they ask for just too much paperwork just to get you certified …” [#I-18]

- The African American female owner of a DBE-certified goods firm reported that certifications are similar regarding their paperwork; however, the tax information required is challenging. [#I-11]

- The African American female owner of an MBE-certified specialty contracting firm commented, “When you first start, anything is difficult because they want tax returns … but after that, it’s a smooth ride … but you just have to remember when it expires.” [#I-20]

- The African American MBE-certified general contractor and consultant remarked, “If you are currently certified or have been … it should be an easier step … Georgia wouldn’t acknowledge Iowa.” [#I-10]

- A female African American owner of a DBE-certified specialty services firm reported that the process was lengthy and required a lot of work. [#I-12]

- An African American president of an MBE- and DBE-certified supply firm commented, “It’s a rigorous process. They want your ‘first-born and a blood sample.’ But once you get it, you get to put this ‘beautiful plaque’ on the wall.” [#I-13]
H. Insights Regarding Improving Work with AHA

The study team asked if businesses had any experiences when working with AHA that differed from their experiences when working with other firms or public agencies. Topics included:

- Whether working with AHA differs from working with other firms or public agencies;
- What AHA is doing well, specifically in its minority- and women-owned business practices; and
- How AHA can improve, specifically in its minority- and women-owned business practices and in other ways.

Whether working with AHA differs from working with other firms or public agencies. Many business owners and representatives reported on how working with AHA differed from working with other entities.

For many businesses, AHA work was distinguished by its heavy levels of paperwork, time-consuming certified payroll compliance, slow payment and other issues that made working with AHA more difficult. For instance:

- The representative of an African American-owned development firm commented that there is “more paperwork” when working with AHA. [#DI-1]
  
  The same business representative explained, “[When working with AHA] a company’s back-end burden is fairly large in terms of certified payrolls, etc., which takes a lot of back-office time … there are no million-dollar projects for AHA, so less vendors are willing to “absorb the back-end cost to them.” [#DI-1]

- Work with AHA (and other public agencies) in Atlanta was “time consuming” for an Asian Pacific American minority-owned specialty contracting firm. [#S-101]

- The African American owner of a DBE- and SBE-certified construction firm stated that AHA projects were “managed differently” and the Authority’s payment was slow. He recommended that the “federal prompt payment program,” where small businesses are paid within 14 days, would be a better rule for AHA. He stated, “[It] keeps everybody accountable … nobody’s pay should be held up.” [#I-8]

- The African American owner of a DBE- and SBE-certified construction firm remarked that AHA gives contractors “a hard time.” [#I-8]

  This business owner stated, “There’s a lot [of work] out there, but that’s where agencies like the AHA will suffer, because people will take the path of least resistance.” He went on to report that because AHA gives contractors “a hard time” they will ask, “Why should I go over there [to AHA] when I can get work over here.” [#I-8]
One African American female co-owner of a minority-owned development firm distinguished working with AHA from working with other private sector entities and public agencies. She said that working with AHA “has its pros and cons,” explaining that, with the Authority, there is less income and more time expended than when working in private sector. She added, “The people that are doing this type of work [for AHA], it’s not like you’re rolling in dough and do this for the money. Most of the people that do this and do this well really do have a ‘mission’ behind it … there’s easier ways than real estate development to make money. But, [other ways do] not have the same kind of community impact.” [#DI-2]

The co-owner added that work with AHA results in a “somewhat depressed” cash flow, because “you are not getting market-rate rents for all of the units” although it “costs what it would cost to build a market-rate development … [a firm needs to] balance that out” with other deals that bring in more profit. [#DI-2]

This same co-owner continued that working with AHA also differs from working with other public agencies. She stated that AHA grants access to land in “key locations” in the City, which is “the beauty of it … you do get the opportunity to develop some very important parts of the City.” [#DI-2]

The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm reported that AHA projects are “very different.” Housing Choice Voucher (HCV) management is straightforward but “we don’t have a one size fits all approach”; we ensure that we are “providing the exact thing that our clients need.” [#I-5a]

She added that the firm is involved in the opening of a new affordable multi-family housing outside of Atlanta, which is “very different” from The HCV management program projects, and added that the Chicago Housing Authority (another client) provides staff to run its program. [#I-5a]

A representative of a majority-owned property management business reported, “It is a ‘pain in the butt’ to do business with AHA.” [#S-405]

An African American MBE-certified general contractor and consultant simply stated, “HUD is better [than AHA].” [#I-10]

