BBC RESEARCH & CONSULTING

2022 Disparity Study

Lexington-Fayette Urban County Government

FINAL REPORT

Final Report

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Lexington-Fayette Urban County Government 2022 Disparity Study

Prepared for
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Table of Contents

Table of Contents

CHAPTER ES.
Executive Summary

The Lexington-Fayette Urban County Government (LFUCG, or the Urban County Government) spends hundreds of millions of dollars in contracts and procurements each year to procure various construction services, professional services, and goods and other services to serve the needs of the residents, visitors, and businesses of Fayette County, Kentucky. LFUCG operates the Minority Business Enterprise Program (MBEP) to encourage the participation of minority- and woman-owned businesses in that work. As part of the program, LFUCG primarily uses *race- and gender-neutral* measures to meet its objectives. Race- and gender-neutral measures are efforts designed to encourage the participation of all businesses in an organization's work, regardless of the race/ethnicity or gender of business owners. In contrast, *race- and gender-conscious* measures are measures specifically designed to encourage the participation of minority- and woman-owned businesses in government work (e.g., goals for minority- and woman-owned business participation on individual contracts). The only race- and gender-conscious measure LFUCG uses is its Bid Bond Assistance Program, in which it waives bid bond requirements for eligible disadvantaged, minority-, and woman-owned businesses that request bond assistance.

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

- The percentage of contract and procurement dollars—including subcontract dollars—LFUCG awarded to minority- and woman-owned businesses during the *study period*, which was defined as July 1, 2016 through June 30, 2021 (i.e., *utilization*); and
- The percentage of contract and procurement dollars minority- and woman-owned businesses might be expected to receive based on the degree to which they are *ready, willing, and able* to perform specific types and sizes of LFUCG prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the MBEP;
- Local marketplace conditions for minorities, women, and minority- and woman-owned businesses; and
- Contracting practices and business assistance programs LFUCG has in place.

LFUCG could use information from the study to help refine its implementation of the MBEP and refine its contract and procurement policies, as well as various program measures, to further encourage the participation of disadvantaged, minority-, and woman-owned businesses in its work.

BBC summarizes key information from the 2022 LFUCG Disparity Study in three parts:

A. Analyses in the Disparity Study;

B. Key Results; and

C. Program Implementation.

A. Analyses in the Disparity Study

BBC examined extensive information related to outcomes for disadvantaged, minority-, and woman-owned businesses and the MBEP:

- The study team conducted an analysis of regulations, case law, and other information to guide methodology for the disparity study. The analysis included a review of legal requirements related to disadvantaged, minority-, and woman-owned business programs, including the MBEP (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities, women, and minority- and woman-owned businesses throughout the *relevant geographic market area (RGMA)*.[1] In addition, the study team collected anecdotal evidence about potential barriers that individuals and businesses face in the local marketplace through in-depth interviews, surveys, public meetings, and focus groups (see Chapters 3 and 4 and Appendices C and D).
- We analyzed the percentage of relevant LFUCG contract and procurement dollars minority- and woman-owned businesses are available to perform. That analysis was based on surveys the study team completed with businesses that work in industries related to the specific types of construction, professional services, and goods and other services contracts and procurements LFUCG awards (see Chapter 6 and Appendix E).
- We analyzed the dollars LFUCG awarded to minority- and woman-owned businesses during the study period on relevant construction, professional services, and goods and other services contracts and procurements (see Chapters 5 and 7).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on construction, professional services, and goods and other services contracts and procurements LFUCG awarded during the study period (see Chapter 8 and Appendix F).

[1] BBC identified the RGMA for LFUCG's construction and professional services work as the *Bluegrass Area Development District*, which comprises Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nicholas, Powell, Scott, and Woodford Counties in Kentucky. We identified the RGMA for LFUCG's goods and other services work as the *Bluegrass Area Development District* plus Boone, Campbell, Grant, Jefferson, Kenton, Oldham, Pendleton, and Shelby Counties in Kentucky.

- We reviewed measures LFUCG uses to encourage the participation of small businesses as well as disadvantaged, minority-, and woman-owned businesses in its contracts and procurements (see Chapter 9).
- BBC provided guidance related to additional program options and potential changes to current contracting practices for LFUCG's consideration (see Chapter 10).

B. Key Results

BBC presents detailed results related to outcomes for minority- and woman-owned businesses in LFUCG work in each section of the report. We summarize key results below, but LFUCG should carefully review detailed results when assessing its efforts to encourage the participation of minority and woman-owned businesses in its work.

- Overall, the availability of minority- and woman-owned businesses for LFUCG work is 16.5 percent, indicating that those businesses might be expected to receive 16.5 percent of the dollars LFUCG awards in construction, professional services, and goods and other services.
- Overall utilization results indicated that LFUCG awarded 12.0 percent of its relevant contract and procurement dollars to minority- and woman-owned businesses during the study period.
- The contract and procurement dollars LFUCG awarded to minority- and woman-owned businesses during the study period were concentrated with relatively few businesses.
- All relevant business groups exhibited substantial disparities across different contract sets, but outcomes varied across contract sets and business groups.
- Quantitative and qualitative analyses of marketplace conditions indicated that certain minority groups and women face barriers related to human capital, financial capital, and business ownership in the local marketplace.
- The MBEP primarily comprises race- and gender-neutral measures, and study results indicated that those measures have not sufficiently addressed disparities for all groups.

Disparity study results, including those presented above, informed the study team's considerations related to program implementation which are summarized below and presented in detail in Chapter 10.

1. Overall availability analysis results. BBC analyzed the availability of minority- and woman-owned businesses for LFUCG prime contracts and subcontracts, which relied on information from surveys the study team conducted with potentially available businesses located in the RGMA as well as information about the contracts and procurements LFUCG awarded during the study period. Figure ES-1 presents availability estimates by relevant business groups for all LFUCG contracts and procurements examined in the study. Overall, the availability of minority- and woman-owned businesses for LFUCG work is 16.5 percent, indicating that those businesses might be expected to receive 16.5 percent of the dollars LFUCG awards in construction, professional services, and goods and other services. Non-Hispanic white woman-owned businesses (11.9%) and Black American-owned businesses (2.3%) exhibited the highest availability among all relevant groups.

Figure ES-1.
Overall availability estimates for all relevant LFUCG work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability
Non-Hispanic white woman-owned	11.9 %
Asian American-owned	0.6
Black American-owned	2.3
Hispanic American-owned	1.2
Native American-owned	0.5
Total Minority-owned	4.6 %
Total Minority- and Woman-owned	**16.5 %**

2. Overall utilization analysis results. BBC measured the participation of minority- and woman-owned businesses in LFUCG contracts and procurements in terms of *utilization*—the percentage of dollars LFUCG awarded to those businesses on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority- and woman-owned businesses in LFUCG work regardless of whether they were certified as minority-owned or woman-owned business enterprises or as disadvantaged business enterprises (DBEs) by certifying agencies. Figure ES-2 presents utilization analysis results by relevant business groups for all LFUCG contracts and procurements examined in the study. As shown in Figure ES-2, LFUCG awarded 12.0 percent of its relevant contract and procurement dollars to minority- and woman-owned businesses during the study period. Woman-owned businesses (8.3%), Black American-owned businesses (1.5%), and Hispanic American-owned businesses (1.2%) exhibited the highest levels of participation.

Figure ES-2.
Utilization analysis results for all relevant LFUCG contracts and procurements

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization
Non-Hispanic white woman-owned	8.3 %
Asian American-owned	0.9
Black American-owned	1.5
Hispanic American-owned	1.2
Native American-owned	0.1
Total Minority-owned	3.7 %
Total Minority- and Woman-owned	**12.0 %**

Further analysis indicated that the contract and procurement dollars LFUCG awarded to minority- and woman-owned businesses during the study period were concentrated with relatively few businesses. LFUCG awarded contract and procurement dollars to 151 different minority- and woman-owned businesses during the study period, and 28 of them (or, 19%) accounted for 75 percent of those dollars.

3. Key disparity analysis results. BBC compared the participation of minority- and woman-owned businesses in LFUCG prime contracts and subcontracts with the percentage of contract dollars one might expect LFUCG to award to those businesses based on their availability for the organization's work. We calculated disparity indices for each relevant business group and for various contract sets by dividing percent utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for

a particular group for a particular contract set (referred to as parity). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a substantial disparity between participation and availability.

a. All contracts and procurements. Figure ES-3 presents disparity indices for all relevant prime contracts and subcontracts LFUCG awarded during the study period. As shown in Figure ES-3, minority- and woman-owned businesses considered together exhibited a disparity index of 73 for contracts and procurements LFUCG awarded during the study period, indicating substantial underutilization. White woman-owned businesses (disparity index of 69), Black American-owned businesses (disparity index of 66), and Native American-owned businesses (disparity index of 20) exhibited substantial disparities for all relevant LFUCG contracts and procurements considered together.

Figure ES-3.
Disparity analysis results for all relevant LFUCG contracts and procurements

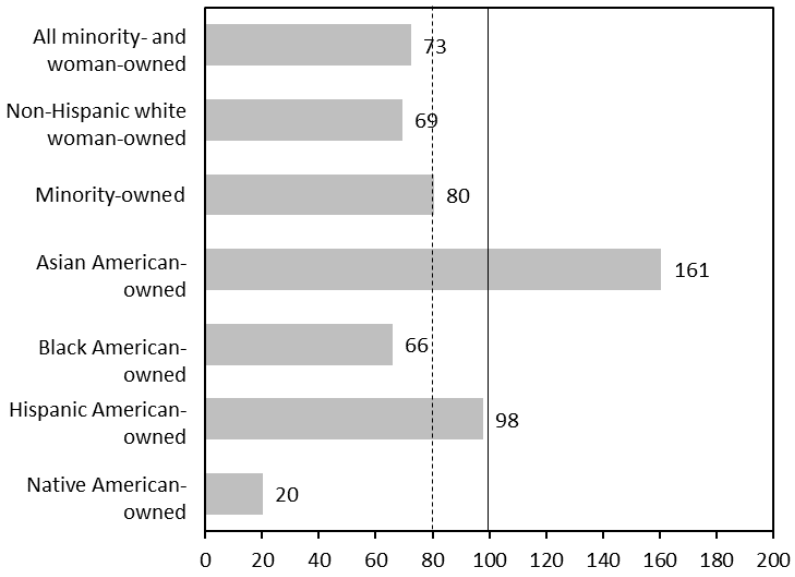
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



b. Contract role. Subcontracts tend to be smaller in size than prime contracts, and thus may be more accessible to small businesses, many of which are minority- and woman-owned businesses, so BBC examined disparity analysis results separately for the prime contracts and subcontracts LFUCG awarded during the study. As shown in Figure ES-4, minority- and woman-owned businesses considered together showed a substantial disparity for LFUCG prime contracts (disparity index of 61) but not for subcontracts (disparity index of 151). Results for relevant business groups differed between prime contracts and subcontracts:

- All business groups showed substantial disparities for prime contracts except Asian American-owned businesses (disparity index of 140).
- Only Native American-owned firms showed a substantial disparity for subcontracts (disparity index of 53).

Figure ES-4.
Disparity analysis results by contract role

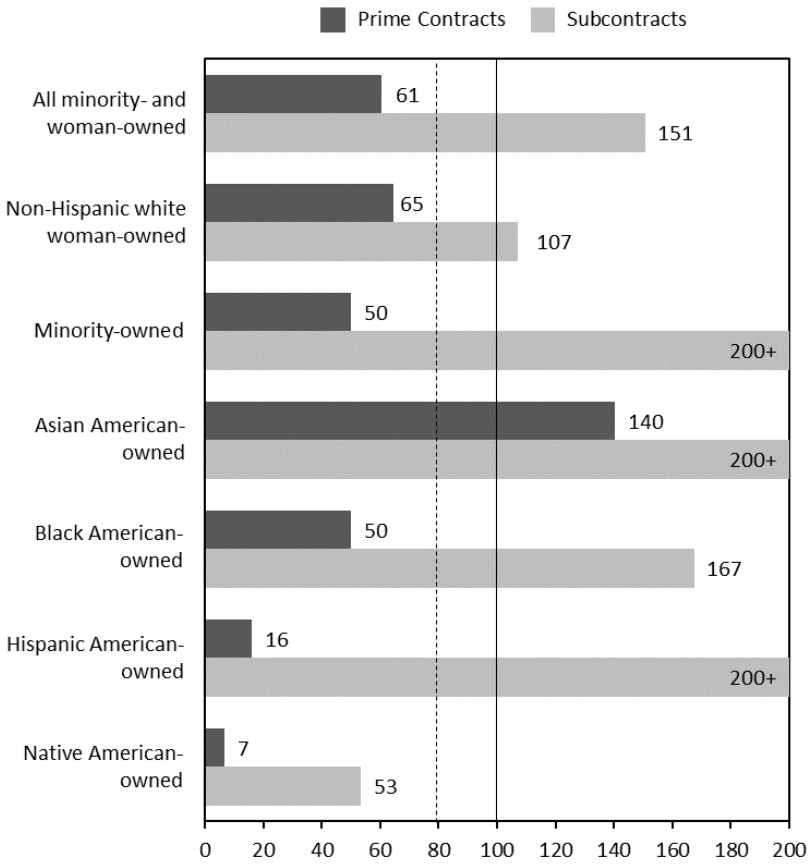
Note:

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

For more detail and results by group, see Figure F-8 and F-9 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



c. Industry. BBC also examined disparity analysis results separately for LFUCG's construction, professional services, and goods and other services work to determine whether disparities between participation and availability differ by work type. As shown in Figure ES-5, minority- and woman-owned businesses considered together exhibited substantial disparities for LFUCG's construction (disparity index of 69), and goods and other services (disparity index of 38) work but not for the organization's professional services work (disparity index of 128). Disparity analysis results differed for relevant business groups across different industries:

- White woman-owned businesses (disparity index of 68), Black American-owned businesses (disparity index of 59), and Native American-owned businesses (disparity index of 24) all showed substantial disparities for construction work.
- Hispanic American-owned (disparity index of 3) and Native American-owned businesses (disparity index of 0) showed substantial disparities for professional services work.
- White woman-owned businesses (disparity index of 45), Asian American-owned businesses (disparity index of 31), Black American-owned businesses (disparity index of 27), Hispanic American-owned businesses (disparity index of 11), and Native American-owned businesses (disparity index of 0) all showed substantial disparities for goods and other services work.

Figure ES-5.
Disparity analysis results by industry

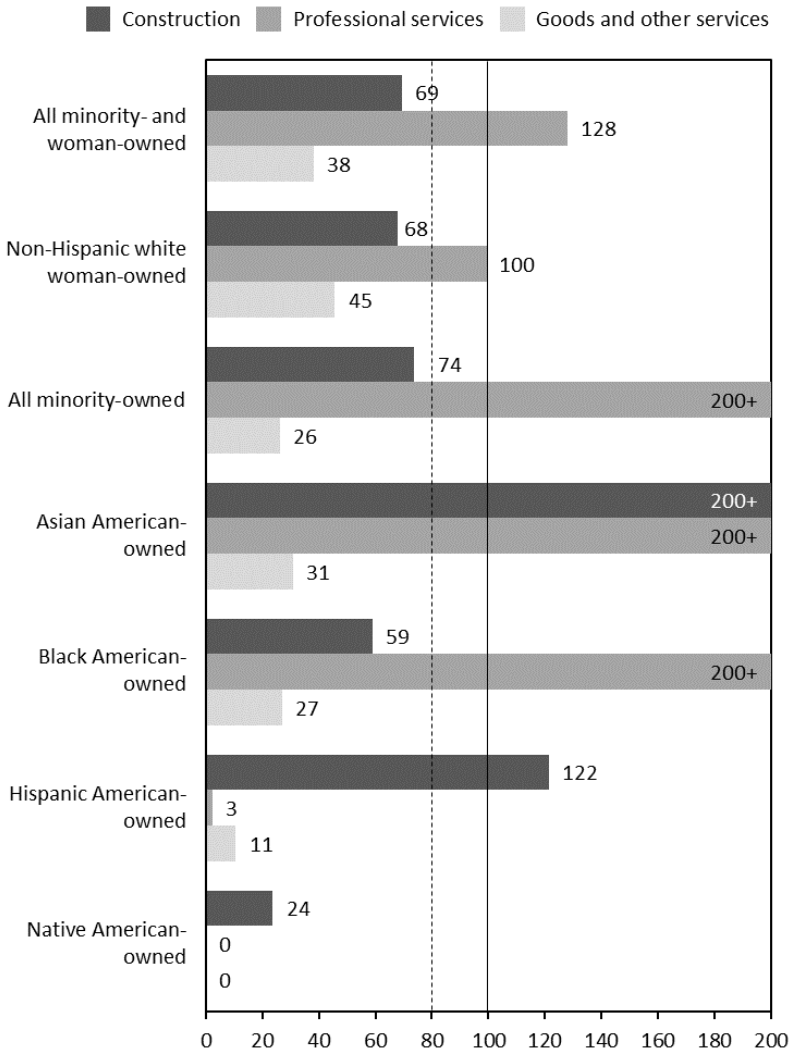
Note:

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

For more detail and results by group, see F-5, F-6, and F-7 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



C. Program Implementation

LFUCG should review study results and other relevant information related to its efforts to encourage the participation of minority- and woman-owned businesses in its work, including its operation of the MBEP. BBC presents key considerations LFUCG should make based on disparity study results. When making those considerations, the organization should assess whether additional resources, changes in internal policy, or changes in state law might be required for implementation. For additional details about program implementation, see Chapter 10.

1. Overall aspirational goal. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to LFUCG in establishing an overall aspirational goal for the participation of minority- and woman-owned business in its contracting and procurement. The availability analysis indicates that minority- and woman-owned businesses are potentially available to compete successfully for 16.5 percent of LFUCG's contracting and procurement dollars, which LFUCG could consider as its *base figure* for its overall aspirational goal. In addition, the disparity study provides information about factors LFUCG should review in considering whether an adjustment to its base figure is

warranted, particularly information about the volume of LFUCG work in which minority- and woman-owned businesses have participated in the past; barriers in the local marketplace related to employment, self-employment, education, training, and unions; barriers in the marketplace related to financing, bonding and insurance; and other relevant information.

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

3.Subcontract minimums. Subcontracts often represent accessible opportunities for minority- and woman-owned businesses to become involved in an organization's contracting and procurement. However, subcontracting appears to account for a relatively small percentage of the total contract and procurement dollars LFUCG awards. To increase subcontract opportunities, the organization could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. For specific types of work where subcontracting opportunities might exist, LFUCG could set a minimum percentage of work to be subcontracted. Prime contractors would have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If LFUCG were to implement such a program, it should include GFEs provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

4. Small business set aside program. Disparity analysis results indicate substantial disparities for most racial/ethnic and gender groups on prime contracts LFUCG awarded during the study period. LFUCG might consider reserving certain small prime contracts exclusively for small business bidding to encourage their participation as prime contractors. In addition to setting aside contracts for small business competition, LFUCG could consider encouraging at least one quote from small businesses for certain projects. LFUCG could also consider reviewing its Pro-Card procurements—which are purchased through a relatively informal process—to identify any potential opportunities it could instead procure through more formal quote or competitive bid processes.

5. New businesses. Disparity study results indicate that a substantial portion of the contract and procurement dollars LFUCG awarded to minority- and woman-owned businesses during the study period went to a relatively small number of businesses. To expand the number of minority- and woman-owned businesses that participate in its work, LFUCG could consider using bid and contract language to encourage prime contractors to partner with subcontractors

and suppliers with which they have never worked in the past. The organization could award evaluation points or price preferences based on the degree to which prime contractors partner with new subcontractors with which they have not previously worked. In addition, LFUCG could consider efforts to expand its base of minority- and woman-owned businesses for small prime contracts, including leveraging information on the businesses BBC contacted as part of the availability analysis and making additional outreach efforts throughout the local marketplace.

6. Prompt payment. As part of in-depth interviews and surveys, several businesses reported difficulties receiving payment in a timely manner on government work, particularly when they work as subcontractors and suppliers. LFUCG should consider establishing prompt payment processes to ensure timely payment to prime contractors and from prime contractors to subcontractors and suppliers, ideally within a specified maximum number of days after the organization has approved invoices. LFUCG should also consider making efforts to enforce those requirements by creating electronic systems to track and confirm subcontractor payments throughout the life of the projects it awards.

7. Data collection. LFUCG maintains comprehensive data on the prime contracts it awards, and those data are generally well-organized and accessible. However, it does not collect comprehensive data on subcontracts. LFUCG should consider collecting comprehensive data on *all* subcontracts, regardless of subcontractors' characteristics or whether they are certified as minority-owned or woman-owned business enterprises or as DBEs. Collecting data on all subcontracts will help ensure LFUCG monitors the participation of minority- and woman-owned businesses in its work accurately and will also help identify additional businesses that could become certified. LFUCG should consider collecting those data as part of bids but also requiring prime contractors to submit data on subcontracts as part of the invoicing process for all contracts and procurements.

8. Subcontractor commitments. LFUCG should consider implementing an electronic system to track subcontract participation on an invoice-by-invoice basis to ensure prime contractors use subcontractors to the full extent of their subcontracts on projects. In addition to tracking subcontractor payments, establishing points of contact between subcontractors and LFUCG to address any underutilization or unauthorized substitutions may help ensure minority- and woman-owned businesses receive the work prime contractors committed to them at the time of bids, quotes, and proposals. Interview and public meeting participants made several additional suggestions to maximize work on subcontracts, including inviting subcontractors to contract negotiation meetings to discuss their expected portions of projects, notifying the entire team when projects have been awarded, and considering prime contractors' past use of subcontractors relative to subcontract commitments as a factor during bid evaluations.

9. Bonding assistance. Small businesses typically receive bonds at higher rates than other businesses, making it more difficult for them to get bonds and compete for larger projects. The LFUCG Procurement Policy requires bid bonds for all construction projects worth more than $50,000 and for all goods and other services work. Projects of that size are relatively accessible to small businesses but bid deposit and bonding requirements can be a substantial barrier. LFUCG does offer a Bid Bond Assistance Program to certified minority- and woman-owned businesses, but awareness of the program among businesses is relatively low. LFUCG should consider efforts to advertise the program better so all eligible businesses can benefit from it. In

addition, LFUCG could consider partnering with local, regional, or statewide financial institutions to encourage standardized bonding rates at more equitable levels.

10. Program manual. LFUCG should consider developing a comprehensive program plan and manual to communicate the MBEP's objectives and the organization's supplier diversity requirements to both internal and external stakeholders. At a minimum, the plan and manual should include information about:

- Program objectives and justification;
- Overall aspirational minority- and woman-owned business goal;
- Monitoring and reporting requirements;
- Race- and gender-neutral measures; and
- Contract-specific goals (if applicable).

CHAPTER 1.
Introduction

Fayette County, Kentucky is located in central Kentucky and is the second-most populous county in the state with approximately 325,000 residents. Its population, geography, and government are coextensive with the City of Lexington, which also serves as the county seat. Each year, the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) spends hundreds of millions of dollars in contracts and procurements to procure various construction services, professional services, and goods and other services to serve the needs of local residents, visitors, and businesses. LFUCG operates the Minority Business Enterprise Program (MBEP) to encourage the participation of minority- and woman-owned businesses in that work.

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

- The percentage of contract and procurement dollars—including subcontract dollars—LFUCG awarded to minority- and woman-owned businesses during the *study period*, which was defined as July 1, 2016 through June 30, 2021 (i.e., *utilization*); and
- The percentage of contract and procurement dollars minority- and woman-owned businesses might be expected to receive based on the degree to which they are *ready, willing, and able* to perform specific types and sizes of LFUCG prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the MBEP;
- Local marketplace conditions for minorities, women, and minority- and woman-owned businesses; and
- Contracting practices and business assistance programs LFUCG has in place.

There are several reasons information from the study is potentially useful to LFUCG:

- The disparity study provides information about whether substantial disparities exist between the participation and availability of minority- and woman-owned businesses for LFUCG contracts and procurements.
- The study identifies barriers minorities, women, and minority- and woman-owned businesses face in the local marketplace that might affect their ability to compete for LFUCG contracts and procurements.
- The study provides an evaluation of how effective various efforts are in encouraging minority- and woman-owned business participation in LFUCG's contracting and procurement.

- The study provides insights into how LFUCG could refine its contracting processes and program measures to better encourage the participation of minority- and woman-owned businesses in its contracting and procurement and help address marketplace barriers.
- An independent review of the participation of minority- and woman-owned businesses is valuable to internal or external groups that may be monitoring LFUCG's contracting and procurement practices.
- Government organizations that have successfully defended programs like the MBEP in court have typically relied on information from disparity studies.

BBC introduces the 2022 Lexington-Fayette Urban County Government (LFUCG) Disparity Study in three parts:

A. Background;

B. Study Scope; and

C. Study Team Members.

A. Background

The MBEP is designed to help diversify the vendors LFUCG uses to provide the construction services, professional services, and goods and other services the City of Lexington and Fayette County require to meet the needs of local residents, visitors, and businesses. Minority- and woman-owned businesses interested in doing business with LFUCG can become certified as such by credible and recognized certifying agencies—including the Kentucky Transportation Cabinet (KYTC), the Commonwealth of Kentucky, Tri-State Minority Supplier Development Council, and the National Women Business Enterprise Council—to benefit from the various efforts LFUCG uses to encourage their participation in its contracts and procurements.

The MBEP utilizes various *race- and gender-neutral* measures to meet its objective of encouraging the participation of minority- and woman-owned businesses in LFUCG's contracting and procurement. Race- and gender-neutral measures are measures designed to encourage the participation of small businesses in an organization's contracting, regardless of the race/ethnicity or gender of business owners. Types of race- and gender-neutral measures included in MBEP are:

- Networking and outreach events;
- Bonding assistance; and
- Technical assistance.

In contrast to race- and gender-neutral measures, *race- and gender-conscious* measures are measures specifically designed to encourage the participation of minority- and woman-owned businesses in government contracting (e.g., goals for minority- and woman-owned business participation on individual contracts or procurements). LFUCG applies an aspirational goal of 10 percent for the participation of minority- and woman-owned businesses to its competitively bid contracts and procurements. Bidders are encouraged to either meet the goal or submit good faith efforts showing they tried to meet the goal but were not able to do so, which LFUCG

reviews. Although bidders are encouraged to meet the 10 percent goal, they are not required to do so as a matter of responsiveness or condition of contract award, and LFUCG does not reject bids for failure to meet the goal or submit good faith efforts.

B. Study Scope

The crux of the disparity study was to examine whether there are any disparities between the participation and availability of minority- and woman-owned businesses on LFUCG contracts and procurements. The study focused on construction, professional services, and goods and other services contracts and procurements the agency awarded between July 1, 2016 and June 30, 2021. Information from the disparity study will help LFUCG continue to encourage the participation of minority- and woman-owned businesses in its contracts and procurements effectively and in a legally defensible manner.

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

a. Minority-owned businesses. The study team focused its analyses on the following minority-owned business groups: Asian American-, Black American-, Hispanic American-, and Native American-owned businesses. The study team's definition of minority-owned businesses included businesses owned by minority men and minority women. For example, the study team grouped results for businesses owned by Black American men with results for businesses owned by Black American women to represent outcomes for Black American-owned businesses in general. The study team considered businesses to be minority-owned based on the known races/ethnicities of business owners, regardless of whether the businesses were certified as such by any credible and recognized certifying agencies.

b. Woman-owned businesses. Because the study team classified minority woman-owned businesses according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *non-Hispanic white woman-owned businesses*.[1] As with minority-owned businesses, the study team considered businesses to be woman-owned based on the known genders of business owners, regardless of whether the businesses were certified as such by any credible and recognized certifying agencies.

c. Minority business enterprises (MBEs) and woman business enterprises (WBEs). In the context of the disparity study, *MBE and WBE* refers specifically to local businesses certified as such by any credible and recognized certifying agencies, including KYTC, the Commonwealth of Kentucky, National Women Business Enterprise Council, and the Tri-State Minority Supplier Development Council. Businesses seeking MBE or WBE certification are required to submit applications to certifying agencies. Applications are available online and require businesses to submit various information, including business names, contact information, and races, ethnicities, and genders of their owners.

[1] For brevity, BBC refers to non-Hispanic white woman-owned businesses as woman-owned businesses throughout the report.

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

e. Majority-owned businesses. The study team considered businesses to be majority-owned if they are businesses owned by *white men*. For certain disparity study analyses, the study team coded each business as minority-, woman-, or majority-owned.

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

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

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

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

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

e. Utilization analysis. BBC also analyzed contract and procurement dollars LFUCG awarded to minority- and woman-businesses during the study period, including information about associated subcontracts. Results from the utilization analysis are presented in **Chapter 7**.

f. Disparity analysis. BBC assessed whether there were any disparities between the participation and availability of minority- and woman-owned businesses on contracts and procurements LFUCG awarded during the study period. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 8** and **Appendix F**.

g. Program measures. The study team reviewed measures LFUCG uses to encourage the participation of small businesses as well as minority- and woman-owned businesses in its contracts and procurements. That information is presented in **Chapter 9**.

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

C. Study Team Members

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

1. BBC. BBC is a disparity study and economic research firm based in Denver, Colorado. BBC had overall responsibility for the study and performed all of the quantitative and qualitative analyses.

2. EHI Consultants. EHI Consultants is an MBE-certified Black American-owned urban planning and engineering firm based in Lexington, Kentucky. The firm conducted in-depth interviews with business owners and trade association representatives and helped review program measures agencies in the region use to encourage the participation of minority- and woman-owned businesses in their contracting and procurement.

3. Abundant Living. Abundant Living is an MBE-certified Black American woman-owned diversity psychological and coaching services firm based in Lexington, Kentucky. The firm conducted in-depth interviews with business owners and trade association representatives.

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

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

CHAPTER 2.
Legal Analysis

As part of the Minority Business Enterprise Program (MBEP), the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) uses various efforts to encourage the participation of small businesses, including many minority- and woman-owned businesses, in the contracts and procurements it awards. Virtually all of those efforts are *race- and gender-neutral* in design. Race- and gender-neutral measures are measures designed to encourage the participation of small businesses in an organization's contracting regardless of the race/ethnicity or gender of businesses' owners. In contrast, *race- and gender-conscious* measures are measures designed specifically to encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned business on individual contracts or procurements). The only race- and gender-conscious measure LFUCG uses is its Bid Bond Assistance Program, in which it waives bid bond requirements for eligible minority- and woman-owned businesses that request bond assistance.

It is instructive to review information related to the legal standards governing the use of both race- and gender-neutral and race- and gender-conscious measures. BBC Research & Consulting (BBC) summarizes legal information related to the use of these measures in three parts:

A. Legal Standards for Different Types of Measures;

B. Seminal Court Decisions; and

C. Addressing Requirements.

Appendix B presents additional details about the above topics.

A. Legal Standards for Different Types of Measures

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

1. Programs that rely only on race- and gender-neutral measures. Government agencies that implement minority- and woman-owned business programs that rely only on race- and gender-neutral measures must show a *rational basis* for their programs. Showing a rational basis requires agencies to demonstrate their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of programs that could impinge on the rights of others. When courts review programs based on a rational basis, only blatant violations typically lead to programs being deemed unconstitutional.

2. Programs that include race- and gender-conscious measures. Minority- and woman-owned business programs that also include race- and gender-conscious measures must meet the

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

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

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

- The necessity of such measures and the efficacy of alternative race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waiver and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.[3]

B. Seminal Court Decisions

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

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

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

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

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

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

- Agencies' use of race-conscious measures must meet the strict scrutiny standard of constitutional review—that is, in remedying any identified discrimination, they must establish a *compelling governmental interest* to do so and must ensure the use of such measures is *narrowly tailored*.
- In assessing availability, agencies must account for various characteristics of the prime contracts and subcontracts they award and the degree to which local businesses are *ready, willing, and able* to perform that work.
- If agencies show *statistical disparities* between the percentage of dollars they awarded to minority-owned businesses and the percentage of dollars those businesses might be available to perform, then *inferences of discrimination* could exist, justifying the use of narrowly-tailored race-conscious measures.

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

Many subsequent decisions in district courts and federal courts have expanded requirements for the use of race- and gender-conscious measures as part of minority- and woman-owned business programs, including several cases in the Sixth Circuit, the jurisdiction in which LFUCG operates. Those and other relevant court decisions are described in detail in Appendix B.

C. Addressing Requirements

Many government agencies have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring their use of race- and gender-conscious measures is narrowly tailored. Various aspects of the 2022 Lexington-Fayette Urban County Government Disparity Study specifically address requirements the United States Supreme Court and other federal courts have established around minority- and woman-owned business programs and race- and gender-conscious measures:

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

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

- The study includes extensive econometric analyses and analyses of anecdotal evidence to assess whether any discrimination exists for minorities, women, and minority- and woman-owned businesses in the RGMA and whether LFUCG is actively or passively participating in that discrimination.
- The study accounts for various characteristics of the prime contracts and subcontracts LFUCG awards as well as specific characteristics of businesses working in the RGMA, resulting in estimates of the degree to which minority- and woman-owned businesses are *ready, willing, and able* to perform that work.
- The study includes assessments of whether minority- and woman-owned businesses exhibit substantial statistical disparities between participation and availability for LFUCG's contracts and procurements, indicating whether any inferences of discrimination exist for individual groups.
- The study includes specific recommendations to help ensure LFUCG's potential use of any race- or gender-conscious measures is narrowly tailored in remedying identified discrimination, including recommendations related to:
  - Identifying which racial/ethnic and gender groups exhibit substantial barriers;
  - Maximizing the use of race- and gender-neutral measures to address any barriers;
  - Ensuring race- and gender-conscious measures are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
  - Setting overall aspirational goals for the participation of minority- and woman-owned businesses in LFUCG work that are consistent with federal regulations and case law.

CHAPTER 3.
Marketplace Conditions

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

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

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

BBC Research & Consulting (BBC) conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in LFUCG's *relevant geographic market area* (*RGMA*). The study team also examined the potential effects any such barriers have on the formation and success of businesses and on their participation in, and availability for, contracts and procurements LFUCG awards. The study team examined marketplace conditions in four primary areas:

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

BBC defined the RGMA for LFUCG's construction and professional services work as the *Bluegrass Area Development District*, which comprises Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nicholas, Powell, Scott, and Woodford Counties in Kentucky. The study team defined the RGMA for LFUCG's goods and other services work as the *Bluegrass Area Development District* plus Boone, Campbell, Grant, Jefferson, Kenton, Oldham, Pendleton, and Shelby Counties in Kentucky. The study team made that determination based on the fact that LFUCG awards the vast majority of its contract and procurement dollars to businesses located within those geographical areas (69.6% of construction work, 87.1% of professional services work, and 88.6% of goods and other services work).

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

A. Human Capital

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

1. Education. Barriers associated with educational attainment may preclude the entry or advancement of certain individuals in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which have both been shown to be related

to business formation and success.[28, 29] Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.[30, 31] Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.[32] Moreover, Black American students are more than three times as likely to be expelled or suspended from high school as non-Hispanic whites.[33] For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college, enroll at highly- or moderately selective four-year institutions, or earn college degrees.[34]

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

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

Group	Percentage	
Race/ethnicity		
Asian Pacific American	63.2 %	**
Black American	24.7	**
Hispanic American	17.9	**
Other race minority	57.9	**
Non-Hispanic white	39.4	
Gender		
Women	41.1 %	**
Men	34.8	

Notes:

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

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

Source:

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

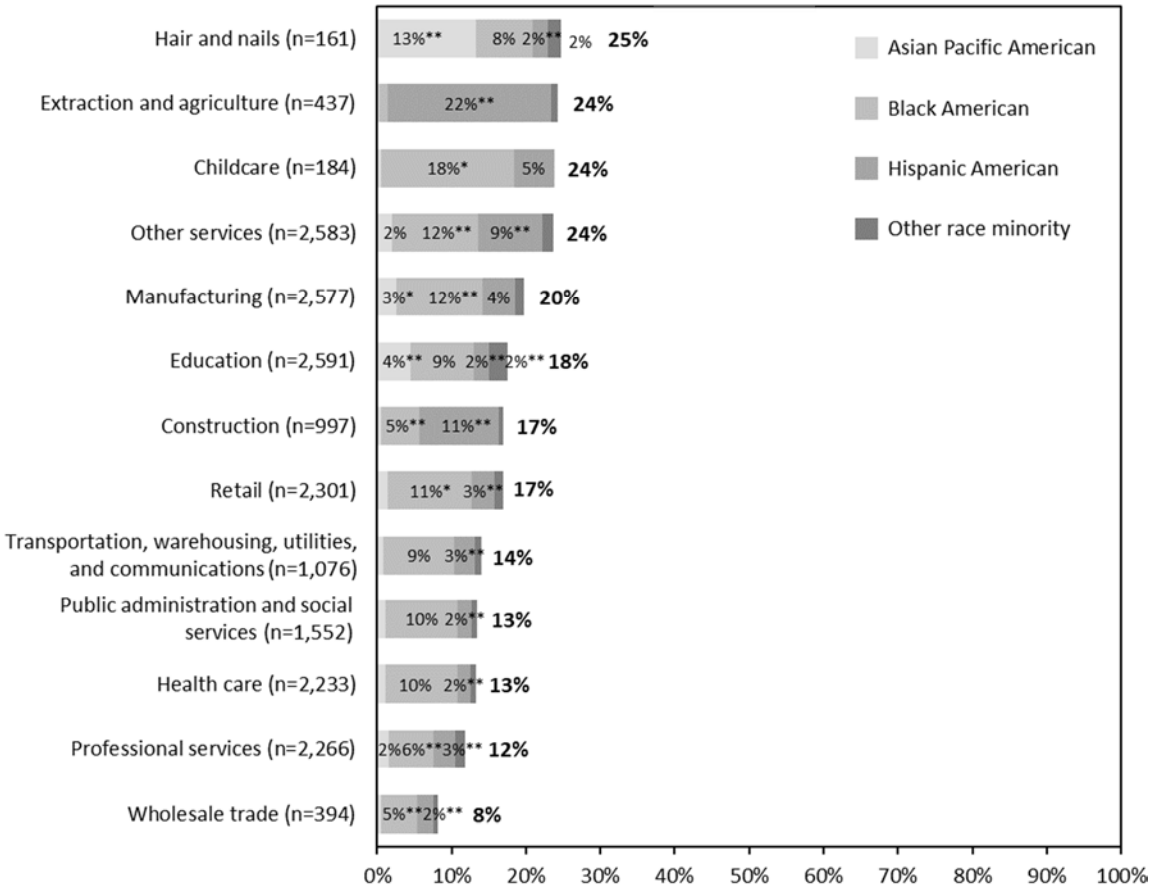
2. Employment and management experience. Another important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in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

a. Employment. On a national level, prior industry experience has been shown to be an important precursor to business ownership and success. However, minorities and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.[36, 37, 38] When employed, they are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of minorities or women.[39, 40, 41, 42, 43] In addition, minorities are incarcerated at higher rates than non-Hispanic whites in Kentucky and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.[44, 45, 46, 47]

BBC's analyses of the labor force in the Lexington area are largely consistent with nationwide findings. Figure 3-2 presents the representation of minority workers in various local industries.

As shown in Figure 3-2, the industries with the highest representations of minority workers are hair and nails, extraction and agriculture, and childcare. The local industries with the lowest representations of minority workers are health care, professional services, and wholesale trade.

Figure 3-2.
Percent representation of minorities in various industries in Lexington, 2015-2019



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

The representation of minorities among all Lexington workers is 2% for Asian Pacific Americans, 9% for Black Americans, 5% for Hispanic Americans, 1% for other race minorities, and 17% for all minorities considered together.

"Other race minority" includes Native Americans, Subcontinent Asian Americans, and people of other races.

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

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

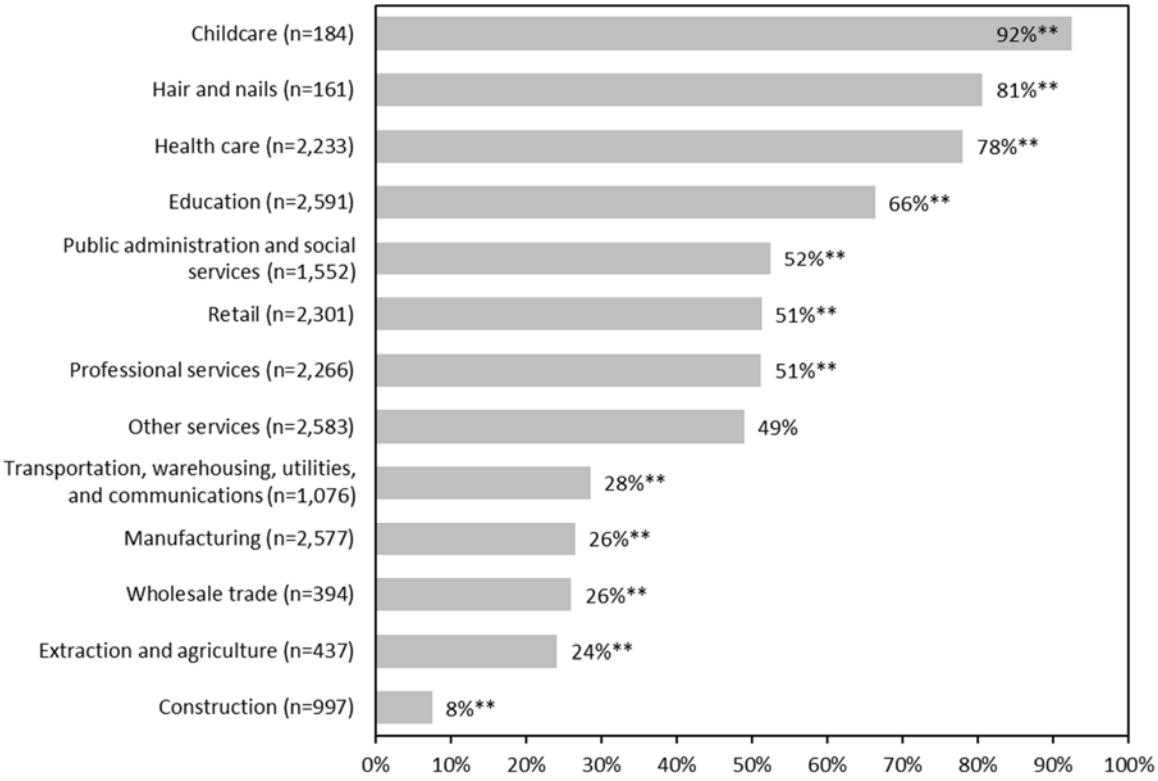
Workers in barber shops, beauty salons, nail salons, and other personal care services were combined into one category of hair and nails.

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

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

Figure 3-3 indicates that the industries in the Lexington area with the highest representations of women workers are childcare, hair and nails, and health care. The industries with the lowest representations of women workers are wholesale trade, extraction and agriculture, and construction.

Figure 3-3.
Percent representation of women in various industries in Lexington, 2015-2019



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

The representation of women among all Lexington workers is 48%.

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

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

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

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

b. Management experience. Managerial experience is essential to business success, but discrimination remains a persistent obstacle to greater diversity in management positions.[48, 49, 50] Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.[51, 52] Similar outcomes appear to exist for minorities and women in the Lexington area as well. BBC examined the concentration of minorities and women in management positions in the Lexington construction, professional services, and goods and other services industries. As shown in Figure 3-4:

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

Figure 3-4.
Percentage of workers in Lexington who work as managers in study-related industries

Group	Construction	Professional services	Goods and other services
Race/ethnicity			
Asian Pacific American	0.0 % †	0.0 % †	0.0 % †
Black American	1.6 % **	5.2 %	5.1 %
Hispanic American	0.0 % **	3.9 % †	0.0 % †
Other race minority	36.4 % †	0.0 % †	0.0 % †
Non-Hispanic white	5.5 %	5.9 %	4.8 %
Gender			
Women	1.7 % **	4.7 %	1.3 % **
Men	5.1 %	6.3 %	5.2 %
All individuals	**4.8 %**	**5.6 %**	**4.4 %**

Note:

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

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

"Other race minority" includes Native Americans, Subcontinent Asian Americans, and people of other races.

Source:

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

3. Intergenerational business experience. Having family members who own and work in businesses is a predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks, obtain knowledge of best practices and business etiquette, and receive hands-on experience in helping run businesses. However, nationally, minorities have substantially fewer family members who own businesses than whites, and both minorities and women have fewer opportunities to be involved with those businesses than whites and men, respectively.[53, 54] That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.[55, 56, 57] Individuals can acquire financial capital through many sources, including employment wages, personal wealth, homeownership, and loans. If barriers exist in financial capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men exist throughout the country, even when researchers have statistically controlled for various personal factors ostensibly unrelated to race and gender.[58, 59, 60] For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.[61, 62] Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.[63]

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

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

BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various personal factors such as age, education, and family status. Those analyses indicated that, even after accounting for various personal factors, being Black American or Hispanic American was associated with substantially lower earnings than being non-Hispanic white. In addition, being a woman was associated with substantially lower earnings than being a man (for details, see Figure C-7 in Appendix C).

Figure 3-5.
Mean annual wages in Lexington

Note:

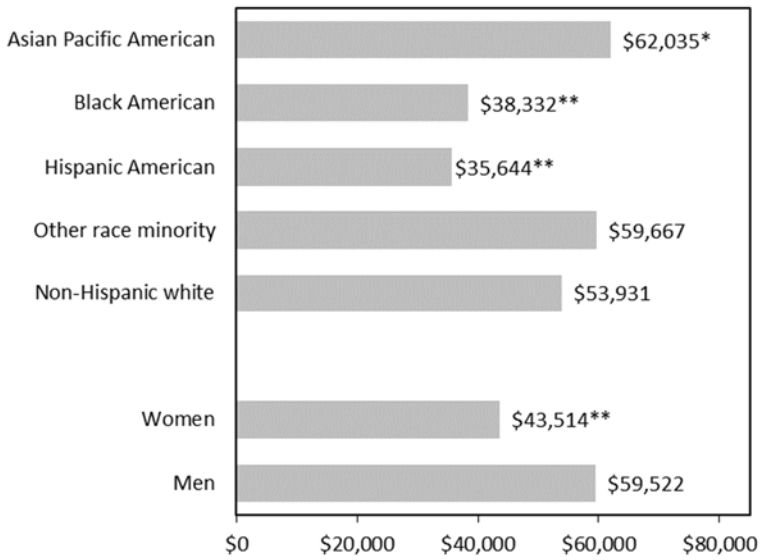
The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.

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

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

Source:

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



2. Personal wealth. Another important source of business capital is often personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.[64, 65] For example, in 2019, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 14 percent and 17 percent that of non-Hispanic whites, respectively.[66] In addition, approximately 20 percent of Black Americans and 17 percent of Hispanic Americans in the United States are living in poverty, compared to less than 10 percent of non-Hispanic whites.[67] Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.[68]

3. Homeownership. Homeownership and home equity have also been shown to be key sources of business capital.[69, 70] However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.[71] Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.[72, 73] Minorities who own homes tend to own homes worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.[74, 75] Differences in home

values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to depressed property values that tend to exist in racially-segregated neighborhoods.[76, 77]

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

Figure 3-6.
Home ownership rates in Lexington

Note:

The sample universe is all households.