An African American owner of a DBE- and MBE-certified development firm commented on the lack of mandated minority participation among AHA and other housing authorities, and how that specifically benefited majority-owned business owners post-recession. She stated, “It’s mandated [minority participation in the private sector] in certain areas. The State, the housing authorities do not have [minority participation] mandated ….” [#DI-3]
This business owner explained, “You have public property [in predominantly poor African American communities]. You move everybody out, come back in with developers and spruce it up … For instance, she added, “AHA carried the note, carried the debt on the actual land. In the recession, most developers, home developers were going out of business because your biggest cost was to carry the land even in a down market … If you had to ‘deal’ with AHA, you didn’t have to [go out of business] because you weren’t paying AHA for that land until after the house was built and … sold. You got a ‘white dude’ over there who ‘rides the wave,’ files for bankruptcy, stays in the project, now that the economy has come back around he’s selling houses at $350,000 and above.” [#DI-3]

A few business owners interviewed could not respond with any differences, as they have never had the opportunity to work with AHA or any other public housing authorities. For example:

- The male African American president of an MBE- and DBE-certified supply firm reported, “They [AHA] haven’t spent a dime with me yet, so I don’t know.” [#I-13]

- The African American female president of a woman-owned certified specialty contracting firm reported that she has never secured work with AHA or any public housing authority. [#I-14]

Only a limited number of interviewees reported no differences when working with AHA or when working with other entities. [e.g., #I-7, #I-18]

**What AHA is doing well, specifically in its minority- and women-owned business practices.** Some business owners and representatives gave insights on AHA’s successes.

Some interviewees, that responded, reported positively or could not comment because their experiences with AHA had been limited. For example:

- An African American owner of a DBE- and SBE-certified construction firm commented that the fact that they are doing the disparity study “is a start.” [#I-8]

- A majority owner of a specialty consulting firm reported, “Both [AHA-related] RFP’s had very well-defined scopes and I had no reason to think that they didn’t select a reasonably qualified firm to fill that role … nothing unfair about their RFP process. I was aware of their minority and woman-owned and small criteria. I qualified as small; I couldn’t check either of the other two boxes.” He added that he has no reason to believe that the process was not fair. [#I-7]

- One African American owner of a specialty contracting firm reported that whenever he has had contact, although limited, with AHA staff, they were “nice people.” [#I-1]

- The Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm indicated that their firm does not have enough involvement with AHA to offer an opinion. [#I-5]
A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm said that he has no complaints, he is not aware of “what happens there” because he just supplies products. [#I-9]

One African American female owner of a DBE-certified goods firm responded negatively. She reported that AHA is doing “nothing [well]” regarding women and minority contracting programs. [#I-11]

How AHA can improve, specifically in its minority- and women-owned business practices and in other ways. Interviewees made recommendations for improvements.

Many business owners and representatives made recommendations specifically related to AHA’s minority- and woman-owned business practices. These included:

- The African American owner of a contracting firm suggested, “If it’s still government-funded money, it should be noted that they have to use minority firms ….” He added, “When the private management company comes in, the first thing they do is bring ‘their people’ in, so the minorities that are actually on the government list are void.” [#AI-6]

- An African American owner of a DBE- and SBE-certified construction firm commented that, to be more inclusive, AHA should make itself aware of “who is getting the business and who is not.” [#I-8]

- A Subcontinent Asian American representative of a woman-owned DBE- and MBE-certified supply firm said, “Keep it open and fair and consider small businesses.” [#I-9]

- The African American general contractor remarked that AHA should “reconsider the demographics” of contractors. He reported that opportunities are going to foreign-born minorities and that African Americans are entitled to some of AHA’s projects. [#I-22]

- The African American owner of a specialty consulting firm commented that AHA should award contracts “more frequently.” [#I-16]

- The African American MBE-certified general contractor and consultant remarked that AHA could do a better job with certifications, by adding “more teeth to it” and not having percentage goals or specific language in contract documents regarding good faith efforts. [#I-10A]

- To assist firms, the African American owner of an MBE-certified IT-related firm suggested that public agencies, such as AHA, provide feedback to failed bidders so they can learn about their shortcomings. [#I-21]

- The African American owner of a specialty services firm commented, “[AHA] needs to find ways to bridge the gap. Even for a company like mine, that does not have a previous customer base. Create some type of opportunity where they [MWBEs] can build that [experience]. Whether it is subcontracting, with a firm that wins a bid or there are other opportunities that they may have third-parties involved. Create ways … to
bridge that gap and create ways for companies such as mine to build up their customer base so when there is a larger bid, smaller firms are on record.” [#I-24]