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

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

Source:

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

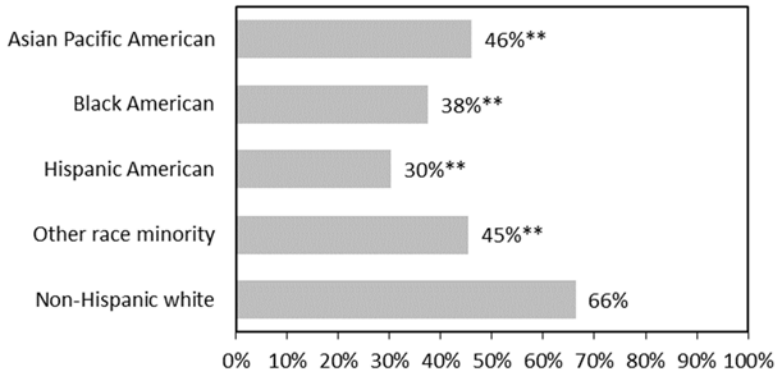


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in the Lexington region. Those data indicate that Lexington area homeowners who identify as Black Americans, Hispanic Americans, and other race minorities own homes that, on average, are worth less than those of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

Figure 3-7.
Median home values in Lexington

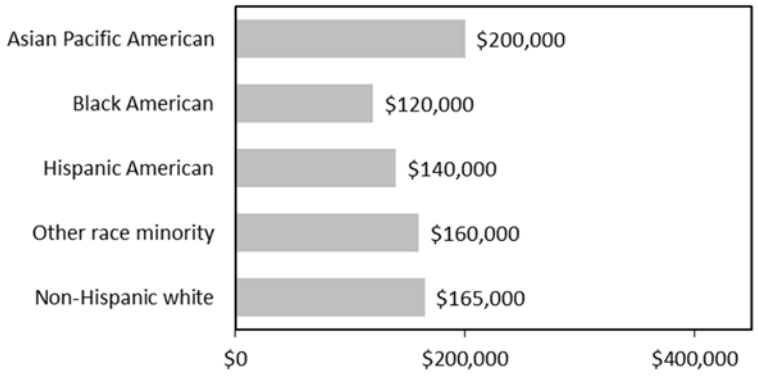
Note:

The sample universe is all owner-occupied housing units.

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

Source:

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



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

a. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and

women during the pre-application phase and disproportionate targeting of minorities and women borrowers for subprime home loans.[84, 85, 86, 87, 88] Race- and gender-based barriers in home credit markets have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.[89, 90, 91, 92] To examine how minorities fare in the home credit market relative to non-Hispanic whites, BBC analyzed home loan denial rates for high-income households by race/ethnicity in the Lexington area. As shown in Figure 3-8, high-income Hispanic American households in the Lexington area appear to have been denied home loans at higher rates than non-Hispanic white households. In addition, the study team's analyses indicate Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in the Lexington area are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-11 in Appendix C).

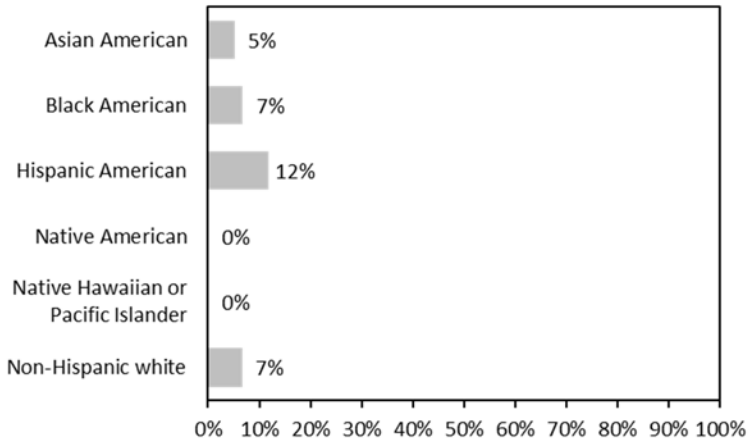
Figure 3-8.
Denial rates of conventional purchase loans for high-income households in Lexington

Note:

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

Source:

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



b. Business credit. Minority- and woman-owned businesses also face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.[93] Researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.[94, 95, 96] In addition, women are less likely to apply for credit than men and receive loans of less value when they do.[97, 98] Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.[99, 100, 101, 102]

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2012 to 2018, the number of woman-owned businesses increased by 10 percent, Black American-owned businesses increased by 14 percent, and Hispanic American-owned businesses increased by 15 percent.[103, 104] Despite the progress minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.[105, 106, 107, 108] In addition, although rates of business ownership have increased among minorities and women, they have

been unable to penetrate all industries evenly. They disproportionately own businesses in industries that require less human and financial capital to be successful and already include large concentrations of individuals from disadvantaged groups.[109, 110, 111]

The study team examined rates of business ownership in relevant Lexington industries by race/ethnicity and gender. As shown in Figure 3-9:

- Black Americans own construction businesses at lower rates than non-Hispanic whites and women own construction businesses at a lower rate than men.
- Black Americans own professional services businesses at a lower rate than non-Hispanic whites.
- Women own goods and other services businesses at a lower rate than men.

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

Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	8.0 % †	2.2 % †	0.0 % †
Black American	14.9 % **	0.0 % **	2.4 %
Hispanic American	22.4 %	6.8 % †	2.4 % †
Other race minority	24.8 % †	0.0 % †	0.0 % †
Non-Hispanic white	27.1 %	15.1 %	5.8 %
Gender			
Women	12.0 % **	10.9 %	0.6 % **
Men	27.0 %	14.7 %	6.0 %
All individuals	**25.9 %**	**13.2 %**	**5.0 %**

Note:

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

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

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

Source:

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

BBC also conducted regression analyses to determine whether differences in business ownership rates based on race/ethnicity and gender exist even after statistically controlling for various personal factors such as income, education, and familial (i.e., household or family) status. The study team conducted those analyses separately for each relevant industry. As shown in Figure 3-10, even after accounting for various personal factors, being a woman is associated with a lower likelihood of owning a construction business compared to being a man.

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

Industry and Group	Coefficient
Construction	
Women	-0.8167
Hispanic American	0.3737

Note:

The regression included 892 observations.

Asian Pacific American omitted from the regression due to small sample size.

Source:

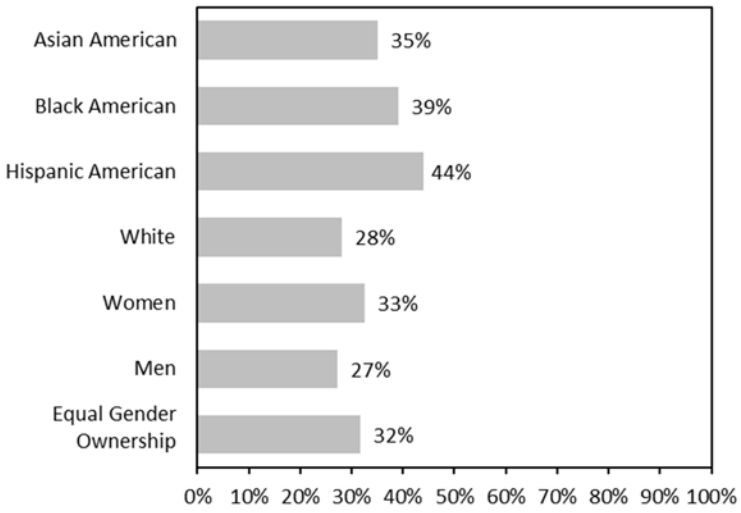
BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

D. Business Success

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

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

Figure 3-11.
Rates of business closure in Kentucky



Note:

Data include only non-publicly held businesses.

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

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

Source:

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

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

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

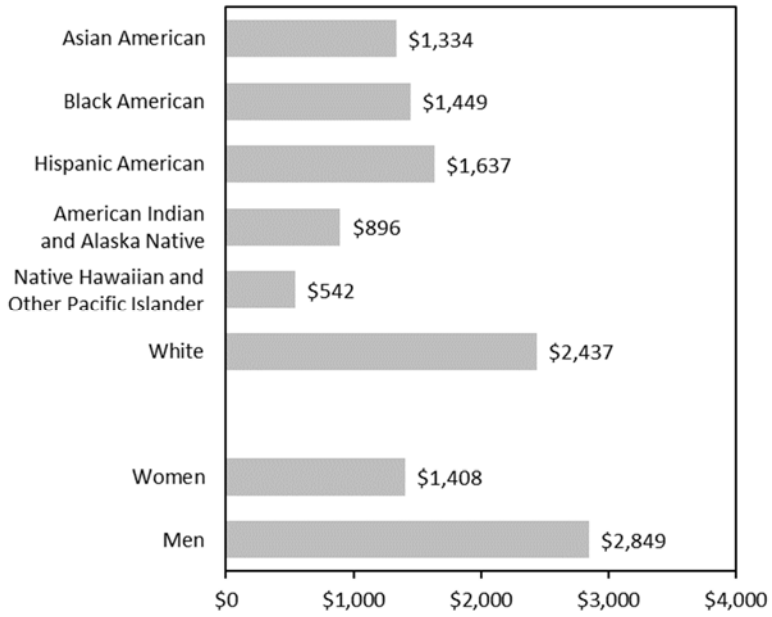
Figure 3-12.
Mean annual business receipts (in thousands) in Kentucky

Note:

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

Source:

BBC Research & Consulting from 2018 Annual Business Survey.



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

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

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

Note:

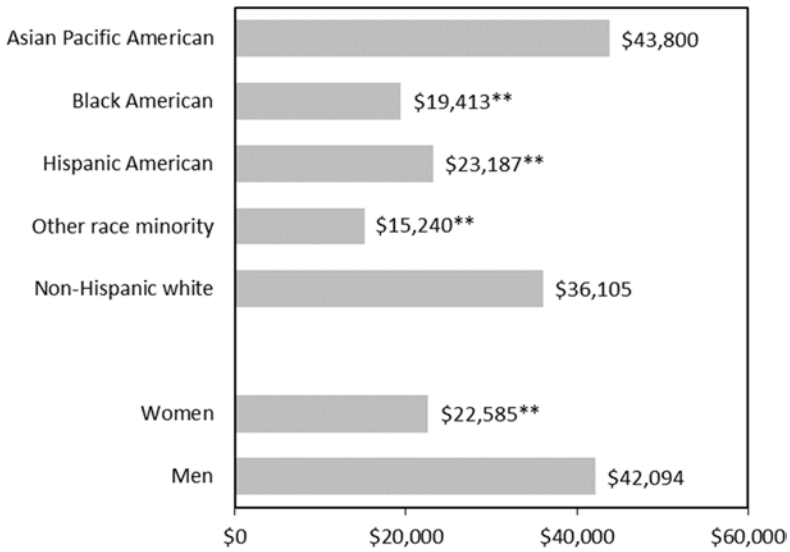
The sample universe is business owners age 16 and older who reported positive earnings. All amounts in 2019 dollars.

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

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

Source:

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



BBC also conducted regression analyses to determine whether race- or gender-based differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared

to being a man, being a woman was associated with substantially lower business owner earnings (for details, see Figure C-23 in Appendix C).

E. Summary

BBC's analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face certain barriers in the Lexington area. Existing research and primary research BBC conducted indicate that race- and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence those disparities exist even after accounting for various factors such as age, income, education, and familial status. There is also evidence that many disparities are due—at least, in part—to discrimination.

Barriers in the marketplace likely have important impacts on the ability of minorities and women to start and successfully operate businesses in construction, professional services, and goods and other services. Any difficulties those individuals face in starting and operating businesses may reduce their availability for government work and may also reduce the degree to which they are able to successfully compete for that work. In addition, the existence of barriers in the marketplace indicates that LFUCG may be passively participating in discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for its contracts and procurements. Many courts have held that passive participation in any such discrimination establishes a compelling governmental interest for agencies to take remedial action to address it.

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CHAPTER 4.
Anecdotal Evidence

As part of the disparity study, business owners, trade association representatives, and other stakeholders had the opportunity to share anecdotal evidence about their experiences working in the local marketplace and with the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government). BBC Research & Consulting (BBC) documented those insights and identified key themes about conditions in the local marketplace for disadvantaged, minority-owned, and woman-owned businesses. The study team used that information to augment many of the quantitative analyses it conducted as part of the disparity study to provide context for study results and provide explanations for various barriers disadvantaged, minority-, and woman-owned businesses potentially face as part of LFUCG's contracting and procurement. Chapter 4 describes the anecdotal evidence collection process and key themes the study team identified from that information. BBC presents all the anecdotal evidence we collected as part of the disparity study in Appendix D.

A. Data Collection

The study team collected anecdotal information about marketplace conditions, experiences working with LFUCG, and recommendations for program implementation through various means between August 2021 and May 2022.

1. Public forums. LFUCG and the study team solicited various stakeholders for written and verbal insights at two public forums that were held virtually on August 25 and 27, 2021. Those insights were compiled and analyzed as part of the anecdotal evidence process.

2. In-depth interviews. The study team conducted 37 in-depth interviews with owners and representatives of local businesses. The interviews included discussions about interviewees' perceptions of and experiences with the local contracting industry; working or attempting to work with government agencies in the Lexington marketplace; LFUCG's Minority Business Enterprise Program (MBEP); and other relevant topics. Interviewees included individuals representing construction, professional services, and goods and other services businesses. BBC identified interview participants primarily from a random sample of businesses the study team contacted during the availability survey process, stratified by business type, location, and the race/ethnicity and gender of business owners. The study team conducted most of the interviews with the owner or another high-level manager of each business.

3. Availability surveys. BBC conducted availability surveys with 674 businesses between September 2021 and February 2022. As a part of the surveys, the study team asked business owners and managers to share qualitative information about whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries, obtaining work in the Lexington marketplace, or working with government organizations in the region. Two hundred thirty-four (234) business owners and representatives shared such information.

4. Focus groups. BBC conducted two focus groups with disadvantaged, minority-, and woman-owned business representatives and construction business representatives on February 8 and 9, 2022. During each focus group, participants engaged in group discussions and shared their insights about working in the Lexington marketplace and with public sector and private sector organizations.

5. Written comments. Throughout the study, stakeholders and community members had the opportunity to submit written comments regarding their experiences working in the local marketplace directly to the study team. One community member shared such comments.

B. Key Themes

Various themes emerged across all of the anecdotal evidence the study team collected as part of the disparity study. BBC summarizes those themes by relevant topic area, along with illustrative quotations. In order to protect the anonymity of individuals and businesses, BBC coded the source of each quotation by random numbers and prefixes that represent the individual who submitted the comments and the data collection method.[1] We also preface each quotation with a brief description of the race and gender of the business owner and the business type. In addition, we indicate whether each participant represents a certified disadvantaged, minority-, or woman-owned business.

1. Marketplace conditions. Most businesses characterized marketplace conditions prior to and during the COVID-19 pandemic as highly competitive. More businesses began bidding in different markets—either in terms of contract size, sector, or types of work—because less work was available overall. The number of large construction contractors decreased, increasing the availability of large contracting opportunities and weakening the bargaining power of small subcontractors. Other markets, like engineering and environmental services, became more saturated with businesses, leading to increased price competition.

> *The Black American male owner of an MBE- and DBE-certified construction company stated, "We would go to pre-bids, and we started seeing people from a higher market, if you want to call it, come down to a mid-market. We've seen people from the lower market come up to the mid-market, or vice versa. And it was basically because everybody's looking for work." [#1]*

> *A representative of a majority-owned professional services company stated, "It's extremely competitive in our business, mainly because of [the] number of firms that do what we do. I think this is due to graduates from the University of Kentucky becoming engineers and architects, and then starting their own business." [#AV61]*

2. Experience in the private and public sectors. Generally, the public sector procurement process is seen as more open, fair, and easier to learn about than that of the private sector. Although payment may not be as fast as in the private sector, businesses believe there is at least a guarantee of eventually receiving payment in the public sector.

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[1] We denote availability survey comments by the prefix "AV," focus group comments by the prefix "FG," and public forum comments by the prefix "PT," and written comments by the prefix "WT." In-depth interview comments do not have a prefix.

The Black American male owner of a DBE-certified construction company stated, "The thing about it too is, we're not privy to [private sector] bids a lot of times, I'm finding out. I'm like, 'Now, where do you go to bid on that? And you can't find out where [to bid]?'" [#13]

The co-owner of a WBE- and DBE-certified professional services firm stated, "The public sector work is much better regulated. It is a much fairer, more level playing field. And that's across the board with the larger public entities, like the state and the larger municipalities in the state. You know that you are going to be able to negotiate fees, you're going to get treated fairly, and you're going to get paid in a fairly timely fashion. And while they have certainly favorite people that they work with, that's generally based on performance and is fair." [#11]

A representative of a majority-owned professional services firm stated, "Payment is harder in the private sector than in the public. I don't know why that is, but the accounting departments are just more rigid … When it comes to accounting and payment and contracting, it's harder in the private sector." [#16]

A representative of a woman-owned professional services firm stated, "Our [private sector] clients, we send them a bill, they send us a check. It's good. When you get into government, … you send them an invoice and it may be three to six months before you see the money." [#27]

The public sector is generally seen as having more opportunities than the private sector, especially for disadvantaged, minority-, and woman-owned businesses. However, the bid process is considered more difficult in the public sector, especially around bonding and paperwork, and businesses believe there is more competition for particular projects in the public sector.

The Black American male owner of an MBE- and DBE-certified construction company stated, "[In the] private [sector], like there was a bid that goes on Friday. There's three of us that's bidding. Three of us bidding, the other two, I know of them, [they are our] competitor. If that same job was out open on the public [sector], it'd probably have 10 bidders on it. So, then it gets real competitive … The paperwork file is like 30 pages or more. I spend all that day filling out the paperwork or waiting on getting subcontract bids from my vendors, because there's so many people bidding … The bid form on a private job, a lot of times, if there is a bid form, it's two pages. It's just less work, less of a demand sometimes. … The administration on the job goes a whole lot smoother." [#1]

The co-owner of a WBE- and DBE-certified professional services firm stated, "I think we've seen more emphasis from certain public entities on, for us particularly WBE, DBE requirements becoming more stringent or considered more in terms of selecting consultants." [#11]

A representative of a majority-owned professional services firm stated, "We do very little private [sector work], and it seems like there's an abundance of opportunity in [the] public [sector]." [#18]

Profitably is considered comparable between the private and public sectors but estimating work in the private sector is considered more flexible because of the lack of emphasis on low-bid awards. The size of projects in the private sector is generally viewed as smaller than that of the public sector, but there appears to be a trend towards larger projects in the private sector as lending begins to increase. Private sector work is believed to rely more on word-of-mouth and prior relationships, and the bid process is believed to be less regulated and prescriptive.

The co-owner of a WBE- and DBE-certified professional services firm stated, "In the private [sector], … I feel like that's much more sort of networking-based and not based so much on, well, for example, a WBE certification really doesn't mean anything in the private sector, unless a particular owner has an interest in that, but that doesn't carry any significance." [#11]

The Black American male owner of a professional services company stated, "It's easier [in the private sector] because they usually go by word of mouth, and you give them your references and kind of go with it that way. But when you're in on the public side, you usually dealing with a general contractor, and he usually uses who he's comfortable with. And most of the general contractors are not DBEs." [#21]

The Black American male owner of a construction company stated, "Usually in private work you're going to have probably … more [funding] .... So, I don't think it's a matter of … what the cost of the project. They just want to get the project done as quick as possible. They don't have the stipulations that normally a non-private [job], like for a government agency or a city agency have. They're totally different. I don't think they have the same stipulations, so it's a little bit more flexible. … You get paid more money because of it." [#13]

The co-owner of a majority-owned, SBE-certified professional services company stated, "I think that our public projects definitely have the ability, particularly, on the civic side, to be much larger. The private [sector] development has been getting bigger because money's been easy to get, and it's been less expensive. So, with lower interest rates, a lot of our private development projects, say 10 years ago compared to today, they've been much larger, and I think, that's just relative to low interest rates and … cheap money." [#20]

Multiple interviewees mentioned the various barriers and challenges associated with public sector work in particular, including issues with bonding requirements, billing rate and financing issues, and excessive paperwork.

The Black American male owner of an MBE- and DBE-certified construction company stated, "It is a lot of effort. I mean, typically a public bid requires a bid bond. So now I have to send out to my bond agency and let them know …and it takes a bid bond, which is, I think it's 5 percent or whatever." [#1]

The Subcontinent Asian American male owner of a DBE-certified professional services firm stated, "You know, the only drawback to [public sector work] … are their rates need updated. I don't think they've changed their rates since the 1980s or something and that needs to be fixed, because we're not paying our engineers what they made in 1988. I mean, literally, the salaries from when I got out of school as an engineer … to the engineers we're hiring here today, they're making twice as much, and those rates are the same. So, it makes it difficult" [#12]

The owner of a WBE- and DBE-certified professional services firm stated, "I'm having to use the cash flow from my private jobs to even chase the government jobs." [#26]

3. Doing business with LFUCG. Many interviewees discussed their experiences working with LFUCG in particular. LFUCG is seen as responsive, attentive, and willing to work with the contracting community, particularly as it relates to the MBEP. Multiple interviewees mentioned how easy it is to get lists of certified subcontractors from the MBEP Liaison, the benefits of having the MBEP Liaison check in with subcontractors about their payments, the effectiveness of LFUCG's outreach efforts, and the number of resources LFUCG can recommend for businesses

needing support. Interviewees also commended the LFUCG's pre-bid and pre-proposal meetings, where the MBEP Liaison is generally present, lists of potential certified subcontractors are disseminated, and upcoming projects are announced.

> *The Black American female owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We got connected to an opportunity through LFUCG for the waste management bid. … LFUCG diversity staff called us up and said, 'Look, we have someone, we know you have trucks, we heard someone, someone approached us about wanting to find a … minority-based company to partner with and bid on this together.' We connected and we went after that." [#2]*

> *The co-owner of a WBE- and DBE-certified professional services firm stated, "I think [LFUCG's] pretty clear in their mission, and anytime that I have pursued a project and needed the current list of WBE, DBE businesses, I can e-mail [the MBE Liaison] and I see it within the hour. So, they've always been, in my experience, really responsive when I had any questions or anything to that effect. I would say the City really, in my personal experience, does a good job of illustrating the resources that are out there and being responsive and everything. So, I mean, it was honestly the City that really helped us with the certification process in general and kind of said, 'We recommend you go to WBENC first.' One thing that LFUCG does with their projects, they have their subcontractor monitoring, and you have to check in and tell them, 'Yes, I've been paid, and it was in a timely fashion,' or what have you. I think they do a better job of tracking … really than anybody else that we work for. LFUCG does a really good job of that. They consistently have the WBE, DBE representative at pre-bid meetings and pre-proposal meetings, and they do a good job of disseminating bid opportunities … So, I think they do a really good job of administering that program." [#11]*

> *A representative of a majority-owned construction company stated, "We can talk to people in Lexington. I can pick up the phone and call a procurement officer and talk to him, call him by his first name, he calls me by my first name, we know each other. 'What's your problem? Just tell us what it is,' and they're very open, which is a good thing. … The engineering department in Louisville doesn't even communicate with the diverse works program in their organization. Lexington is very connected. Procurement, engineering, they all work together, and that is the way all organizations prosper, by working together." [#FG2]*

4. Doing business as a prime contractor or subcontractor. Multiple interviewees noted that they focus on using minority- and woman-owned subcontractors more when there is a stated minority- or woman-owned business goal on a project than when there is not. However, some businesses said they intentionally use minority- and woman-owned subcontractors on every project, because of internal targets and because past experience with such businesses has resulted in strong working relationships. Finding certified minority- and woman-owned businesses with which to partner can be difficult, and multiple interviewees said they struggle to find appropriate opportunities for the few certified businesses they can find.

> *The Black American male owner of a DBE-certified construction company stated, "I think too that a lot of times these larger companies … is that I guess before they wouldn't use you on specific projects. Now they're kind of being forced to or being pushed to use minorities. If they don't have to use minorities, they won't. They'll just use their friends and the same people." [#13]*

A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Most of the time we use a DBE for HVAC, sometimes concrete we'll sub out to a DBE. But most of the time, … there's not too many certified plumbers that's DBE… We got an electric division, and we do drywall and painting. [Primes reach out, and] they'll say, 'Hey, come look at this pump station.' I'll say, 'Okay.' I'll go look at it, and the only thing he wants me to do is demo the drywall off the walls in the pump station. He's going to do the electric. He's going to put the drywall back." [#14]

The Black American male owner of an MBE- and DBE-certified construction company stated, "More often than not actually [we use certified subcontractors]. … Just because we notice … a lot of them, they wouldn't have the opportunity to work on some of the projects unless we provided it for them. We have developed relationships with them and a lot of times … we've helped them along the way and showed them how to bid the job or how to be able to work their employees out, in order to be able to perform the job in a timely manner." [#15]

A representative of a majority-owned construction company stated, "We do so much in house that we have a hard time finding diverse subcontractors that do the type of work we need when putting together a proposal." [#WT1]

5. Potential barriers to business success. Several interviewees mentioned bonding as a barrier, particularly minority-owned businesses. Interviewees noted that having strong back-of-the-house organization is vital to acquiring bonding and that developing strong relationships with bonding companies can result in lower bonding rates. Bonding limits can prevent businesses from bidding on multiple jobs at a time, which can limit their growth and ability to increase their bonding capacities.

The Black American male owner of a DBE-certified construction company stated, "I think the relationships with the insurance companies for bonding [are important]. Because a lot of times, if you haven't bonded in a while, what happens is that you end up having to pay a higher rate to get a bond … That hurts the minorities. A lot of times on these jobs the bonding's just so high, there's no way you can bond these jobs [like] these other companies." [#13]

A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Well, mainly, a lot of the jobs, we could bid on bigger jobs, but it's the bonding capacity, getting the jobs bonded. … it kind of puts a limit on the jobs we can take on at a certain time. We have issues with bonding." [#14]

Some interviewees noted that it can be a struggle to win projects as prime contractors, because past experience and business size are crucial to winning such work. Other interviewees noted that prime contractors and agencies prefer to stick with businesses with which they have had positive experiences in the past, making it difficult for small businesses and young businesses to break into new markets. The primary suggestions to ameliorate such barriers include small business set asides to gain experience as prime contractors, experience with public agencies, and opportunities to bid on projects that are appropriately sized.

The Black American male owner of an MBE- and DBE-certified construction company stated, "If you don't have that resume or research or data, why would a prime contractor say, 'Okay, I'm going to be interested in using this contractor.'… I feel like the City needs to, instead of going and forcing and saying, 'Hey, team up with these [businesses],' there should be a set aside to

say, 'Let's focus on this minority sector, give them the direct opportunity, allow them to build up, allow other smaller businesses to be encouraged to do work with the City.' And then once you have established a relationship or resume or a portfolio and grown the business where you may grow outside of utilizing the City as a steppingstone, other larger prime contractors will consider using these other smaller contractors as a sub if need be." [#1]

The Black American woman owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "If you never get the opportunity to lead and do prime [work], you can't get prime work. ... I think a set aside, depending on what it is, of two, three million dollars is very reasonable. ... Until they start setting aside things to allow smaller companies to demonstrate their leadership abilities, it's not going to be a lot of small companies, especially minority companies, who will get that opportunity to gain the control ... If we don't get any work that's really going to allow us to build our wealth, how can we build the buffer these larger, non-minority companies have so we can get to a point to competitively bid?" [#2]

The Black American male owner of an MBE- and DBE-certified construction company stated, "You have to be able to work on larger projects in order to make enough money to where you have enough profits in order to grow your company. ... There are only few large companies. And from my perspective, they don't have an interest in trying to work with a smaller contractor to help them build capacity." [#15]

A representative of a majority-owned professional services company stated, "[Public agencies are] just constantly looking over a company of our size. Sometimes there's insurance requirements, and things like that, versus what we stand to gain." [#28]

The owner of a WBE-certified professional services company stated, "I think Lexington procurement is predominantly driven by two factors: past performance with them and then they're also highly price sensitive buyers." [#FG1]

Many interviewees commented on the difficulties they face in accessing financing, which is crucial to business investment, bidding on new projects, and paying staff. Some interviewees said that developing strong, personal relationships with banks is key to obtaining financing, but developing such relationships is more difficult for minority-owned businesses.

The Black American woman owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Money for minorities is always a problem, especially in this area because it is about relationships and most of the minorities don't have a lot of non-minority friends to have relationships [with] the bank, so if you don't have no black bankers around here, you probably won't get what you need." [#2]

The owner of a majority-owned construction company stated, "That's one of the impediments to the DBE community is probably some blatant kind of, or maybe subtle ... but there's got to be some acceptance of the fact that there is some racism in the lending..." [#4]

The Subcontinent Asian American male owner of a DBE-certified professional services firm stated, "If someone wants to start up a DBE, having that relationship with a bank and having that bank understand what the nature of your business is would be key, because that was a hurdle early on, is to get the line of credit." [#12]

Many interviewees said that finding sufficient, qualified personnel can be challenging. There seems to be a general lack of interest among young employees to work in the construction industry and retaining employees can be difficult when unemployment benefits are in the same range as potential incomes.

The Black American male owner of an MBE- and DBE-certified construction company stated, "You have guys retiring and you don't have the group of 18 to … 30-year-olds, … there's a gap. … At the same time, when you get up [in] age, they're the knowledgeable ones, they're not your hardcore laborer in the field." [#1]

The owner of a WBE-certified construction company stated, "There are not enough craftsmen available. I mean, in construction it's a believed fact that there aren't enough craftsmen coming up through the ranks that are learning trades. Trades make pretty good money, but there's a lot of other things that people would like to do for quicker, easier money." [#5]

The Black American male owner of a DBE-certified construction company stated, "The problem that I'm running into is trying to find good people and hold on to good people. Because it's hard, because they are staying at home drawing unemployment and making just as much at unemployment as they're making working. And so hopefully that'll change, because it is starting to take effect that construction companies like mine, we can't find good employees. They're not out there anymore. We're losing them." [#13]

A representative of a majority-owned professional services firm stated, "The biggest challenge we face at the moment is finding qualified people to hire. There's a real shortage of people. And this has nothing to do with unemployment insurance or anything like that. It just seems to be a shortage in the engineering science marketplace." [#16]

A representative of a majority-owned construction company stated, "We're dealing with what we call the great resignation. You know? Everybody jumping ship." [#17]

6. Barriers related to race and gender. Many interviewees discussed a general reluctance for prime contractors to use minority-owned businesses and their tendency to exaggerate the number of bad experiences with minority-owned businesses.

The Black American male owner of an MBE- and DBE-certified construction company stated, "I've been told to my face, 'I'm going to tell you upfront. I haven't had the greatest experience with minority contractors.' I say, 'You haven't?' 'No, I haven't.' I say, 'Have you had bad experiences with non-minority contractors?' He say, 'Yeah.' I said, 'Well, so why are you remembering the minorities?' He said, 'That's a good point.' Because [that's the] nature of the beast—discrimination of our culture around us. He might have had 20 relationships with contractors, two of them been minorities went bad, five of them been non-minority went bad, but he, off the top of his head, he remembers the two." [#1]

The owner of a majority-owned construction company stated, "Well, [someone might say], 'I don't trust [minority-owned businesses].' That's racist, but I mean, why? What? Because he's a minority? I mean, what's the deal? So, I don't know. I don't know where that's coming from, but I would say that if somebody were thinking about it, they would probably rephrase and say, 'I trust Billy Bob, because he's been working with me for 20 years, and I always use him.' Well,

that's an impediment right there to not leave the door open to new people. It's frustrating." [#4]

Several interviewees also mentioned price discrimination on the part of suppliers when supplying goods to disadvantaged, minority-, and woman-owned businesses and difficulties for minority- and woman-owned businesses in obtaining loans.

The Black American male owner of an MBE- and DBE-certified construction company stated, "I do feel like there is less of a restriction, or less of a concern, with non-minorities going and walking into a bank and asking for a loan versus the minorities. It's pretty evident. You see it all the time. You see one guy start a business. Two months later, he's out of business, and six months later he got a new business, but with three more trucks." [#1]

The owner of a WBE-certified construction company stated, "There were issues. I went to a banker, and I tried to do a line of credit … and she said, 'The best thing you can do for your business is just to save your money, because I don't think a banker is going to give you a line of credit.' So, I took her advice and that's what I did." [#5]

The Middle Eastern American male owner of a majority-owned construction company stated, "I couldn't even get my bank to give me this online invoicing because I was a risky business, according to them. They expect you to get paid less [as a minority]." [#19]

A representative of a majority-owned construction company stated "Well, if you're looking at a supplier and saying, 'We're ready to send you a purchase order for $2 million,' versus sending a purchase order for $200,000, yes, I'd say it would definitely be a factor [in their pricing]." [#FG2]

Multiple interviewees mentioned the 'good ol' boy' club as a barrier in the marketplace. It is seen most prominently in how prime contractor and subcontractor relationships are developed and how upcoming projects are communicated across different business groups. Although many interviewees commented that such relationships are natural outcomes of networking, there are particular barriers for minority- and woman-owned businesses developing such relationships with white male-owned prime contractors.

The Black American woman owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "People work with who they like. White males like to work with white males—within their pool, with their pools of friends. Somebody might be working in the wastewater plant and be like, 'Oh, you know… two of the tanks, they're planking right now, they're about to blow up. I know about the replacement; we've been talking about it in meetings.' And they're talking about it with their other counterparts, which are white, and hear about it … They've already got time to go in and map out their numbers. Now then, it becomes official and gets rolled out, they already got their information and numbers, and then when we come to the table, we're like, 'Okay, now we're starting to do it.' We're already behind the eight ball." [#2]

The co-owner of a WBE- and DBE-certified professional services firm stated, "I hate to use the term good ol' boy network, but sometimes a lot of these firms, particularly when I started working 20 years ago, were run by people that were well-established in their careers and were used to working with other people that they've worked with for years and years and years. And

that's understandable in terms of those relationships you develop, but sometimes … … there were certain ways that it was difficult to kind of get that contact face time." [#11]

A majority-owned professional services company stated, "The firms that have been in Lexington, especially engineering, have plan sets and are ahead of the curve. [They] have local projects and knowledge of site we won't have. [It] makes it hard to compete." [AV53]

The owner of an SBE-, DBE-, and WBE-certified professional services firm stated, "Before I went into business I went through a lot of training, and that's all I heard is relationships. You have to have a relationship. You have to have a relationship. But to me, relationships equals friendships. If they don't know you, and they don't have that friendship with you, you're not going to get the contract." [#PT2]

6. Business assistance programs. Several interviewees spoke positively about small business set asides, where competition for contracts of certain sizes or types are limited to small businesses regardless of the race/ethnicity and gender of their owners. The benefits of set asides that interviewees specifically mentioned were that such opportunities would increase small businesses' familiarity with LFUCG's contracting and bidding processes, give them more experience working as prime contractors, help build working capital through winning larger projects, and foster business growth.

The Black American male owner of an MBE- and DBE-certified construction company stated, "If you want to diversify, you have to bring the people in. … Once you get them in, and then you have to give them an opportunity to grow. Your goal is as they grow without you holding their hand, right? So eventually that they grow out and get outside of this $60,000, $50,000 market with you, and you'll start bidding your $400,000 market? … If you really want to improve and get diversity within your organization, there should be a set aside. There is enough general maintenance that goes on in this industry with LFUCG that there should be a set aside to allow minority or small business to grow." [#1]

The Black American woman owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Until they start setting aside things to allow smaller companies to demonstrate their leadership abilities, it's not going to be a lot of small companies, especially minority companies, who will get that opportunity to gain the control." [#2]

The Black American male owner of a DBE-certified construction company stated, "What really helped me, is that 8(a) [set aside] program. Because a lot of jobs that I did with the government were sole-sourced. They just sent me an RFP and I just negotiated the contract. I think that really can help smaller companies, and I think if they can do it for so many years until the company build themself up, and then they can consider graduating and they can't get back into that sole-sourced thing. After they [graduate] they can't get it anymore, with the sole [source]. Just kind of like the 8(a) program, I think that would work for the Lexington-Fayette Urban County Government." [#13]

The owner of a WBE- and DBE-certified professional services firm stated, "One thing that they could do is they could have some smaller projects that they purposefully ask DBEs to do. Because then they've shown experience with the different departments, and that's useful and helpful. And honestly, it's usually a better fit. … Doing some things that are, you know, specific to the smaller firms, I think would be helpful in a lot of different ways." [#26]

Many interviewees discussed mandatory subcontracting minimums, most of them positively. Others brought up challenges related to the risk for prime contractors in teaming with subcontractors with which they have not worked, the difficulties finding appropriate subcontractors, and the risk of contracting dollars flowing out of the local community to subcontractors coming from other regions to perform agency work.

> *The Black American male owner of an MBE- and DBE-certified construction company stated, "You take a contractor who's been here and working, and they never done work with any minority contractors within this area, doesn't know of any, and all of the sudden, you tell him he has to take a risk on this million-dollar job of 10 percent being [with] some minority contractor. … So, imagine, you get down to the end of the job, this [minority] contractor… they come in, and they ordered all the wrong doors. … That's a bad mark on your business, because everybody is going to remember, … 'Oh, man. they did a terrible job.'… [Because] we end up picking up this one sub we never used, and it made everybody's life hell. So that's the problem. Somehow you got to be able to figure out how to build relationships, and it's not going to happen overnight." [#1]*
>
> *The owner of a WBE- and DBE -certified professional services firm stated, "Sometimes primes can't find the people to do it. … I don't know how they would meet it, at least locally. They might have to hire people from out of state or from outside the region … which would not be good for our economy. It helped that business out of state, I guess." [#3]*

Several interviewees mentioned financing assistance as very important to disadvantaged, minority- and woman-owned businesses. Suggestions for such assistance included lender fairs, contract-based lending, support with guarantees through grants, and providing collateral to offer lines of credit to new businesses. Some interviewees indicated that the United States Small Business Administration's (SBA's) financial assistance programs are a good a model for LFUCG to consider.

> *The Subcontinent Asian American male owner of a DBE-certified professional services firm stated, "I don't know if you need to have a lender fair where you bring in Central Bank and Fork Bank, all the local banks, so they can gain a better understanding of how our business works, because these banks, they're more used to lending for retail, … to have the lending institutions more familiar with our operations, I think would be helpful for small business." [#12]*
>
> *A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Maybe they can work out a situation where if you get the contract with like LFUCG, you can take the contract to the bank, and they say, 'Well, since you have a contract to do this job, we'll give you funding to get started.' That might be a possible solution." [#14]*
>
> *The Black American male owner of an MBE- and DBE-certified construction company stated, "I think, offering up, or helping with guarantees that would assist the bank and lending, so like offer kind of, grants that companies could apply for, in which the City would have funds, they would be able to act as collateral for a larger fund, from a bank. Similar to what the SBA does." [#15]*

Interviewees indicated that developing relationships between businesses and LFUCG is vital to business growth. Strong relationships with LFUCG allows prime contractors and subcontractors to anticipate upcoming contracts and the potential needs of the agency. To facilitate such

relationship building, agency outreach and vendor fairs are generally seen as helpful, especially those designed to bring together similar vendors and developing relationships between LFUCG and businesses.

> *The owner of a WBE- and DBE--certified professional services firm stated, "I think it would be great if they went back to having procurement fairs. … A lot of times, organizations don't even know that we could be helping them with things. And so that gave me the opportunity to talk to people and say, 'Have you had this problem? Do you need this help? Could we do this?' And so that was very helpful." [#3]*
>
> *The Black American male owner of a DBE-certified construction company stated, "I used to go to all the 8(a) job fairs that they had around the country. ... That was a big thing, because you could pick up a lot of work from going into these agencies and introducing yourself. Also, you got a chance to meet other 8(a) contractors and other general contractors that's looking to work with minorities, so it was a win/win by going to a lot of these. .... With going to these events, you also pick up their forecast sometimes for the next three or four years, jobs that come out." [#13]*
>
> *The owner of a majority-owned professional services firm stated, "One thing I think would help in the City of Lexington: I recall attending a couple of procurement seminars. ... It really didn't do anything to deal with the AE industry and our particular needs and our particular niche, as far as what service we provide. I think it would be beneficial … for someone to host the interested AE firms. It'll do two things: it'll let them understand what the city's looking for, and it'll hopefully create a vehicle by where there is some realization, or recognition, of who's interested in doing city work." [#24]*
>
> *The owner of a WBE-certified professional services company stated, "If they had … meet and greets with the different agencies—there's division of waste, there's public service, there's facilities— just all those different branches of the city government and do a one-on-one conversation with listed firms. … I'd jump all over that. …Exposure to decision makers, that would be valuable." [#FG1]*

On-the-job training and workforce development are seen as beneficial routes to overcoming personnel and labor challenges, especially in the construction industry. One interviewee noted that there are multiple construction programs in the area, at Eastern Kentucky University and the University of Kentucky, that help in finding qualified and capable staff. Other companies have developed their own on-the-job training programs.

> *The Black American male owner of an MBE- and DBE-certified construction company stated, "I'm working on trying to make sure I get linked to one of the construction programs surrounding Lexington, whether it's a [Construction Management] program out of Eastern or UK. I'm trying to work on making sure to get involved with them so I can have a direct attachment or pool to review the new graduates, up and coming future leaders. Also, on the technical end, there's a couple of technical schools … that I've just now recently just built a relationship with. And it's helped out with some of those individuals having already some skill. The biggest thing a lot of us in this industry is dealing with is to not enough skilled trade individuals." [#1]*

A representative of a woman-owned professional services firm stated, "Over in Hazard, there's a community college that actually has a lineman school. I've gotten a few of those coming out of lineman school. They'll apply, and those have worked out really good too." [#27]

Many interviewees noted that good faith efforts prime contractors use as part of disadvantaged, minority- and woman-owned business programs are hollow and perfunctory rather than genuine efforts to engage with minority- and woman-owned businesses. One interviewee noted that they no longer provide copies of their certification information during bid submissions, because prime contractors have used their certification information to meet good faith efforts requirements without ever contacting the company. Other interviewees recalled projects in which their scope of work was eliminated after contract award. They were "awarded" the work, but the prime contractor never contacted them to actually perform the work.

The Black American male owner of an MBE- and DBE-certified construction company stated, "I've had contractors just say, 'Hey, when you submit your bid, make sure you send us a copy of your DBE certification.' No. You know why I say no? Because I send you a copy of my DBE certification, from now on every job without my knowledge, you can bid a job as if you have me involved and here goes my cert floating through the industry for a year. … I might get one—one genuine phone call. The rest of it was just the e-mail saying, bloop, we tried. … They're just checking the box, and they try to get your information." [#1]

The Black American woman owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "During [the goals] process [on a past project], our prime would always say, 'Well, if we win this, you girls, y'all don't have to stay on this project. We can buy you out. We'll buy you out. Just, we can win this, and this is too much for you girls. We can just buy you out.' And we were like, 'Well, no, we're not coming to the table to just be bought out, we're coming here to prove ourselves and do our job.'… The other thing is, which I know just from experiencing this, they'll win the contract, they'll call us, and they'll say, 'Hey, we won the contract. We used you guys.' And we never hear from them. What happened? And then you try to reach out to them, phone call, e-mail, and they don't contact you. But when they're looking for that quote, they're calling you day, night, e-mailing you like crazy, where's your quote, we need your quote." [#2]

The co-owner of a WBE- and DBE-certified professional services firm stated, "We did have one experience on a project where we were used as the DBE with a certain percentage. And most of our work scope was eliminated after the fact. And that's happened probably a couple of times." [#11]

The Black American male owner of a DBE-certified construction company stated, "A lot of times now I get a lot of calls from companies that need DBE participation. That's with a lot of different agencies, so I do get calls for wanting participation. Sometimes you don't know if they just call just to say, 'I talked to a minority company' or not. … I get a lot of letters wanting me to bid jobs, or send me a thing to fill out, but they never ask me to bid a job. I just don't send it back in. I tell them, 'I'm not stupid.' I say, 'You want me to bid a job, let me know what area you need a price in, and I'll price it, if you're sincere about it.'" [#13]

A representative of a Black American-owned MBE- and DBE-certified construction company stated, "They'll e-mail you, and say, 'Hey, this job bids on September 2nd. Can you give us a bid?' Today's the 30th, you know? Then they'll say, 'Hey, can you e-mail me back, and let me know

that you was thinking about bidding, or you're not going to bid it.' … They're only doing it to meet the requirement [disingenuously]. … They really didn't have no intentions of working with us." [#14]

The Black American male owner of an MBE-certified construction company stated, "One of the things that I notice is that on some of these projects where the goals are good faith, as a contractor, a lot of times maybe the generals, they'll call you a day before the bid's due, and ask you, 'Are you going to bid the project?' And you'll ask the folks like, 'Hey. Well, what portion of the scope would you like for me to bid?' Well, the person on the phone won't even know. You get the sense that maybe they're just trying to satisfy that they tried to meet a requirement as opposed to actually utilizing your skills." [#FG1]

The Black American male owner of an MBE-certified goods and services company stated, "I get requests for bids … in so many deals that I am not eligible for. I'm not a contractor. And I get contracting bid, landscaping bid, construction bid. I'm a chef. I do food. That's the only thing I do. I think a lot of the time, they're just trying to meet that quota in saying that they solicited, or at least attempted to [solicit] so many minority businesses or whatever quota they have." [#FG1]

7. Recommendations. Several interviewees recommended that the LFUCG should develop a mentor protégé program, because such relationships are very valuable to developing businesses. One interviewee noted that the SBA's 8(a)-mentorship program is a great model for mentor protégé programs, but the success of any such program lies in properly matching mentors and protégés based on their sizes and industries.

The owner of a majority-owned construction company stated, "A protege came to me, an MBE, and asked me if I would help him. … So, he came in here and we struck up a friendship. And now when I get a job, I show him the bid and say, 'Pick what you want to do out of there.' He knows, he trusts me. He knows that he could pick any item he wanted…. I think the foundation for that was he knew I wasn't just trying to take his numbers and yank him around. I was showing him the numbers and letting him pick what he wanted to do. [I started working with him] because I wanted participation, and I couldn't get it. I couldn't figure out how to do it. So, I had to rewrite the rule book." [#4]

The Black American male owner of a DBE-certified construction company stated, "I was just lucky and blessed, I guess, because when I started out in … the 8(a) program, the 8(a) program was really hot. I got into it at the right time, and I had a good mentor company that taught me the ropes and introduced me to a lot of government contractors. … If it wasn't for that, I don't think I could compete with the other guys. I think [the City] should set up the mentor-protégé program also, where the mentor can help the protégé bond, also." [#13]

The Black American woman owner of a professional services firm stated, "If I got to do my time, then at least LFUCG could put some type of protege mentorship program in place and … force [larger firms] to assure minority success and breaking down those barriers. Like the SBA have protégé mentorship programs. Putting some type of program in place to really force these people who have the relationships [to help], because everything here is about relationships. It's about who you know, who likes you." [#PT1]

Multiple interviewees provided recommendations and comments regarding LFUCG's procurement process. Several interviewees mentioned the need for more "teeth" in minority- and woman-owned business goals.