- The African American owner of an MBE-certified specialty contracting firm remarked, “I think the Housing Authority needs to get a staff together and maybe have a ‘Q&A’ [session] to let [minority business owners] know that they are trying to make some changes for minorities so that they can get some of the work. Once that is done they have opened the door for minorities to get more work.” [#I-20]

- The African American president of an MBE- and DBE-certified supply firm commented that AHA should “just think outside the box.” [#I-13]

- The female African American representative of a minority contractors’ trade organization reported that there is not enough oversight of the private management companies to ensure that they are “walking all the way through” the contract compliance process and continuing to reach out for new businesses rather than having a select few businesses on their list that they return to repeatedly. [#ORG-3]

  The same representative said, “I think that they [AHA] have to become actively involved … with the associations themselves. We are partners with the Atlanta Black Chamber of Commerce, we are co-members with the Hispanic Chamber of Commerce …. We try not to just speak the word but ‘walk and do’ … you have to be out there.” [#ORG-3]

Several reported a need for greater transparency in procurement procedures and improved communications over all. For instance:

- The African American CEO of a DBE-, MBE- and SBE-certified specialty services firm recommended, “[AHA should] start by posting jobs … post a job. Post an opportunity. What is the purpose of having the program, if you do not post an opportunity? … There is nothing on their site ….” [#I-15]

- The African American owner of a HUD- and SBE-certified specialty services firm remarked that AHA should be more transparent. He added that AHA should develop a “meaningful” relationship with the community. [#I-25]

- One Hispanic American female co-owner of a minority- and woman-owned specialty consulting firm indicated no barriers when “… the RFPs and information are available in an easy way.” [#I-5]

- A representative of a white woman-owned specialty contracting firm expressed a need for more transparency, “A website for jobs … a better way of doing it, where it’s more available ….” [#S-294]

- The African American owner of an MBE-certified IT-related firm recommended that AHA “reach out, conference and send everybody an email.” [AI-21]
The African American owner of a minority-owned contracting firm reported, “[Property management firms] don’t want the truth.” This firm reported having a fear of being “blackballed.” [#I-6]

Many business owners and representatives wanted to learn more about bidding procedures, process and where to look for bidding opportunities with public agencies such as AHA. Many of the firms that responded were minority-owned and did not know how the request-for-bid or request-for-proposal process worked, or where to find bidding opportunities with AHA and others. [e.g., #S-18, #S-23, #S-55, #S-65, #S-66, #S-205, #S-274] For instance:

- One representative of an African American minority-owned specialty contracting firm explained, “When you’re trying to bid for government bids and contracts, there needs to be more education on the business side to obtain info about how to bid on contracts.” [#S-310]

- A representative of an African American minority-owned professional services business reported, “We don’t know where to look for the opportunities. I would love to [get] help [from] anyone [to] get started in the field.” [#S-193]

- A representative of a white woman-owned legal services firm expressed, “I simply have a lack of knowledge of how to go about it [proposing on work with public agencies and AHA].” [#S-317]

- The representative of a Subcontinent Asian American minority-owned construction firm indicated, “I am unaware of where to look for bidding opportunities, with either contractors or government agencies.” [#S-71]

- A representative of a majority-owned IT-related firm reported, “I think the way we find out about work with AHA can be improved.” [#S-26]

- A representative of a white woman-owned A&E firm reported that not knowing about bidding opportunities challenges her business sometimes. [#S-119]

A number of business owners reported room for improvements in business assistance and other areas, that could improve AHA’s operations. Examples included:

- An African American female owner of a DBE-certified goods firm recommended that AHA develop materials for bidders such as webinars or a tab on their website that says “understanding AHA’s vendor selection process” would be very helpful. She added that she would also like to see a “practical application workshop,” not only a 90-minute workshop. She added, “… but really, this is how you build a proposal, this is how you stand out.” [#I-11]

- One female African American specialty contractor recommended the need for AHA to have a more effective website, “Yeah … cancel that contract with [the firm that] does AHA’s] website. First step, cancel that.” [#I-17]
A representative of an African American minority-owned specialty contracting firm indicated that the biggest issue for a small contractor is being able to find out about bids. There needs to be more education on how to get information on bids and how to bid on available opportunities. [#S-394]

The female African American owner of a DBE-certified specialty services firm recommended that AHA provide training on bidding so that “[her firm] can have a chance.” [#I-12]

A non-Hispanic white principal of a specialty consulting firm recommended that AHA improve their “procurement form” as its “static rate” requirements posed difficulties when calculating the cost of a project. [#I-2]

The representative of a housing industry trade association remarked that AHA should vet companies, make sure they have a good record of accomplishment and comply with all regulations. He said that it is not the association’s job to vet firms for its members. [#ORG-1]