The Black American woman owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Well, before, it was just simply little to no incentive to do anything for minorities. ... LFUCG started doing things to encourage [minority- and woman-owned business participation]. They didn't have mandates. It was more so, 'Come on, guys. Can't we all get along? Let's try to do a little something, but we're not going to put it in the law.'... [Just] mandate it." [#2]

The owner of a majority-owned construction company stated, "A lot of public agencies when they're faced with enforcing the rule or not enforce a rule, they want to save the money. They just tell you that it's a goal. But when it comes down to it, they're not dedicated to doing it." [#4]

A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I think the bid process, they need to create a section where if they're not going to make the primes accountable for hiring ... Say you got a goal of 10 percent. So, if you don't punish them or make them accountable for that 10 percent ... if you took $1,000, or %10 of that money, and put it in a fund, that since they didn't use a DBE .... They ain't going to give that 10 [percent] away… And it's etched in stone, a part of the contract." [#14]

The Black American male owner of a professional services company stated, "You can say, 'Well look, we going to spend a hundred million on this new school. So, we'll [say] 10 percent goes mandatory to minorities, minority-owned black businesses then. And if you don't use them, then you'll be penalized.' It'll be put in like a fund, to fund black businesses, then they'll be intentional about using them. … That's the best way to go about it." [#21]

The Black American male owner of an MBE- and DBE-certified construction company stated, "I think the public entities need to require the prime contractors to present them a plan of how they will utilize or how they will increase their African American participation on jobs and make the prime contractor … present them with a plan on how they're going to work with minority contract[or]s… They have a commitment, but there's no pressure or accountability given to the larger contractors to achieve the goals that they have set forth." [#15]

The owner of a WBE- and DBE-certified professional services firm stated, "Anything that they can legally and appropriately break into smaller parts to allow smaller businesses to bid on and take a role in work out there would be very helpful. … If they can look at work and parts, rather than a massive whole, that would increase the opportunities for smaller businesses to take apart." [#3]

The Black American male owner of an MBE-certified construction company stated, "If maybe the City maybe has a relationship with one of the local banks, and that might be an avenue to maybe help with maybe the lines of credit with people that are just getting established, and things like that. And in the same regard, I guess in my business, bonding capacity is a big deal. Maybe a relationship with a [bonding] company so you can maybe try to marry up any companies with them just to try to figure out what they need to do to secure bonding I think would be great. [#FG1]

Multiple interviewees expressed the need for consistent, legally enforceable, payment policies for subcontractors. Although it was noted that LFUCG tracks subcontractor payments, there is no procurement policy or code to force prime contractors to pay subcontractors in a timely manner.

> *The co-owner of a WBE- and DBE-certified professional services firm stated, "One thing that LFUCG does with their projects, they have their subcontractor monitoring, and you have to check in and tell them, 'Yes, I've been paid, and it was in a timely fashion,' or what have you. I think they do a better job of tracking that, really, than anybody else that we work for." [#11]*

> *The owner of a WBE- and DBE-certified professional services firm stated, "When you're doing work directly for Lexington, for the General Services Department, they treat you fairly and they pay you in 30 days with a check. … They treat you very fairly if you're in General Services. But if you are a sub to something in the Engineering Department or the Environmental Services, yeah, 90 days if you're lucky. And you can't count on it. City of Atlanta and [the Georgia Department of Transportation] both have slightly different programs, both of which far exceed what we have up here. … One of them pays contractors in seven to 10 days… . It's whatever the contractor puts in the system, they're going to get paid, and then they will audit whether or not that was correct. They don't pay the engineers quite that fast down there, but it's usually between 30 and 90, but you can count on it, which is a totally different thing than what we have up here." [#26]*

CHAPTER 5.
Collection and Analysis of Contract Data

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

A. Collection and Analysis of Contract Data;

B. Collection of Vendor Data;

C. Relevant Types of Work; and

D. Agency Review Process.

A. Collection and Analysis of Contract Data

BBC collected contract and vendor data from various Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) data systems, including Ionwave, PeopleSoft, and B2Gnow, as well as LFUCG's Procard payment system and internal record keeping. Those data served as the basis for key disparity study analyses, including the utilization, availability, and disparity analyses. The study team collected the most comprehensive data available on prime contracts and subcontracts LFUCG awarded between July 1, 2016 and June 30, 2021 (i.e., *the study period*). BBC sought data that included information about prime contracts and subcontracts regardless of the race/ethnicity and gender of the owners of the businesses that performed the work or their statuses as certified disadvantaged, minority-, or woman-owned businesses. The study team collected data on construction, professional services, and goods and other services prime contracts and subcontracts LFUCG awarded during the study period. Figure 5-1 presents the number of contract elements and associated dollars—including both prime contracts and subcontracts—that the study team included in its analyses.

1. Prime contract data collection. LFUCG provided BBC with electronic data on relevant prime contracts the agency awarded during the study period. Prime contract data came primarily from the PeopleSoft data system and was augmented with data from other sources. As available, BBC collected the following information about each relevant prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount;
- Amount paid-to-date;
- Whether LFUCG used contract goals to award the contract;

- Funding source (federal, state, or local funding); and
- Prime contractor name.

LFUCG advised BBC on how to interpret the provided data, including how to identify unique bid opportunities and how to aggregate related payment amounts. When possible, the study team aggregated individual payments or purchase order line items into related contract or purchase order elements. In instances where payments or line items could not be aggregated, BBC treated individual payment and line-item records as contract elements themselves.

Figure 5-1.
LFUCG contract elements included in the disparity study

Source:
BBC Research & Consulting from LFUCG contract and procurement data.

Contract type	Number	Dollars (in thousands)
Construction	4,422	$317,648
Professional services	1,114	$61,041
Good and other services	4,465	$81,461
Total	**10,001**	**$460,150**

2. Subcontract data collection. LFUCG provided BBC with data on subcontracts related to prime contracts the agency awarded during the study period. The data was sourced from Ionwave, LFUCG's online procurement site, and internal record keeping. BBC collected subcontractor data through bid documents available on Ionwave, which accounted for 43 prime contracts and approximately $80 million of the contract dollars it awarded during the study period. To gather data about additional subcontracts, BBC conducted surveys with prime contractors to collect information on the subcontracts associated with the prime contracts on which they worked during the study period. BBC collected subcontract information about construction, professional services, and goods and services contracts. The study team sent surveys via e-mail to request subcontract data associated with 92 prime contracts LFUCG awarded during the study period, accounting for approximately $278 million. BBC requested the following information about each relevant subcontract as part of the survey process:

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

After the first round of surveys, BBC sent reminder letters and emails to unresponsive prime contractors and worked with LFUCG to contact remaining unresponsive prime contractors. Through the survey effort, BBC collected subcontract data associated with more than $277 million worth of contracting LFUCG awarded during the study period.

3. Prime contract and subcontract amounts. For each contract element—that is, prime contract or subcontract—included in the study team's analyses, BBC examined the dollars LFUCG awarded to each prime contractor and the dollars prime contractors committed to any

subcontractors. If a contract did not include any subcontracts, BBC attributed the entire dollar amount to the prime contractor. If a contract included subcontracts, BBC calculated subcontract amounts as the amounts committed to each subcontractor during the study period. BBC then calculated the prime contract amount as the total dollar amount less the sum of dollars committed to all subcontractors.

B. Collection of Vendor Data

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

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

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

- LFUCG's contract and vendor data;
- LFUCG's list of certified vendors;
- The Kentucky Transportation Cabinet's DBE Directory List;
- The Kentucky Finance and Administration Cabinet Directory;
- The Ohio Department of Transportation's DBE Directory List;
- The Indiana Department of Transportation's DBE Directory List;
- Lists of certified vendors from Louisville, Kentucky; Cincinnati, Ohio; and Hamilton County, Ohio;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Small Business Administration certification and ownership lists, including 8(a), HUBZone, and self-certification lists;
- Surveys the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Online research of business websites and other sources.

C. Relevant Types of Work

For each prime contract and subcontract, BBC determined the *subindustry* that best characterized the primary line of work (e.g., heavy construction) of the business that performed the work. BBC identified subindustries based on LFUCG's contract and vendor data, surveys the study team conducted with prime contractors and subcontractors, business certification lists, D&B business listings, and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 5-2 presents the dollars the study team examined in the various subindustries BBC included in its analyses.

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

There were also contracts and procurements BBC categorized in various subindustries the study team did not include as part of its analyses. BBC did not include contracts in its analyses that:

- LFUCG awarded to universities, government agencies, utility providers, hospitals, or other nonprofit organizations ($46 million);
- Reflected national markets (i.e., subindustries dominated by large national or international businesses) or subindustries for which LFUCG awarded the majority of dollars to businesses located outside the relevant geographic market area ($86 million);[1]
- Reflected subindustries which often include property purchases, leases, or other pass-through dollars ($24 million);[2] or
- Reflected subindustries not typically included in disparity studies and which account for small proportions of LFUCG's contracting dollars.[3]

[1] Examples of such industries include computer manufacturing and proprietary software.

[2] Examples of such industries include real estate services and banking services.

[3] Examples of industries not typically included in disparity studies include publishing and scientific and precision equipment.

Figure 5-2.
LFUCG dollars by subindustry

Note:

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

Source:

BBC Research & Consulting from LFUCG contract and procurement data.

Industry	Total (in thousands)
Construction	
Water, sewer, and utility lines	$95,450
Highway, street, and bridge construction	$73,120
Building construction	$39,214
Plumbing and HVAC	$18,108
Electrical work	$12,038
Landscape services	$11,947
Concrete, asphalt, sand, and gravel products	$10,662
Concrete work	$10,126
Other construction materials	$6,692
Excavation, drilling, wrecking, and demolition	$5,557
Electrical equipment and supplies	$5,309
Trucking, hauling and storage	$5,214
Other construction services	$4,853
Painting, striping, and marking	$3,780
Heavy construction equipment rental	$3,709
Roofing	$3,118
Plumbing and HVAC supplies	$2,875
Insulation, drywall, and masonry	$2,343
Fencing, guardrails, barriers, and signs	$1,684
Rebar and reinforcing steel	$993
Landscaping supplies and equipment	$854
Total construction	**$317,648**
Professional services	
Engineering	$28,135
Human resources and job training services	$17,567
IT and data services	$4,237
Environmental services	$3,383
Advertising, marketing and public relations	$2,697
Testing and inspection	$1,584
Architectural and design services	$761
Construction management	$739
Landscape architecture	$680
Transportation planning services	$637
Other professional services	$340
Surveying and mapmaking	$281
Total professional services	**$61,041**
Goods and services	
Automobiles	$22,170
Dining services	$9,060
Industrial equipment and supplies	$6,251
Vehicle parts and supplies	$6,238
Facilities management	$5,523
Waste and recycling services	$5,438
Petroleum and petroleum products	$5,122
Other services	$3,913
Vehicle repair services	$3,617
Other goods	$3,397
Office equipment and supplies	$3,006
Safety equipment	$2,085
Cleaning and janitorial supplies	$1,836
Uniforms and apparel	$1,772
Equipment maintenance and repair	$1,432
Printing, copying, and mailing	$601
Total goods and services	**$81,461**
GRAND TOTAL	**$460,150**

D. Agency Review Process

LFUCG reviewed contracting and vendor data several times during the study process. BBC met with LFUCG to review the data collection process, information the study team gathered, and summary results. BBC incorporated LFUCG's feedback into the final contract and vendor data the study team used as part of its analyses.

CHAPTER 6.
Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of disadvantaged, minority-, and woman-owned businesses *ready, willing, and able* to perform prime contracts and subcontracts awarded by the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) in the areas of construction, professional services, and goods and other services.[1] Chapter 6 describes the availability analysis in five parts:

A. Purpose of the Availability Analysis;

B. Potentially Available Businesses;

C. Availability Database;

D. Availability Calculations; and

E. Availability Results.

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

A. Purpose of the Availability Analysis

BBC examined the availability of disadvantaged, minority-, and woman-owned businesses for LFUCG prime contracts and subcontracts to assess the degree to which those business are ready, willing, and able to perform LFUCG contracts and procurements. The findings were benchmarks against which to compare the actual participation of disadvantaged, minority-, and woman-owned businesses in that work. Comparisons between participation and availability allowed BBC to determine whether certain business groups were *underutilized* during the study period relative to their availability for LFUCG work (for details, see Chapter 8).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements LFUCG awarded during the study period, which served as a proxy for the contracts and procurements it might award in the future. BBC began the availability analysis by identifying the specific subindustries in which LFUCG spends the majority of its contracting dollars (for details, see Chapter 5) as well as the geographic area in which the majority of the businesses with which LFUCG spends contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*).[2]

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

[2] BBC defined the RGMA for LFUCG's construction and professional services work as the Bluegrass Area Development District, which comprises Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nicholas, Powell, Scott, and Woodford Counties in Kentucky. The study team defined the RGMA for LFUCG's goods and other services work as the Bluegrass Area Development District plus Boone, Campbell, Grant, Jefferson, Kenton, Oldham, Pendleton, and Shelby Counties in Kentucky.

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

1. Overview of availability surveys. The study team conducted telephone and online surveys with business owners and managers to identify local businesses potentially available for LFUCG prime contracts and subcontracts. BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and are located within the RGMA. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about all business establishments listed under 8-digit D&B work specialization codes that were most related to the contracts and procurements LFUCG awarded during the study period. BBC obtained listings on 4,598 local businesses that do work related to those work specializations. BBC did not have working phone numbers for 1,147 of those businesses but attempted availability surveys with the remaining 3,451 businesses.

2. Availability survey information. BBC worked with Davis Research to conduct telephone and online surveys with the owners or managers of the identified businesses. Each availability survey collected information about the characteristics of each business, including:

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

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

- Being a private sector business;
- Having performed work relevant to LFUCG construction, professional services, or goods and other services contracting or procurement;
- Having bid on or performed construction, professional services, or goods and other services prime contracts or subcontracts in the RGMA in the past five years; and

- Being interested in working with government organizations.[3]

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts LFUCG awards:

- The role in which they work (i.e., as a prime contractor, subcontractor, or both); and
- The largest contract they bid or performed in the past five years.

C. Businesses in the Availability Database

After conducting availability surveys, BBC developed a database of information about businesses potentially available for relevant LFUCG contracts and procurements. Figure 6-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The database included information on 499 businesses potentially available for specific construction, professional services, and goods and other services contracts and procurements LFUCG awards. As shown in Figure 6-1, of those businesses, 21.8 percent were minority- or woman-owned.

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

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

Source:
BBC Research & Consulting availability analysis.

Business group	Percent
Non-Hispanic white woman-owned	12.0 %
Asian American-owned	1.4
Black American-owned	4.6
Hispanic American-owned	2.6
Native American-owned	1.2
Total Minority-owned	9.8 %
Total Minority- and Woman-owned	**21.8 %**

The information in Figure 6-1 reflects a simple *head count* of businesses with no analysis of their availability for specific LFUCG contracts or procurements. It represents only a first step toward analyzing the availability of minority- and woman-owned businesses for LFUCG work. BBC used a *custom census* approach to calculate the availability of minority- and woman-owned businesses, because it accounts for specific business characteristics such as work type, business capacity, contractor role, and interest in government work. A custom census approach has been accepted in federal court as the preferred methodology for conducting availability analyses.

D. Availability Calculations

BBC analyzed information from the availability database to develop dollar-weighted estimates of the availability of minority- and woman-owned businesses for LFUCG work. Those estimates represent the percentage of associated contracting and procurement dollars minority- and woman-owned businesses would be expected to receive based on their availability for specific types and sizes of LFUCG prime contracts and subcontracts.

[3] That information was gathered separately for prime contract and subcontract work.

BBC used a bottom up, contract-by-contract matching approach to calculate availability. Only a portion of the businesses in the availability database was considered potentially available for any given LFUCG prime contract or subcontract. For each participating organization, BBC first examined the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*), including type of work, contract size, and contract role. We then identified businesses in the availability database that perform work of that type, in that role (i.e., as a prime contractor or subcontractor), of that size, and in the Lexington area. BBC identified the characteristics of each prime contract and subcontract included in the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, BBC identified businesses in the availability database that reported they:
   - Are interested in performing construction, professional services, or goods and other services work in that particular role for that specific type of work for government organizations in Kentucky;
   - Can serve customers in the Lexington area; and
   - Have bid on or performed work of that size in the past five years.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.
3. The study team translated the counts of businesses in step 2 into percentages.

BBC repeated those steps for each contract element included in the disparity study, and then multiplied the percentages of businesses for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses overall as well as separately for each relevant racial/ethnic and gender group. Figure 6-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract LFUCG awarded during the study period.

BBC's availability calculations are based on prime contracts and subcontracts LFUCG awarded between July 1, 2016 and June 30, 2021. A key assumption of the availability analysis is that the contracts and procurements LFUCG awarded during the

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

On a contract LFUCG awarded during the study period, the prime contractor awarded a subcontract worth $45,780 for engineering services. To determine the overall availability of minority- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

a. Indicated they performed engineering work;
b. Reported bidding on work of similar or greater size in the past;
c. Can serve customers in the Lexington area; and
d. Reported interest in working as a subcontractor on government contracts or procurements.

BBC found 33 businesses in the availability database that met those criteria. Of those businesses, four were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 12.1 percent (i.e., 4/33 X 100 = 12.1).

study period are representative of the contracts and procurements it will award in the future. If the types and sizes of the contracts and procurements LFUCG awards in the future differ substantially from the ones it awarded in the past, then it should consider adjusting availability estimates accordingly.

E. Availability Results

BBC estimated the availability of minority-and woman-owned businesses for construction, professional services, and goods and other services prime contracts and subcontracts that LFUCG awarded during the study period. BBC presents availability analysis results for LFUCG work overall and for different subsets of contracts and procurements.

1. Overall. Figure 6-3 presents dollar-weighted estimates of the availability of minority- and woman-owned businesses for LFUCG contracts and procurements. Overall, the availability of minority- and woman-owned businesses for LFUCG work is 16.5 percent, indicating that those businesses might be expected to receive 16.5 percent of the dollars LFUCG awards in construction, professional services, and goods and other services. Non-Hispanic white woman-owned businesses (11.9%) and Black American-owned businesses (2.3%) exhibited the highest availability among all relevant groups.

Figure 6-3.
Overall availability estimates for LFUCG work, by racial/ethnic and gender group

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail and results by group, see Figure F-2 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Availability
Non-Hispanic white woman-owned	11.9 %
Asian American-owned	0.6
Black American-owned	2.3
Hispanic American-owned	1.2
Native American-owned	0.5
Total Minority-owned	4.6 %
Total Minority- and Woman-owned	**16.5 %**

2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often operate as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for LFUCG prime contracts and subcontracts. Figure 6-4 presents those results. As shown in Figure 6-4, the availability of minority- and woman-owned businesses considered together is actually higher for LFUCG prime contracts (16.7%) than for subcontracts (15.6%).

Figure 6-4.
Availability estimates for LFUCG work by contract role

Note:

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

For more detail, see Figures F-8 and F-9 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	12.2 %	9.7 %
Asian American-owned	0.6	0.2
Black American-owned	2.3	2.2
Hispanic American-owned	1.1	2.3
Native American-owned	0.4	1.1
Total Minority-owned	4.4 %	5.9 %
Total Minority- and Woman-owned	**16.7 %**	**15.6 %**

3. Industry. BBC examined availability analysis results separately for LFUCG construction, professional services, and goods and other services contracts. As shown in Figure 6-5, the availability of minority- and woman-owned businesses considered together is highest for LFUCG construction contracts (17.0%) and lowest for goods and other services contracts (14.3%).

Figure 6-5.
Availability estimates for LFUCG work by industry

Note:

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

For more detail and results by group, see Figures F-5, F-6, and F-7 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	12.3 %	13.3 %	9.1 %
Asian American-owned	0.0	0.9	2.5
Black American-owned	2.6	1.0	2.2
Hispanic American-owned	1.4	1.5	0.3
Native American-owned	0.7	0.2	0.3
Total Minority-owned	4.7 %	3.5 %	5.3 %
Total Minority- and Woman-owned	**17.0 %**	**16.8 %**	**14.3 %**

4. Contract size. BBC examined availability analysis results separately for *large contracts*—construction contracts and procurements worth more than $1 million and professional services and goods and other services contracts and procurements worth $500,000 or more—and *small contracts*—construction contracts and procurements worth less than $1 million and professional services and goods and other service contracts and procurements worth less than $500,000—to examine the impact of contract size on availability. As shown in Figure 6-6, the availability of minority- and woman-owned businesses considered together is higher for small contracts (22.1%) than for large contracts (13.8%).

Figure 6-6.
Availability estimates for LFUCG work by contract size

Note:

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

For more detail, see Figures F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract size	
	Small	Large
Non-Hispanic white woman-owned	13.7 %	11.5 %
Asian American-owned	1.2	0.3
Black American-owned	3.3	1.8
Hispanic American-owned	2.6	0.3
Native American-owned	1.3	0.0
Total Minority-owned	8.4 %	2.3 %
Total Minority- and Woman-owned	**22.1 %**	**13.8 %**

5. Funding source. LFUCG awards contracts and procurements wholly funded by local funding sources (*non USDOT-funded*) as well as contracts and procurements that include United States Department of Transportation (USDOT) funding via the Kentucky Transportation Cabinet, or KYTC (*USDOT-funded*).[4] For non USDOT-funded work, LFUCG uses aspirational contracting goals to award many contracts and procurements to encourage the participation of minority- and woman-owned businesses. For USDOT-funded work, LFUCG uses condition-of-award, Disadvantaged Business Enterprise (DBE) contracting goals that KYTC determines to encourage the participation of certified DBEs, most of which are minority- or woman-owned businesses.

BBC examined availability estimates separately for both types of work. As shown in Figure 6-7, the availability of minority- and woman-owned businesses considered together is higher for LFUCG's non USDOT-funded work (16.9%) than for its USDOT-funded work (13.7%).

Figure 6-7.
Availability estimates for USDOT- and non USDOT-funded work

Note:

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

For more detail and results by group, see Figure F-12 and F-13 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Funding source	
	USDOT-funded	Non USDOT-funded
Non-Hispanic white woman-owned	10.9 %	12.0 %
Asian American-owned	0.1	0.6
Black American-owned	1.0	2.5
Hispanic American-owned	1.4	1.2
Native American-owned	0.3	0.6
Total Minority-owned	2.8 %	4.9 %
Total Minority- and Woman-owned	**13.7 %**	**16.9 %**

[4] BBC considered a contract to be USDOT-funded if it included at least one dollar of USDOT funding.

CHAPTER 7.
Utilization Analysis

Chapter 7 presents information about the participation of minority- and woman-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) awarded between July 1, 2016 and June 30, 2021 (i.e., the *study period*).[1]

BBC Research & Consulting (BBC) measured the participation of disadvantaged, minority-, and woman-owned businesses in LFUCG contracting and procurement in terms of *utilization*—the percentage of prime contract and subcontract dollars LFUCG awarded to those businesses during the study period. BBC measured the participation of disadvantaged, minority-, and woman-owned businesses in LFUCG work regardless of whether they were certified as disadvantaged business (DBE), minority-owned (MBE), or woman-owned (WBE) businesses by a certifying agency.

A. All Contracts

BBC first examined participation of minority- and woman-owned businesses in all relevant construction, professional services, and goods and other services prime contracts and subcontracts LFUCG awarded during the study period. As shown in Figure 7-1, minority- and woman-owned businesses considered together received 12.0 percent of the relevant contract and procurement dollars LFUCG awarded during the study period. The groups that exhibited the highest levels of participation were woman-owned businesses (8.3%), Black American-owned businesses (1.5%), and Hispanic American-owned businesses (1.2%). Most of the dollars LFUCG awarded to minority- and woman-owned businesses—7.1 percent—went to businesses that were certified as MBEs, WBEs, or DBEs by certifying agencies.

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

Figure 7-1.
Utilization analysis results for LFUCG contracts and procurements

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization
Minority- and woman-owned	
Non-Hispanic white woman-owned	8.3 %
Asian American-owned	0.9
Black American-owned	1.5
Hispanic American-owned	1.2
Native American-owned	0.1
Total Minority-owned	3.7 %
Total Minority- and Woman-owned	**12.0 %**
Certified	
Non-Hispanic white woman-owned	4.9 %
Asian American-owned	0.7
Black American-owned	0.6
Hispanic American-owned	0.8
Native American-owned	0.1
Total Minority-owned	2.2 %
Total MBE/WBE/DBE	**7.1 %**

B. Contract Role

Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine utilization analysis results separately for prime contracts and subcontracts. As shown in Figure 7-2, the participation of minority- and woman-owned businesses considered together was in fact higher in subcontracts LFUCG awarded during the study period (23.4%) than in prime contracts (10.1%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts, and thus may be more accessible to minority- and woman-owned businesses.

Figure 7-2.
Utilization analysis results by contract role

Note:

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

For more detail, see Figures F-8 and F-9 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

	Contract role	
Business group	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	7.9 %	10.4 %
Asian American-owned	0.9	1.1
Black American-owned	1.2	3.7
Hispanic American-owned	0.2	7.6
Native American-owned	0.0	0.6
Total Minority-owned	2.2 %	13.0 %
Total Minority- and Woman-owned	**10.1 %**	**23.4 %**

C. Industry

BBC also examined utilization analysis results separately for LFUCG's construction, professional services, and goods and other services contracts and procurements to determine whether the participation of minority- and woman-owned businesses differed by industry. As shown in Figure 7-3, the participation of minority- and woman-owned businesses considered together was highest for professional services work LFUCG awarded during the study period (21.5%) and lowest for goods and other services work (5.5%).

Figure 7-3.
Utilization analysis results by industry

Note:

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

For more detail and results by group, see Figure F-5, F-6, and F-7 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	8.4 %	13.2 %	4.1 %
Asian American-owned	0.0	5.6	0.8
Black American-owned	1.5	2.7	0.6
Hispanic American-owned	1.7	0.0	0.0
Native American-owned	0.2	0.0	0.0
Total Minority-owned	3.4 %	8.3 %	1.4 %
Total Minority- and Woman-owned	**11.8 %**	**21.5 %**	**5.5 %**

D. Contract Size

BBC examined utilization analysis results separately for *large contracts*—construction contracts and procurements worth more than $1 million and professional services and goods and other services contracts and procurements worth $500,000 or more—and *small contracts*—construction contracts and procurements worth less than $1 million and professional services and goods and other service contracts and procurements worth less than $500,000—to examine the impact of contract size on utilization. As shown in Figure 7-4, the participation of minority- and woman-owned businesses considered together was higher for small contracts (14.8%) than for large contracts (7.7%).

Figure 7-4.
Utilization analysis results by contract size

Note:

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

For more detail, see Figures F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract size	
	Small	Large
Non-Hispanic white woman-owned	9.4 %	7.1 %
Asian American-owned	1.5	0.5
Black American-owned	3.3	0.0
Hispanic American-owned	0.5	0.0
Native American-owned	0.1	0.0
Total Minority-owned	5.4 %	0.5 %
Total Minority- and Woman-owned	**14.8 %**	**7.7 %**

E. Funding Source

LFUCG awards contracts and procurements wholly funded by local funding sources (*non USDOT-funded*) as well as contracts and procurements that include United States Department of

Transportation (USDOT) funding via the Kentucky Transportation Cabinet, or KYTC (*USDOT-funded*).[2] For non USDOT-funded work, LFUCG uses aspirational contracting goals to award many contracts and procurements to encourage the participation of minority- and woman-owned businesses. For USDOT-funded work, LFUCG uses condition-of-award, Disadvantaged Business Enterprise (DBE) contracting goals that KYTC determines to encourage the participation of certified DBEs, most of which are minority- or woman-owned businesses.

BBC examined utilization results separately by funding type to assess the effectiveness of LFUCG's use of aspirational contracting goals and KYTC's DBE contracting goals in encouraging the participation of minority- and woman-owned businesses in LFUCG work. As shown in Figure 7-5, the participation of minority- and woman-owned businesses considered together is higher for LFUCG's non USDOT-funded contracts (12.2%) than for its USDOT-funded contracts (10.3%).

Figure 7-5.
Utilization analysis results for USDOT- and non USDOT-funded work

Note:

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

For more detail, see Figures F-12 and F-13 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

	Funding source	
Business group	USDOT-funded	Non USDOT-funded
Non-Hispanic white woman-owned	2.8 %	9.0 %
Asian American-owned	0.8	0.9
Black American-owned	0.0	1.7
Hispanic American-owned	6.7	0.5
Native American-owned	0.0	0.1
Total Minority-owned	7.5 %	3.2 %
Total Minority- and Woman-owned	**10.3 %**	**12.2 %**

F. Concentration of Dollars

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

- The number of different businesses within each group to which LFUCG awarded contract and procurement dollars during the study period; and
- The number of different businesses within each group that accounted for 75 percent of the group's total contracting dollars during the study period.

Figure 7-6 presents those results for each relevant business group. Most notably, although LFUCG awarded contract and procurement dollars to 107 different woman-owned businesses during the study period, 15 of them (or, 14.0%) accounted for 75 percent of those dollars. One woman-owned business alone accounted for 26 percent of all dollars that went to woman-

[2] BBC considered a contract to be USDOT-funded if it included at least one dollar of USDOT funding.

owned businesses in total. Similarly, one Native American-owned businesses accounted for virtually all the dollars LFUCG awarded to Native American-owned business in total.

Figure 7-6.
Concentration of LFUCG contracting dollars that went to minority- and woman-owned businesses

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	107	15	14.0 %
Asian American-owned	9	2	22.2
Black American-owned	23	8	34.8
Hispanic American-owned	10	2	20.0
Native American-owned	2	1	50.0

CHAPTER 8.
Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of disadvantaged, minority-, and woman-owned businesses in prime contracts and subcontracts the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) awarded between July 1, 2016 and June 30, 2021 (i.e., the *study period*) with the percentage of contract and procurement one might expect LFUCG to award to those businesses based on their *availability* for that work.[1] The analysis focused on construction, professional services, and goods and other services contracts and procurements LFUCG awarded during the study period. Chapter 8 presents the disparity analysis in three parts:

A. Overview;

B. Disparity Analysis Results; and

C. Statistical Significance.

A. Overview

BBC expressed both participation and availability as percentages of the total dollars associated with a particular set of contracts or procurements and then calculated a *disparity index* to help compare participation and availability results for relevant business groups and different contract sets. We used the following formula to do so:

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

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

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

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

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of disadvantaged, minority-, and woman-owned businesses for contracts and procurements LFUCG awarded during the study period.

1. All contracts and procurements. Figure 8-1 presents disparity indices for all relevant prime contracts and subcontracts that LFUCG awarded during the study period. There is a line at the disparity index level of 100, which indicates parity, and a line at the disparity index level of 80, which indicates a substantial disparity. Disparity indices of less than 100 indicate disparities, and disparity indices of less than 80 indicate substantial disparities. As shown in Figure 8-1, minority- and woman-owned businesses considered together exhibited a disparity index of 73 for contracts and procurements LFUCG awarded during the study period, indicating substantial underutilization. Three relevant business groups exhibited substantial disparities for all relevant prime contracts and subcontracts: white woman-owned businesses (disparity index of 69), Black American-owned businesses (disparity index of 66), and Native American-owned businesses (disparity index of 20).

Figure 8-1.
Disparity analysis results for all LFUCG contracts and procurements

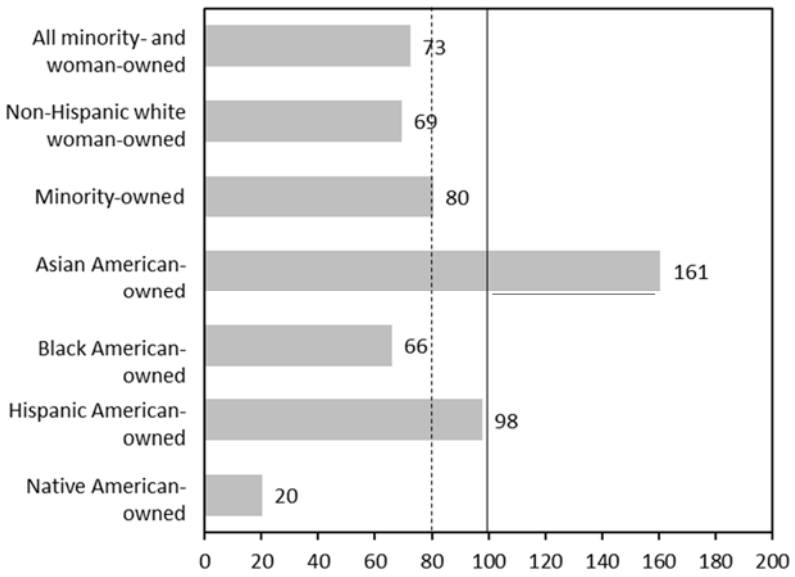
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts. As shown in Figure 8-2, minority- and woman-owned businesses considered together showed a substantial disparity for LFUCG prime contracts (disparity index of 61) but not for subcontracts (disparity index of 151). Results for relevant business groups also differed between prime contracts and subcontracts:

- All business groups showed substantial disparities for prime contracts except Asian American-owned businesses (disparity index of 140).
- Only Native American-owned firms showed a substantial disparity for subcontracts (disparity index of 53).

Figure 8-2.
Disparity analysis results by contract role

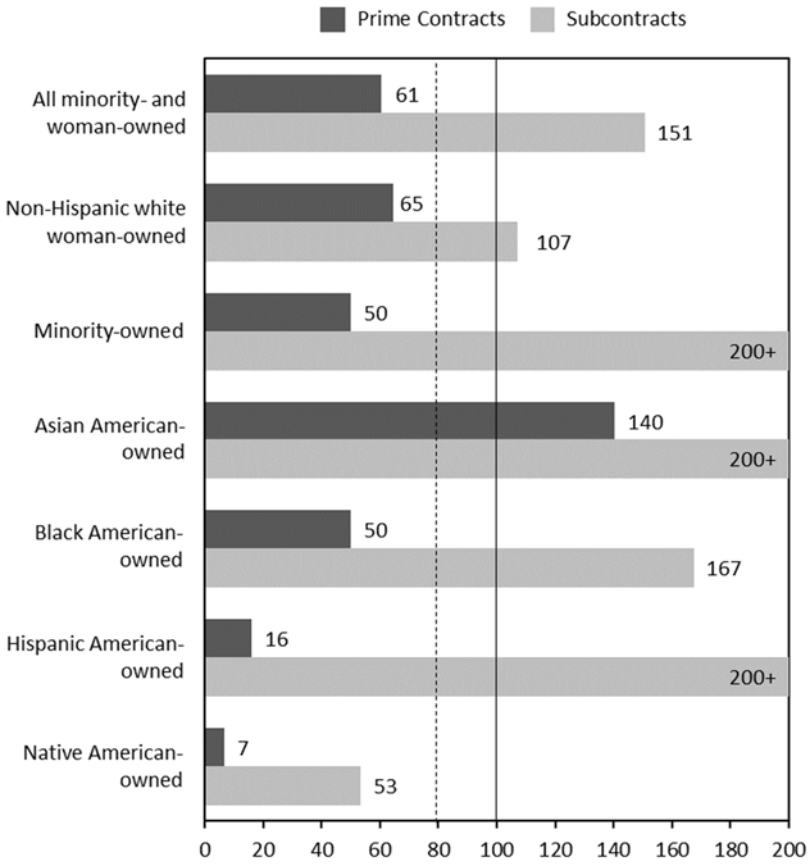
Note:

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

For more detail and results by group, see Figure F-8 and F-9 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



3. Industry. BBC also examined disparity analysis results separately for LFUCG's construction, professional services, and goods and other services contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure 8-3, minority- and woman-owned businesses considered together exhibited substantial disparities for LFUCG's construction (disparity index of 69) and goods and other services (disparity index of 38) contracts and procurements, but not for professional services (disparity index of 128). Disparity analysis results differed for relevant business groups across the different industries:

- White woman-owned businesses (disparity index of 68), Black American-owned businesses (disparity index of 59), and Native American-owned businesses (disparity index of 24) all showed substantial disparities for construction work.
- Hispanic American-owned businesses (disparity index of 3) and Native American-owned businesses (disparity index of 0) showed substantial disparities for professional services work.
- White woman-owned businesses (disparity index of 45), Asian American-owned businesses (disparity index of 31), Black American-owned businesses (disparity index of 27), Hispanic American-owned businesses (disparity index of 11), and Native American-owned businesses (disparity index of 0) all showed substantial disparities for goods and other services work.

Figure 8-3.
Disparity analysis results by industry

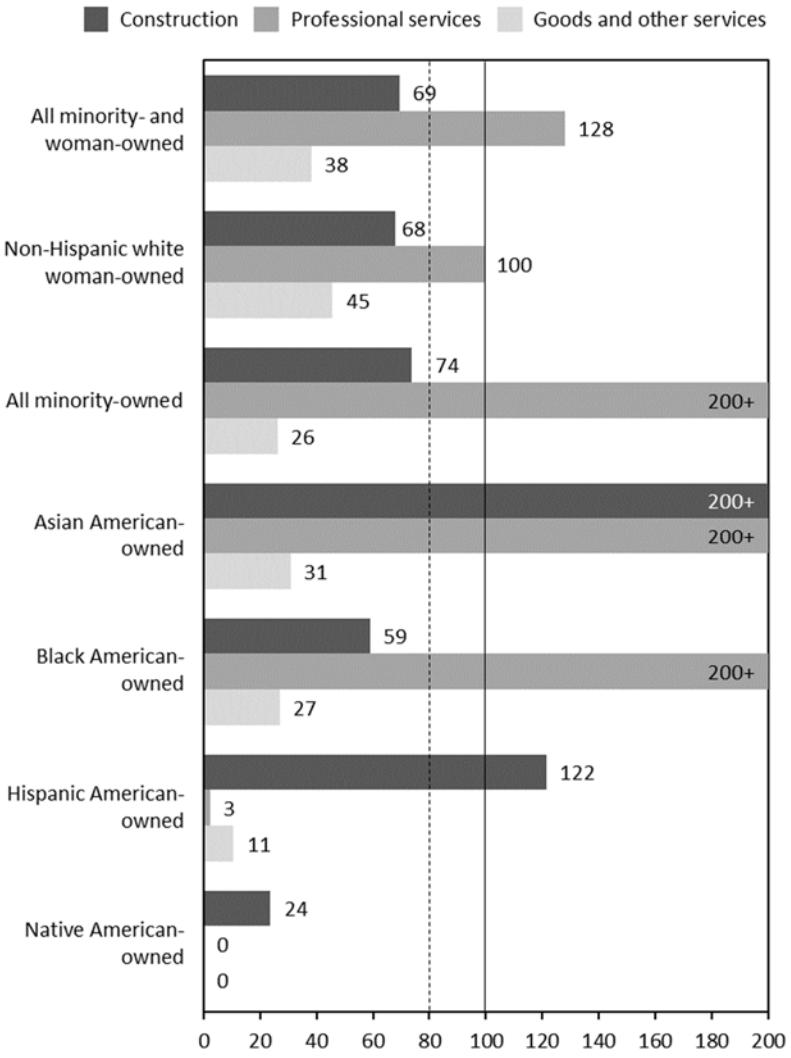
Note:

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

For more detail and results by group, see F-5, F-6, and F-7 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



4. Contract size. BBC examined disparity analysis results separately for *large contracts*—construction contracts and procurements worth more than $1 million and professional services and goods and other services contracts and procurements worth $500,000 or more—and *small contracts*—construction contracts and procurements worth less than $1 million and professional services and goods and other service contracts and procurements worth less than $500,000—awarded by LFUCG during the study period. As shown in Figure 8-4, minority- and woman-owned businesses considered together exhibited substantial disparities for both large and small contracts and procurements. Although most business groups exhibited substantial disparities regardless of contract size, there were a few exceptions:

- All individual business groups exhibited substantial disparities for large contracts except Asian American-owned businesses (disparity index of 177) and Native American-owned businesses (disparity index of 100).
- All individual business groups exhibited substantial disparities for small contracts and procurements except Asian American-owned businesses (disparity index of 124) and Black American-owned businesses (disparity index of 102).

Figure 8-4.
Disparity analysis results by contract size

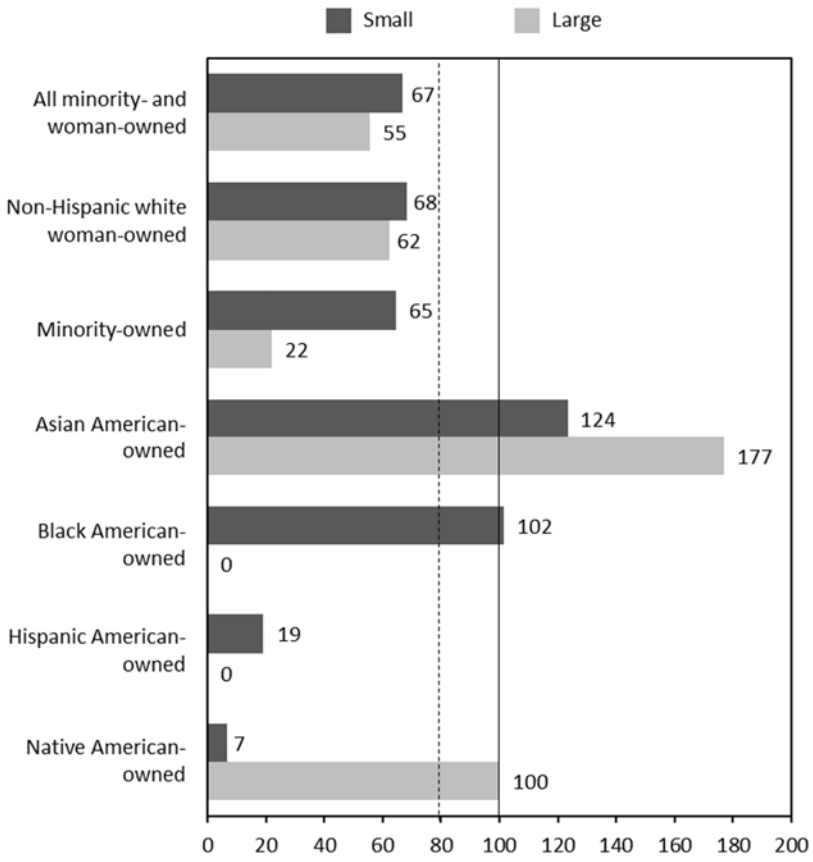
Note:

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

For more detail and results by group, see F-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



5. Funding source. LFUCG awards contracts and procurements wholly funded by local funding sources (*non USDOT-funded*) as well as contracts and procurements that include United States Department of Transportation (USDOT) funding via the Kentucky Transportation Cabinet, or the KYTC (*USDOT-funded*).[3] For non USDOT-funded work, LFUCG uses aspirational contracting goals to award many contracts and procurements to encourage the participation of minority- and woman-owned businesses. For USDOT-funded work, LFUCG uses condition-of-award, Disadvantaged Business Enterprise (DBE) contracting goals that KYTC determines to encourage the participation of certified DBEs, most of which are minority- or woman-owned businesses. BBC examined disparity analysis results separately by funding type to assess the effectiveness of LFUCG's use of aspirational contracting goals and KYTC's DBE contracting goals in encouraging the participation of minority- and woman-owned businesses in LFUCG work.

As shown in Figure 8-5, minority- and woman-owned businesses considered together exhibited substantial disparities for LFUCG contracts and procurements for both non USDOT-funded (disparity index of 72) and USDOT-funded (disparity index of 76) contracts and procurements. Disparity analysis results differed somewhat for relevant business groups by funding type:

[3] BBC considered a contract to be USDOT-funded if it included at least one dollar of USDOT funding.

- White woman-owned businesses (disparity index of 26), Black American-owned businesses (disparity index of 3), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on USDOT-funded contracts and procurements.
- All business groups exhibited substantial disparities on non USDOT-funded contracts and procurements except Asian American-owned businesses (disparity index of 146).

Figure 8-5.
Disparity analysis results by funding source

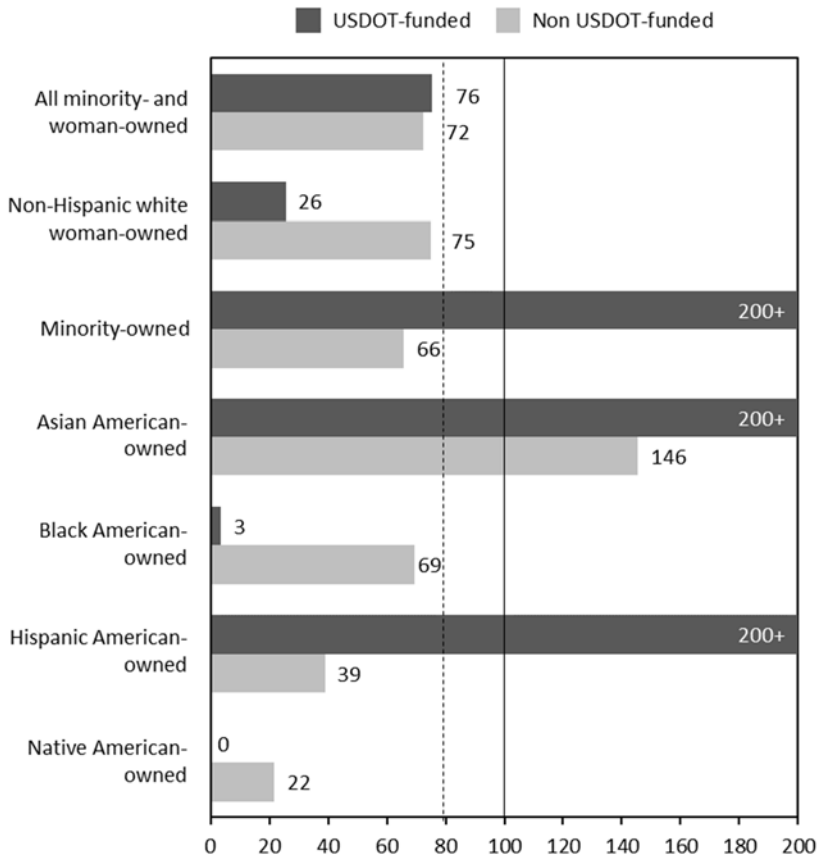
Note:

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

For more detail and results by group, see F-12 and F-13 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



C. Statistical Significance

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

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

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

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

2. Results. BBC ran Monte Carlo simulations on all LFUCG contracts and procurements considered together to assess whether the substantial disparities relevant business groups exhibited for that work were statistically significant. As shown in the top panel of Figure 8-6, results from the Monte Carlo analysis indicated the disparities that minority- and woman-owned businesses considered together exhibited for LFUCG contracts and procurements were statistically significant at the 95 percent confidence level. In addition, the disparities exhibited by Native American-owned businesses were statistically significant at the 95 percent confidence level.

BBC also ran Monte Carlo simulations on the non-USDOT funded contracts and procurements LFUCG awarded during the study period, because that work best reflected LFUCG's own contracting and procurement policies without the influence of KYTC's Federal DBE Program policies. As shown in the bottom panel of Figure 8-6, results from the Monte Carlo analysis indicated the disparities that minority- and woman-owned businesses considered together exhibited for non USDOT-funded contracts and procurements were statistically significant at the 95 percent confidence level. In addition, the disparities exhibited by Hispanic American- and Native American-owned businesses were statistically significant at the 95 percent confidence level.

Figure 8-6.
Monte Carlo simulation results

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
All contracts			
Minority-owned and woman-owned	73	22,899	2.3 %
Non-Hispanic white woman-owned	69	52,633	5.3 %
Minority-owned	80	153,076	15.3 %
Asian American-owned	161	N/A	N/A %
Black American-owned	66	157,539	15.8 %
Hispanic American-owned	98	555,270	55.5 %
Native American-owned	20	63	<0.1 %
Non USDOT-funded contracts			
Minority-owned and woman-owned	72	23,013	2.3 %
Non-Hispanic white woman-owned	75	106,015	10.6 %
Minority-owned	66	21,066	2.1 %
Asian American-owned	146	N/A	N/A %
Black American-owned	69	207,156	20.7 %
Hispanic American-owned	39	14	<0.1 %
Native American-owned	22	190	<0.1 %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 9.
Program Measures

As part of implementing the Minority Business Enterprise Program (MBEP), the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) primarily uses *race- and gender-neutral* measures to encourage the participation of minority- and woman-owned businesses, as well as other disadvantaged businesses, in its contracting and procurement.[1] Race- and gender-neutral measures are designed to encourage the participation of all businesses in an organization's work, irrespective of the race/ethnicity or gender of business owners. In contrast, *race- and gender-conscious* measures are designed specifically to encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned businesses on individual contracts or procurements). The only race- and gender-conscious measure LFUCG uses is its Bid Bond Assistance Program, in which it waives bid bond requirements for eligible minority- and woman-owned businesses that request bond assistance.

BBC Research & Consulting (BBC) reviewed measures LFUCG uses to encourage the participation of minority- and woman-owned businesses, as well as other disadvantaged businesses, in its contracting and procurement in three parts:

A. Program Overview; and

B. Race- and Gender-neutral Measures; and

C. Bid Bond Program.

A. Program Overview

LFUCG implements the MBEP to encourage the participation of minority-owned businesses, woman-owned businesses, and other disadvantaged businesses in its contracting and procurement. Although LFUCG does not certify businesses as minority business enterprises (MBEs) or woman business enterprises (WBEs), it accepts certifications from the Kentucky Finance and Administration Cabinet, Kentucky Transportation Cabinet, National Minority Supplier Development Council, and Women's Business Enterprise National Council, among other state and regional certifying organizations. As part of the MBEP, each city division is required to report on the participation of certified MBEs and WBEs in its contracts and procurements, and LFUCG conducts targeted outreach to disadvantaged businesses and minority- and woman-owned businesses.

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

B. Race- and Gender-neutral Measures

LFUCG uses myriad race- and gender-neutral measures to encourage the participation of minority- and woman-owned businesses—including other disadvantaged businesses—in its contracting. LFUCG uses the following types of race- and gender-neutral measures as part of the MBEP:

- Business outreach and communication;
- Technical assistance;
- Finance and bonding programs; and
- Aspirational goals.

1. Business outreach and communication. LFUCG conducts and participates in various outreach and communication efforts to encourage the growth of disadvantaged businesses, as well as minority- and woman-owned businesses, and their participation in LFUCG contracts and procurements.

a. Construction Business Connection Event. LFUCG hosts the Construction Business Connection Event, an annual construction-focused event, with prime contractors, subcontractors, and division project managers to encourage networking and alert the community to upcoming projects.

b. Lexington Bluegrass Area Minority Business Expo. LFUCG sponsors the annual Lexington Bluegrass Area Minority Business Expo, during which businesses are encouraged to network and attend business workshops.

c. How to do Business with LFUCG. LFUCG hosts a biannual training called "How to do Business with LFUCG" to inform the business community on how to register as a vendor with LFUCG, the types of goods and services LFUCG regularly procures, and other information to increase the participation of disadvantaged businesses and minority- and woman-owned businesses in LFUCG contracting and procurement.

d. GrowInLex. LFUCG, in partnership with Euphrates International Investment Company, offers an online networking platform called GrowInLex, which is designed to help businesses enter new markets, find potential joint venture partners, connect to potential buyers and suppliers, and engage in economies of scale. The platform is free to minority- and woman-owned businesses.

e. Targeted solicitations. Certified businesses registered with LFUCG receive targeted information regarding upcoming contract and procurement opportunities.

2. Technical assistance. LFUCG, in partnership with the Kentucky Procurement Assistance Technical Center (KYPTAC), hosts monthly webinars on certification and other contracting and procurement-related processes and topics. LFUCG also offers training to businesses regarding economic and workforce development, focusing specifically on licensure and certification and employment entry and re-entry.

3. Finance and bonding assistance. LFUCG offers race- and gender-neutral finance and bonding assistance to support small businesses, including many minority- and woman-owned businesses, and make LFUCG contracting and procurement opportunities more accessible. For example, LFUCG's Economic Development Investment Board provides grants of up to $50,000 through the Lexington Jobs Fund for businesses and nonprofit organizations located in or moving to Lexington. Businesses and organizations may use grant funds for workforce training, job placement, and certification activities.

4. Aspirational contract goals. LFUCG has set an aspirational goal of 10 percent for the participation of minority- and woman-owned businesses in its competitively-bid contracts and procurements. Prime contractors bidding on that work are encouraged to meet the goal either by making subcontracting commitments to certified MBEs or WBEs or submitting documentation they made *good faith efforts* (GFEs) to meet the goals but failed to do so. LFUCG encourages bidders to meet the goal, but they are not required to do so as a matter of responsiveness or condition of contract award.

C. Bid Bond Program

The only race- and gender-conscious measure LFUCG uses as part of the MBEP is the Bid Bond Assistance Program, which provides bid bond assistance to certified minority- and woman-owned businesses. As part of the program, eligible businesses can request bid bond assistance from LFUCG within 48 hours of bid closings and, upon receiving approval, are issued "Letters of Certification" from LFUCG's Central Purchasing Department in lieu of securing bid bonds. Approved businesses submitting bids in response to LFUCG solicitations must include their "Letters of Certification" as part of their bid packages. The letters do not exempt them from any required payment or performance bonds.

CHAPTER 10.
Program Considerations

The disparity study provides substantial information the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) should examine as it considers potential refinements to its implementation of the Minority Business Enterprise Program (MBEP) and ways to further encourage the participation of disadvantaged, minority-, and woman-owned businesses in its contracts and procurements. BBC Research & Consulting (BBC) presents several key considerations LFUCG should make based on disparity study results, organized into the following categories:

A. Overall Aspirational Goal;

B. Contract-specific Goals; and

C. Race- and Gender-neutral Measures.

A. Overall Aspirational Goal

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

LFUCG could consider following a two-step process to develop overall aspirational goals for the participation of minority- and woman-owned businesses in its contracts and procurements, consisting of *establishing a base figure* and *considering an adjustment* to the base figure based on information about local marketplace conditions and other factors that might impact the ability of minority- and woman-owned businesses to participate in its work. BBC presents an example of a two-step goal-setting process based on disparity study results.

1. Establishing a base figure. Organizations often develop base figures for their overall aspirational goals based on demonstrable evidence of the availability of minority- and woman-owned businesses for their contracts and procurements. The availability analysis indicated that minority- and woman-owned businesses are potentially available to participate in 16.5 percent of LFUCG's contracting and procurement dollars, which LFUCG could consider as its base figure for its overall aspirational goal.[1]

[1] See Appendix F, Figure F-2 for more details about base availability numbers.

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

1. Volume of work minority- and woman-owned businesses have performed in recent years;
2. Information related to employment, self-employment, education, training, and unions;
3. Information related to financing, bonding, and insurance; and
4. Other relevant data.

a. Volume of work minority- and woman-owned businesses have performed in recent years. LFUCG could consider making an adjustment to its base figure based on the degree to which minority- and woman-owned businesses have participated in its contracts and procurements in recent years. Figure 10-1 presents the percentage of contract and procurement dollars LFUCG awarded to minority- and woman-owned businesses in each year of the study period. The median participation of minority- and woman-owned businesses in LFUCG contracts and procurements during that time was 13.1 percent, which supports a downward adjustment to the base figure.

Figure 10-1.
Minority- and woman-owned business participation in LFUCG work during the study period

Source:
BBC utilization analysis.

Fiscal year	Past participation
2016	15.9 %
2017	13.7
2018	13.1
2019	10.8
2020	4.4

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

c. Information related to financing, bonding, and insurance. BBC's analyses of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in the Lexington area do not

have the same access to those business inputs as white men and businesses owned by white men. For example, minorities were less likely to own homes than whites in the region and were more likely to receive subprime conventional home purchase loans. For many business owners, homeownership and home equity have been shown to be key sources of business capital. In addition, anecdotal evidence the study team collected through public meetings, surveys, and in-depth interviews with local businesses indicated that minority- and woman-owned businesses often have various difficulties obtaining business loans, bonds, and insurance. Any barriers to obtaining financing, bonding, or insurance might limit opportunities for minorities and women to successfully form and operate businesses in the local marketplace, thus making it for difficult for them to compete and perform LFUCG work. Taken together, that information supports an upward adjustment to the base figure.

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

3. Goal updates. If LFUCG decides to establish an overall aspirational goal for minority- and woman-owned business participation, it should determine how frequently it will update its goal. It should also consider any changes it plans on making to business development programs, procurement processes, staff resources, or other processes and programs that might affect its ability to achieve the goal each year and build capacity among minority- and woman-owned businesses. In addition, LFUCG should review its goal-setting process regularly to ensure it provides adequate flexibility to respond to any changes in local marketplace conditions, anticipated contract and procurement opportunities, new evidence, and other factors.

B. Contract-specific Goals

With the exception of the Bid Bond Assistance Program, the MBEP primarily comprises race- and gender-neutral measures, which are designed to encourage the participation of all small businesses in LFUCG contracts and procurements, regardless of the race/ethnicity or gender of business owners. Disparity analysis results indicated that some racial/ethnic and gender groups—Black American-, Native American-, and non-Hispanic white woman-owned businesses—show substantial disparities on key sets of contracts and procurements LFUCG awarded during the study period. Because LFUCG uses myriad race- and gender-neutral measures to encourage the participation of minority- and woman-owned businesses in its work, and because those measures have not sufficiently addressed disparities for all groups, LFUCG might consider using minority- and woman-owned business goals to award individual contracts in the future (i.e., *contract-specific goals*).

To do so, LFUCG would set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating they made sufficient good faith efforts (GFEs) to do so. LFUCG could consider setting participation goals on all relevant contracts and procurements or only on particular types of contracts (e.g., on construction contracts, which account for nearly 70 percent of LFUCG spend, or on goods and other services contracts, for which all relevant racial/ethnic and gender groups exhibited substantial disparities).

Because the use of contract-specific goals is a race- and gender-conscious measure, LFUCG will have to ensure the use of those goals meets the *strict scrutiny standard* of constitutional review, including showing a *compelling governmental interest* for their use and ensuring their use is *narrowly tailored* (for details, see Chapter 2 and Appendix B). Prior to using contract-specific goals, LFUCG should consider whether it has maximized its use of existing race- and gender-neutral measures and whether it should implement additional race- and gender-neutral measures to further encourage the participation of minority- and woman-owned businesses in its work. Finally, LFUCG should consider the staff and resources required to implement a goals program effectively.

C. Race- and Gender-neutral Measures

Disparity study results indicate that there are several race- and gender-neutral measures LFUCG could consider to further encourage the participation of all small businesses—including many disadvantaged, minority-, and woman-owned businesses—in its contracts and procurements. LFUCG should consider new measures and refinements related to:

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

1. Procurement policies. Based on our review of LFUCG policies and feedback we received from stakeholders, BBC identified several ways LFUCG could consider refining or augmenting its procurement policies to help increase the participation of disadvantaged, minority-, and woman-owned businesses in its work.

a. Unbundling contracts and procurements. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts and procurements the LFUCG awarded during the study period. In addition, as part of in-depth interviews and public meetings, several business owners reported that the size of government work is sometimes a barrier to their success. To further encourage the participation of minority- and woman-owned businesses in its work, LFUCG should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into multiple smaller pieces. Such initiatives might increase contracting opportunities for disadvantaged, minority-, and woman-owned businesses. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontract

opportunities into smaller pieces and accepts such measures as GFEs as part of its contract-specific goals program.

b. Alternative teaming arrangements. As part of the anecdotal evidence process, many interviewees reported interest in working as prime contractors but are often only able to work as subcontractors due to capacity issues and lack of opportunities. Interviewees discussed various barriers to obtaining prime contract work, including their inability to gain the experience or capital to bid on future work as prime contractors. LFUCG could better support business growth by identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or alternative teaming arrangements—such as joint ventures or co-prime relationships—to compete for and perform prime contracts. Encouraging alternative teaming arrangements would allow disadvantaged, minority-, and woman-owned businesses to build their capacity for larger projects and gain experience working as prime contractors while mitigating some of the difficulties and costs of doing so.

c. Subcontracting minimums. Subcontracts often represent accessible opportunities for disadvantaged, minority-, and woman-owned businesses to become involved in an organization's contracting and procurement. However, subcontracting appears to account for a relatively small percentage of the total contract and procurement dollars LFUCG awards. To increase subcontract opportunities, LFUCG could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. For specific types of work where subcontracting opportunities might exist, LFUCG could set a minimum percentage of work to be subcontracted. Prime contractors would have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If LFUCG were to implement such a program, it should include GFEs provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

d. Small business set aside program. Disparity analysis results indicated substantial disparities for some racial/ethnic and gender groups on prime contracts LFUCG awarded during the study period. LFUCG might consider reserving certain, small prime contracts exclusively for small business bidding to encourage their participation as prime contractors. As part of in-depth interviews, several businesses identified various advantages of set aside programs for small businesses—including disadvantaged, minority-, and woman-owned businesses—such as fostering familiarity with LFUCG's contracting and bidding process; experience working as prime contractors; and growth through winning larger, steadier projects. In addition to setting aside contracts for small business competition, LFUCG could consider encouraging at least one quote from small businesses for certain projects. LFUCG could also consider reviewing its Pro-Card procurements—which are purchased through relatively informal process—to identify any potential procurement opportunities that it could instead procure through more formal quote or competitive bid processes.

e. Price and evaluation preferences. As part of in-depth interviews, multiple interviewees supported price or evaluation preferences for disadvantaged, minority-, and woman-owned businesses. Options could include basing preferences on business certification status or on whether bidders have a consistent history of meeting established contract-specific goals on

contracting opportunities in the past. One example of a preference program is the District of Columbia Government's (DC Government's) Certified Business Enterprise (CBE) Program, in which CBEs are given price discounts or awarded additional points as part of bid and proposal evaluations.

f. New businesses. Disparity study results indicate that a substantial portion of the contract and procurement dollars LFUCG awarded to minority- and woman-owned businesses during the study period went to a relatively small number of businesses, particularly subcontractors. To expand the number of minority- and woman-owned businesses that participate in its work, LFUCG could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked in the past. For example, as part of the bid process, LFUCG might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past. LFUCG could award evaluation points or price preferences based on the degree to which prime contractors partner with new subcontractors with which they have not previously worked. In addition, LFUCG could consider efforts to expand its base of minority- and woman-owned businesses for small prime contracts, including leveraging information on the businesses BBC contacted as part of the availability analysis and making additional outreach efforts throughout the local marketplace.

g. Advertising requirements. The Commonwealth of Kentucky's KRS 45A.080(3) requires minimum levels of advertising for procurement opportunities, including posting opportunities one (1) week prior to bid opening dates. Beyond those requirements, LFUCG largely allows individual departments to determine what amounts of advertising are appropriate for their solicitations, but typically, departments advertise quotes for 15 days, competitive bids for 17 days, and requests for proposals (RFPs) for 27 days prior to bid openings. In-depth interview participants expressed that LFUCG sufficiently advertises solicitations, but LFUCG should consider formalizing its current practices in its program manual or procurement regulations.

LFUCG could also consider implementing two-step solicitation processes for relatively large, complex projects. For example, the Commonwealth of Pennsylvania solicits experts for assistance drafting RFP or invitations to bid (ITBs) for large, complicated projects. That process gives additional notice to the contracting community about upcoming procurement opportunities and encourages insights and expertise from the local contracting community into procurement processes for such projects.

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

a. Prompt payment. As part of in-depth interviews and surveys, several businesses reported difficulties receiving payment in a timely manner on government work, particularly when they work as subcontractors and suppliers. LFUCG should consider establishing prompt payment processes to ensure timely payment to prime contractors and from prime contractors to subcontractors and suppliers, ideally within a specified maximum number of days after approving invoices. LFUCG should consider making efforts to enforce those requirements by

creating electronic systems to track and confirm subcontractor payments. For example, the Los Angeles County Metropolitan Transportation Authority has established procedures for alerting subcontractors of reported prime contractor payments and requiring payment confirmations.

b. Data collection. LFUCG maintains comprehensive data on the prime contracts it awards, and those data are generally well-organized and accessible. It should also consider collecting subcontract data electronically and developing forms to monitor subcontractor participation throughout the life of projects. LFUCG should consider collecting data on *all* subcontracts, regardless of subcontractors' characteristics or whether they are certified. Doing so will help ensure LFUCG monitors the participation of minority- and woman-owned businesses accurately and can anticipate future subcontracting opportunities. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor names, addresses, phone numbers, and email addresses;
- Type of associated work;
- Subcontract award amounts;
- Subcontract paid-to-date amounts;
- Race/ethnicity and gender of owners; and
- Certification statuses.

LFUCG should consider collecting those data as part of monthly reporting processes and should train relevant department staff to collect and enter subcontract data accurately and consistently.

In addition, LFUCG should consider requiring departments and divisions to develop annual supplier diversity plans and report on the participation of minority- and woman-owned businesses in their work; efforts to diversify their vendor pools; efforts to review upcoming contracting opportunities for minority- and woman-owned businesses; and plans to achieve LFUCG's overall aspirational goal in the upcoming year. In addition, LFUCG should consider requiring departments and divisions to improve their tracking of Pro-Card purchases.

c. Subcontractor commitments. Anecdotal evidence suggests subcontractors are often not used to the full extent of their subcontracts with prime contractors. LFUCG should consider implementing an electronic system to track subcontract participation on an invoice-by-invoice basis to ensure prime contractors use subcontractors to the full extent of their subcontracts on projects. In addition to tracking subcontractor payments, establishing points of contact between subcontractors and LFUCG to address any underutilization or unauthorized substitutions may help ensure minority- and woman-owned businesses receive the work prime contractors committed to them at the time of bid. Interview and public meeting participants made several additional suggestions to maximize work on subcontracts, including inviting subcontractors to contract negotiation meetings to discuss their expected portions of projects, notifying the entire team when projects have been awarded, and considering prime contractors' past use of subcontractors relative to subcontract commitments as a factor during bid evaluations.

3. Supportive services and capacity building. Disparity study results indicate that existing minority- and woman-owned businesses in the Lexington area have relatively low capacities for

LFUCG work. In addition to contract and procurement measures, LFUCG should consider strengthening the MBEP to help build capacity among minority- and woman-owned businesses and encourage their participation in LFUCG work through various efforts.

a. Bonding assistance. As part of in-depth interviews and public meetings, several business owners reported that bonding requirements were a barrier for small businesses, particularly minority- and woman-owned businesses. Small businesses typically receive bonds at higher rates than other businesses, making it more difficult for them to get bonds and compete for larger projects. The LFUCG Procurement Policy requires bid bonds for all construction projects worth more than $50,000 and for all goods and other services work. Projects of that size are relatively accessible to small businesses but bid deposit and bonding requirements can be a substantial barrier. LFUCG does offer a Bid Bond Assistance program to certified minority- and woman-owned businesses, but awareness of the program among businesses is relatively low (for more information, see Chapter 9). LFUCG should consider efforts to advertise the program better so all eligible businesses can benefit from it.

In addition, LFUCG could consider partnering with local, regional, or statewide financial institutions to encourage standardized bonding rates at more equitable levels. Some examples of such efforts include the United States Small Business Association (SBA), the Los Angeles Contractor Development and Bonding Program, the Maryland Department of Transportation's (DOT's) and the Maryland Small Business Development Financing Authority Management Group's Bonding and Contract Financing Program, and the Ohio Development Services Agency's Minority Business Bonding Program.

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

c. Training and technical assistance. LFUCG currently conducts various trainings and technical assistance programs (for more information, see Chapter 9). LFUCG should continue conducting those programs and could consider additional programs focused on bonding, bookkeeping, business plan development and refinement, financial literacy, and other topics. It could host those programs on its own or in conjunction with a local partner, such as the Kentucky Small Business Development Center or the KY Procurement Assistance Technical Center. LFUCG could also consider implementing a program to help individual businesses develop and grow. As part of such a program, LFUCG could have an application and interview process to select businesses with which to work closely to provide tailored support and resources necessary for their growth. Anecdotal evidence indicated that businesses find training and technical assistance programs—

when implemented well—to be valuable in helping them build their capacities for larger projects and learn the necessary skills required to compete in their industries.

In addition, as part of the in-depth interview process, many interviewees noted difficulty finding and hiring qualified personnel, especially businesses working in the construction industry. LFUCG could consider expanding its existing Jobs Fund Program and provide additional workforce development training funding to more businesses in the area. Special attention might be given to training for skilled trades, as mentioned in the Racial Justice and Equality Commission Report.[2] LFUCG could also consider developing formal relationships with existing job training programs through agencies such as the University of Kentucky and Eastern Kentucky University.

d. Outreach. Many subcontractors rely on prior relationships to obtain work, and strong relationships with LFUCG allow businesses to anticipate upcoming projects and potential needs. LFUCG currently hosts multiple outreach and networking events throughout the year (for more information, see Chapter 9). Businesses generally view those events as valuable, especially when they are designed to bring together similar vendors, are aimed at fostering relationships between LFUCG and vendors, and reasonably priced. LFUCG should consider continuing its current networking and outreach efforts and broadening them to include more partnerships with local trade organizations and other government organizations. LFUCG might consider tailoring some events to specific industries or business groups to further maximize their value and provide opportunities to foster deeper connections among participants. In addition, LFUCG could consider conducting more pre-bid and pre-proposal meetings to increase networking among prime contractors and subcontractors in the context of specific projects.

LFUCG might also consider expanding its work with individual departments to host meet-and-greets or public meetings on a quarterly basis or well in advance of relatively large contracting opportunities. Department, procurement, and MBEP staff could attend those meetings to help businesses understand what opportunities will be available and how to successfully compete for those opportunities. Such meetings could also help prime contractors and subcontractors connect and build professional relationships.

e. Business directory. LFUCG should consider developing an online and hardcopy directory of certified minority- and woman-owned businesses that LFUCG departments and divisions, as well as prime contractors, could use to identify minority- and woman-owned businesses potentially available for contract and procurement opportunities. At a minimum, the directory should include the following information about each relevant business:

- **Vendor name:** Primary name that the vendor does business as;
- **Address(es):** Physical address(es) where the business is located, including street address, city, state, and ZIP codes;

[2] The report was authored by five Urban County Government commissions—Education & Economic Opportunity; Housing & Gentrification; Health Disparities; Law Enforcement, Justice, & Accountability; and Racial Equity—upon the request of Mayor Gorton in 2020.

- **Phone number(s):** Primary phone number(s) of the business;
- **E-mail address(es):** Primary email address(es) of the business;
- **Lines of work:** The primary lines of work that the vendor performs;
- **Ownership status:** Whether the business is minority- or woman-owned and, if minority-owned, the owners' race/ethnicity; and
- **Certifications**: Whether the business is certified a minority-owned business enterprise, woman-owned business enterprise, small business enterprise, or disadvantaged business enterprise and the certifying organizations.

LFUCG could also consider conducting additional marketplace research to ensure the directory is up to date.

f. Mentor/protégé relationships. Many businesses that participated in the anecdotal evidence process spoke highly of mentor/protégé relationships, noting the benefits of working with and learning from larger, more successful companies in similar industries. One interviewee noted that the SBA's 8(a)-mentorship program is a great model for mentor/protégé programs, contingent on organizations properly matching mentors and protégés based on size and industry. LFUCG should consider developing a mentor/protégé program or work with other local business assistance agencies to facilitate similar matchmaking efforts.

g. Program manual. LFUCG should consider developing a comprehensive program plan and manual to communicate the MBEP's objectives and supplier diversity requirements for LFUCG departments and divisions. At a minimum, the plan and manual should include information about:

- Program objectives and justification;
- Overall aspirational minority- and woman-owned business goal;
- Monitoring and reporting requirements;
- Race- and gender-neutral measures; and
- Contract-specific goals (if applicable).

h. Staffing. LFUCG employs dedicated staff members to implement the MBEP and monitor the participation of certified businesses in LFUCG work. However, interviews with LFUCG staff and anecdotal evidence indicated that the MBEP Office does not have a large enough staff to fully implement various aspects of the MBEP, including monitoring activities and supportive services programs. LFUCG should consider expanding the MBEP staff to carry out essential program functions as well as implement additional program measures. When considering how many additional staff members it might need, LFUCG should consider various functions, including:

- Certifying businesses, assisting businesses with certification requirements, and conducting required reviews to determine initial and ongoing eligibility;
- Developing program measures and corresponding policy and process documents;

- Implementing business development programs, technical assistance programs, and other program measures;
- Collecting data and monitoring the participation of small businesses, as well as minority- and woman-owned businesses, in LFUCG work on an ongoing basis;
- Training LFUCG staff on program policies, contract compliance, and data reporting requirements; and
- Working with LFUCG departments and other local organizations to host networking and outreach events.

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

APPENDIX A.
Definitions of Terms

Appendix A defines terms useful to understanding the 2022 Lexington-Fayette Urban County Government Disparity Study report.

Anecdotal Information

Anecdotal information includes personal, qualitative accounts and perceptions of specific incidents, including any incidents of discrimination, shared by individual interviewees, public meeting participants, focus group participants, and other stakeholders in the local marketplace.

Business

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

Business Listing

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

Compelling Governmental Interest

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

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Disadvantaged Business Enterprise (DBE)

A DBE is minority- or woman-owned businesses that is specifically certified as such through the Kentucky Transportation Cabinet. To be certified as a DBE, a business must be a for-profit business that is at least 51 percent owned and controlled by socially or economically disadvantaged individuals. Businesses must also meet federal requirements related to the businesses' gross revenues and business owners' personal net worth.

Disparity

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

Disparity Analysis

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

Disparity Index

A disparity index is computed by dividing the actual participation of a specific group of businesses in an organization's contracts and procurements by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Dun & Bradstreet (D&B)

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

Firm

See *business*.

Industry

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

Inference of Discrimination

An inference of discrimination is the conclusion that a particular business group suffers from barriers or discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations often use relatively strong measures to address barriers affecting particular groups.

Lexington-Fayette Urban County Government (LFUCG or the Urban County Government)

The Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) is the government organization responsible for operating the City of Lexington, Kentucky and Fayette County, Kentucky. As part of its responsibilities, LFUCG spends hundreds of millions of dollars in contracts and procurements each year to procure various construction services, professional services, and goods and other services to serve the needs of local residents, visitors, and businesses.

Local Marketplace

See *relevant geographic market area.*

Majority-owned Business

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

Marketplace Conditions

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

Minority

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

Minority Business Enterprise Program (MBEP)

The MBEP is designed to help the Lexington-Fayette Urban County Government's Central Purchasing Department diversify the vendors it uses to provide the construction services, professional services, and goods and other services LFUCG requires to meet the needs of local residents, visitors, and businesses.

Minority-owned Business

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

Minority-owned business enterprise (MBE)

An MBE is a minority-owned business certified as such by any credible and recognized certifying agencies, including the Kentucky Transportation Cabinet, the Commonwealth of Kentucky, and the Tri-State Minority Supplier Development Council.

Narrow Tailoring

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

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

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

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

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

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

Participation

See *utilization*.

Prime Consultant

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

Prime Contract

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

Prime Contractor

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

Procurement

See *contract*.

Project

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

Race- and Gender-conscious Measures

Race- and gender-conscious measures are contracting measures specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but other businesses would not. Similarly, businesses owned by women might be eligible for such measures but businesses owned by men would not. An example of race- and gender-conscious measures is an organization's use of minority- or woman-owned business participation goals on individual contracts.

Race- and Gender-neutral Measures

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

Rational Basis

Government organizations that implement contracting programs that rely only on race- and gender-neutral measures to encourage the participation of businesses, regardless of the race/ethnicity or gender of business owners, must show a rational basis for their programs. Showing a rational basis requires organizations to demonstrate their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which organizations award most of their contracting dollars are located. The RGMA is also referred to as the local marketplace. Case law related to contracting programs and disparity studies requires analyses to focus on the relevant geographic market area. The RGMA for LFUCG's construction and professional services contracts is the *Bluegrass Area Development District*, which comprises Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nicholas, Powell, Scott, and Woodford Counties in Kentucky. The RGMA for LFUCG's goods and other services procurements comprises the *Bluegrass Area Development District* plus Boone, Campbell, Grant, Jefferson, Kenton, Oldham, Pendleton, and Shelby Counties in Kentucky.

Statistically Significant Difference

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

Strict Scrutiny

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

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

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. LFUCG had to have awarded a contract or procurement during the study period for it to be included in the study team's analyses. The study period for the disparity study was July 1, 2016 through June 30, 2021.

Subcontract

A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of a larger contract.

Subcontractor

A subcontractor is a business that performs services for prime contractors as part of larger contracts.

Subindustry

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

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating that actual participation of a specific business group is 80 percent or less of the group's estimated availability. Substantial

disparities are considered *inferences of discrimination* in the marketplace against particular business groups. Government organizations often use substantial disparities as justification for the use of relatively strong measures to address barriers affecting those groups.

Utilization

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

Vendor

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

Woman-owned Business

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

Woman-owned Business Enterprise (WBE)

A WBE is a woman-owned business certified as such by any credible and recognized certifying agencies, including the Kentucky Transportation Cabinet, the Commonwealth of Kentucky, and the Women's Business Enterprise National Council.

Table of Contents

**Please note to use the "control+click" function by placing the cursor on the page number within the Table of Contents to advance the Appendix to that heading and/or case citation.*

APPENDIX B.
Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

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

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

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

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

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

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

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

3 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program"). *See* the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

The appendix analyzes these recent federal cases in Section F below that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, and the validity of local and state DBE programs that are informative to the study, including: *Dunnet Bay Construction Co. v. Illinois DOT,*[4] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*[5] *Western States Paving Co. v. Washington State DOT,*[6] *Mountain West Holding Co. v. Montana, Montana DOT, et al.,*[7] *M.K. Weeden Construction v. Montana, Montana DOT, et al.,*[8] *Northern Contracting, Inc. v. Illinois DOT,*[9] *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads,*[10] *Adarand Construction, Inc. v. Slater*[11] *("Adarand VII")*, *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[12] *Geyer Signal, Inc. v. Minnesota DOT,*[13] *Geod Corporation v. New Jersey Transit Corporation,*[14] and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[15]

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

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,[16] and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence.[17] Congress recently passed legislation in 2021, which was signed by

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

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

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

7 *Mountain West Holding Co., Inc. v. Montana,* 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

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

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

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

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

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

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

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

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

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

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

the President, (H.R. 3684 - 117th Congress, Section 1101, Infrastructure Investment and Jobs Act of 2021)[18] that again reauthorized the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

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

[18] Pub. L. 117-58; H.R. 3684 – 117th Congress (2021), § 1101(b), November 15, 2021.

B. U.S. Supreme Court Cases

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

In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" governmental programs.[19] J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."[20] The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors.[21] The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.[22]

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII.[23] But it is equally clear that "[w]hen special qualifications are required to fill particular

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19 488 U.S. 469 (1989).

20 488 U.S. at 500, 510.

21 488 U.S. at 480, 505.

22 488 U.S. at 507-510.

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

jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[24]

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[25] "Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city."[26]

The Supreme Court stated that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."[27] The Court held that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[28]

The Court said: "If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion."[29] "Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[30]

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[31]

2. Adarand Constructors, Inc. v. Pena ("Adarand I"), 515 U.S. 200 (1995).

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

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

25 488 U.S. at 502.

26 *Id*.

27 488 U.S. at 509.

28 *Id*.

29 488 U.S. at 509.

30 *Id*.

31 488 U.S. at 492.

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

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

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

1. Strict scrutiny analysis.

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[32] The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.[33]

a. The Compelling Governmental Interest Requirement. The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to implement a race- and ethnicity-based program.[34] State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.[35] Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction's boundaries.[36]

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[32] *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013) ; *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Midwest Fence v. Illinois DOT,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT,* 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 990 (3d. Cir. 1993).

[33] *Adarand I*, 515 U.S. 200, 227 (1995); *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Midwest Fence v. Illinois DOT,* 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"),* 6 F.3d 990 (3d. Cir. 1993).

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

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

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

The Sixth Circuit Court of Appeals in *Vitolo v. Guzman,*[37] which involved a challenge to a federal social and economic disadvantaged business program, recently stated that government has a compelling interest in remedying past discrimination when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. But, the Sixth Circuit noted, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.[38]

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[39] The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).[40] The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of "good ol' boy" networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.[41]

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

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

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

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

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

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

that informal, racially exclusionary business networks dominate the subcontracting construction industry.[42]

- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.[43]

- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government's claim that there are significant barriers to minority competition, raising the specter of discrimination.[44]

- **Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In November 2021, October 2018, December 2015 and in July 2012, Congress passed the Infrastructure Investment and Jobs Act of 2021, F.A.A Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets," federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE and DBE Programs.[45] Congress also found in the Infrastructure Investment and Jobs Act of 2021, F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which "provide a strong basis that there is a compelling need for the continuation of the" Federal ACDBE Program and the Federal DBE Program.[46]

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

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

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

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

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

46 *Id*. at § 1101(b)(1).

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.[47] Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five-year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 ("SAFETEA"). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21").[48] In December 2015, Congress passed the Fixing America's Surface Transportation Act ("FAST Act").[49] In October 2018, Congress passed the FAA Reauthorization Act[50]. Most recently, in November 2021, Congress passed the Infrastructure Investment and Jobs Act (H.R. 3684 – 117th Congress, Section 1101) that reauthorized the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.[51]

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

The Federal DBE Program provides requirements for state and local government federal aid recipients and how recipients of federal funds implement the Federal DBE Program for federally-assisted contracts. The federal government and Congress have determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual local and state government federal aid recipients by the regulations. State and local governments are not required to implement race-

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

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

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

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

51 Pub. L. 117-58, H.R. 3684 § 1101(b), November 15, 2021.

and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.[52]

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

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

Provided in 49 CFR § 26.45 are regulations regarding how local and state governments as recipients of federal funds should set the overall goals for their DBE programs, which are instructive to local and state government MBE/WBW/DBE programs. In summary, the state or local government establishes a base figure for relative availability of DBEs.[53] This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.[54] Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.[55] There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.[56] This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination. [57]

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts. [58] A state or

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

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

54 Id.

55 Id. at § 26.45(d); Id. at § 23.51(d).

56 Id.

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

58 49 CFR § 26.51; 49 CFR § 23.51(a).

local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.[59]

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

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

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.[61] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[62] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[63]

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.[64] It is well established that "remedying

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59 49 CFR § 26.51(b); 49 CFR § 23.25.

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

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

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

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

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

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

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[67] "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors … and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"[68] Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[69]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[70] Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.[71] Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.[72]

To successfully rebut the government's evidence, the courts hold, that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of

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

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

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

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

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

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

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

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

a strong basis in evidence for the necessity of remedial action.[73] This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.[74] Conjecture and unsupported criticisms of the government's methodology are insufficient.[75] The courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.[76]

The courts have noted that "there is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'"[77] The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.[78] Instead, the Supreme Court stated that a government may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.[79] It has been further held by the courts that the statistical evidence be "corroborated by significant anecdotal evidence of racial discrimination" or bolstered by anecdotal evidence supporting an inference of discrimination.[80]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a

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

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

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

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

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

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

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

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

remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.[81] "Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[82]

One form of statistical evidence is the comparison of a government's utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.[83] The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.[84] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[85]

Other considerations regarding statistical evidence include:

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

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

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

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

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

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

[86] *See*, *e.g.*, *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 602-603 (3d. Cir. 1996); *see also, Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

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

simply because it may theoretically be possible to adopt a more refined approach."[88]

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

- **Disparity index.** An important component of statistical evidence is the "disparity index."[90] A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as "The Rule of Thumb" or "The 80 percent Rule."[91]

- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.[92]

Marketplace discrimination and data. It is instructive to review the Tenth Circuit Court of Appeals decision in Concrete Works, which held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.[93] The court rejected the district court's "erroneous" legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in Concrete Works II and the plurality opinion in Croson.[94] The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area."[95] In Concrete

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

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

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

91 *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence,* 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans,* 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

92 *See, e.g.*, *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng'g Contractors Ass'n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng'g Contractors Ass'n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

93 *Id*. at 973.

94 *Id*.

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

Works II, the court stated that "we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination."[96]

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.[97] Thus, the local government was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden.[98]

Additionally, the court had previously concluded that the local government's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination.[99] Thus, the court held the local government's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.[100]

The court held the district court, *inter alia,* erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.[101] The court found that the district court's conclusion was directly contrary to the holding in Adarand VII that evidence of both public and private discrimination in the construction industry is relevant.[102]

In *Adarand VII,* the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.[103] ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*"[104]. Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to "the Denver MSA evidence of industry-wide discrimination."[105] The court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*" was relevant to the local government's burden of producing strong evidence.[106]

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

97 *Id*. at 973.

98 *Id*.

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

100 *Id*.

101 *Id*. at 974.

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

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

104 *Id*. (emphasis added).

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

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

Consistent with the court's mandate in *Concrete Works II,* the local government attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business."[107] The Tenth Circuit ruled that the local government can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.[108]

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII,* the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination."[109]

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.[110]

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[111]

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.[112]

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107 *Id*.

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

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

110 *Id*. at 977.

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

112 *Id*. at 979-80.

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.[113] But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.[114] It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative.[115]

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.[116]

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.[117]

As an example of the use of anecdotal evidence, the Fourth Circuit Court of Appeals in *H.B. Rowe* stated that in addition to statistical evidence it "further require[s] that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'"[118] The court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the

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[113] *See, e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1002-1003 (3d. Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

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

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

[116] *See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197*; *H. B. Rowe,* 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *e.g.*, *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, *see Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic,* 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

[117] *See*, *e.g.*, *AGC, SDC v. Caltrans,* 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

[118] 615 F.3d at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

anecdotal data and that the consultant oversampled minority subcontractors in collecting the data.[119]

The Fourth Circuit stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions."[120] The court in *H. B. Rowe* held that anecdotal evidence supplements statistical evidence of discrimination.[121]

The court in *H.B. Rowe* found that North Carolina's anecdotal evidence of discrimination sufficiently supplemented the State's statistical showing.[122] The survey evidence exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors.[123] The court held that the State could conclude that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action.[124]

The court in *H. B. Rowe* concluded the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the disparity study.[125] Thus, the court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.[126]

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.[127]

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119 *Id.* at 249.

120 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

121 *Id.* at 249.

122 *Id*.

123 *Id*. at 251.

124 *Id*.

125 *Id*. at 251.

126 *Id.*

127 *See, e.g., Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe,* 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d at 993-995; *Sherbrooke Turf*, 345

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[128]

The Sixth Circuit Court of Appeals in *Vitolo v. Guzman* stated that for a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.[129]

Similarly, the Sixth Circuit in *Associated Gen. Contractors v. Drabik ("Drabik II")*, stated: "*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting … or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[130]

F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d 586, 605-610 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d 990, 1008-1009 (3d. Cir. 1993); *see also*, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021); Geyer Signal, Inc., 2014 WL 1309092.

128 *See, e.g., Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; *see also Geyer Signal, Inc.*, 2014 WL 1309092.

129 *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021)

130 *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000); see, also, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021).

The Eleventh Circuit described the "the essence of the 'narrowly tailored' inquiry [as] the notion that explicitly racial preferences … must only be a 'last resort' option."[131] Courts have found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake."[132]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[133] also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration."[134] The Court found that the District failed to show it seriously considered race-neutral measures.

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

Race-, ethnicity-, and gender-neutral measures. To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.[135] And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.[136]

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131 *Eng'g Contractors Ass'n*, 122 F.3d at 926 (internal citations omitted); *see also Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff'd per curiam* 218 F.3d 1267 (11th Cir. 2000).

132 *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf,* 345 F.3d at 972; *see also Adarand I*, 515 U.S. at 237-38; *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021).

133 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

134 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also Fisher v. University of Texas,* 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003); *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021).

135 *See*, *e.g.*, *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans, 713 F.3d at 1199*; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II),* 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923; see also, *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA*, 2021 WL 2172181 (6th Cir. May 27, 2021); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

136 *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also, Eng'g Contractors Ass'n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass'n of E. Pa. v. City of Philadelphia (CAEP II),* 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP (I),* 6 F.3d at 1008-1009 (3d. Cir. 1993); *see, also*, *Antonio Vitolo,*

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a "whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."[137]

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- "How to do business" seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.[138]

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et al. v. Isabella Guzman, Administrator of the U.S. SBA, 2021 WL 2172181 (6th Cir. May 27, 2021); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

137 *Croson*, 488 U.S. at 509-510.

138 *See*, *e.g.*, *Croson*, 488 U.S. at 509-510; *H. B. Rowe,* 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *see also, Eng'g Contractors Ass'n*, 122 F.3d at 927-29; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does "require serious, good faith consideration of workable race-neutral alternatives.[139]

Additional factors considered under narrow tailoring. In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.[140] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[141] (2) good faith efforts provisions;[142] (3) waiver provisions;[143] (4) a rational basis for goals;[144] (5) graduation provisions;[145] (6) remedies only for groups for which there were findings of discrimination;[146] (7) sunset provisions;[147] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[148]

2. Intermediate scrutiny analysis.

Certain Federal Courts of Appeal, including the Sixth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.[149] The Sixth Circuit and Kentucky courts have applied

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139 See, e.g., *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, c*iting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe,* 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *see also, Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

140 *See Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf,* 345 F.3d at 971-972; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

141 *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* ("AGC of Ca."), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

142 *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf,* 345 F.3d at 971-972; *CAEP* I, 6 F.3d at 1019; *Cone Corp*., 908 F.2d at 917.

143 *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; AGC of Ca., 950 F.2d at 1417; *Cone Corp*., 908 F.2d at 917; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

144 *Id; Sherbrooke Turf,* 345 F.3d at 971-973; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

145 *Id*.

146 *See, e.g*., *AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca*., 950 F.2d at 1417; *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 91 F.3d at 593-594, 605-609 (3d. Cir. 1996); *Contractors Ass'n (CAEP I),* 6 F.3d at 1009, 1012 (3d. Cir. 1993); *Kossman Contracting Co., Inc., v. City of Houston,* 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf,* 2001 WL 150284 (unpublished opinion), aff'd 345 F.3d 964.

147 *See, e.g., H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf,* 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; *see also, Kossman Contracting Co., Inc. v. City of Houston,* 2016 WL 1104363 (W.D. Tex. 2016).

148 *Coral Constr*., 941 F.2d at 925.

149 See, e.g., *Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally*, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) ("exceedingly persuasive justification."); *Geyer Signal,* 2014 WL 1309092; *D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391 (S. Ct. Ky. 2000)

"intermediate scrutiny" to classifications based on gender.[150] Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.[151]

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

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

2. Substantially related to the achievement of that underlying objective.[152]

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present "sufficient probative" evidence in support of its stated rationale for the program.[153]

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.[154] The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the

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150 *Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391 (S. Ct. Ky. 2000); *see, e.g., H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, e.g., Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)).

151 *See, e.g.*, *Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, e.g.*, *Serv. Emp. Int'l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391 (S. Ct. Ky. 2000).

152 *See, e.g., Vitolo, et al. v. Guzman,* 2021 WL 2172181 (6th Cir. May 27, 2021); *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Contractors Ass'n of E. Pa. v. City of Philadelphia,* 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.,* 83 F. Supp. 2d 613, 619-620 (2000); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.").

153 *Id*. The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

154 *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng'g Contractors Ass'n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.,* 83 F.Supp 2d 613, 619-620 (2000); *see, also, U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.")

intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[155]

The Sixth Circuit has stated that like racial classifications, sex-based discrimination is presumptively invalid. Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives.[156]

The courts in Kentucky have said that between the rational basis and strict scrutiny tiers of review, an intermediate scrutiny "fashion[s] constitutional protections" for groups, like women, who are not "suspect classes" but who "have been historically victimized by intense and irrational discrimination." "Under this higher standard, usually referred to as heightened scrutiny, discriminatory laws survive equal protection analysis only to the extent they are *substantially related* to a legitimate state interest."[157]

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[158]

The Fourth Circuit in *H. B. Rowe*, found that the disparity analysis demonstrated women-owned businesses won far more than their expected share of subcontracting dollars during the study period.[159] Therefore, the court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects.[160] The court held the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires.[161]

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit."[162] The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.[163] The Court in *Contractors Ass'n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the

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

156 *Vitolo, et al. v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021)

157 *D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); *Steven Lee Enterprises v. Varney*, 36 S.W.ed 391 (S. Ct. Ky 2000)

158 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

159 615 F.3d 233 at 254.

160 *Id.*

161 *Id*. at 255.

162 *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1010 (3d. Cir. 1993).

163 *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1010 (3d. Cir. 1993).

participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.[164]

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.[165] Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.[166] But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.[167] The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.[168] This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis.

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.[169] When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose."[170]

The courts in Kentucky and the Sixth Circuit Court of Appeals in applying the rational basis test generally find that a challenged law is upheld as long as there could be some rational basis for enacting it, that is, that the law in question is rationally related to a legitimate government purpose.[171] This standard the courts conclude is considered quite deferential[172] and "the fit between the enactment and the public purposes behind it need not be mathematically

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164 *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1011 (3d. Cir. 1993).

165 *Contractors Ass'n of E. Pa. (CAEP I),* 6 F.3d at 1011 (3d. Cir. 1993).

166 *Id.*

167 *Id.*

168 *Id.*

169 *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Hettinga v. United States,* 677 F.3d 471, 478 (D.C. Cir 2012); *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *Beshear v. Avree*, 615 S.W.3d 780,816 (S. Ct. Ky 2020); *Hunter v. Commonwealth*, 587 S.W.3d 298 (S.Ct. Ky 2019); Commonwealth v. Stumbo, 157 S.W.3d 621 (S. Ct. Ky 2005); *Stephens v. State Farm Mut. Auto. Ins. Co*., 894 S.W.3d 624, 627 (S.Ct. Ky 1995); *see also Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a 'highly deferential rational basis' standard of review."); *H. B. Rowe, Inc. v. NCDOT,* 615 F.3d 233 at 254.

170 *See, e.g., Heller v. Doe,* 509 U.S. 312, 320 (1993); *Hettinga v. United States,* 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988).

171 *See, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Beshear v. Avree*, 615 S.W.3d 780,816 (S. Ct. Ky 2020); *Hunter v. Commonwealth*, 587 S.W.3d 298 (S.Ct. Ky 2019); *D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); Commonwealth v. Stumbo, 157 S.W.3d 621 (S. Ct. Ky 2005); *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391 (S. Ct. Ky. 2000); *Stephens v. State Farm Mut. Auto. Ins. Co*., 894 S.W.3d 624, 627 (S.Ct. Ky 1995); ; *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe,* 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998).

172 *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013).

precise."[173] So long as a government legislature had a reasonable basis for adopting the classification—which can include "rational speculation unsupported by evidence or empirical data"—the law will pass constitutional muster.[174]

"[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record."[175] 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".[176]

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."[177] Because all legislation classifies its objects, differential treatment is justified by "any reasonably conceivable state of facts."[178]

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations ("FAR")[179].

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration ("TSA") issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: "Government anticipates an overall Small Business goal of 40 percent," and that "[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent."[180]

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173 *Id.*

174 *Id. Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013) (*citing FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *see,* SIXTH CIR AND KENTUCKY CASE

175 *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 189 (2012) (*citing Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *See, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Beshear v. Avree*, 615 S.W.3d 780,816 (S. Ct. Ky 2020); *Hunter v. Commonwealth*, 587 S.W.3d 298 (S.Ct. Ky 2019); *D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); Commonwealth v. Stumbo, 157 S.W.3d 621 (S. Ct. Ky 2005); *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391 (S. Ct. Ky. 2000); *Stephens v. State Farm Mut. Auto. Ins. Co*., 894 S.W.3d 624, 627 (S.Ct. Ky 1995);

176 *Heller v. Doe*, 509 U.S. 312, 321 (1993).

177 *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see, e.g., Hettinga v. United States,* 677 F.3d 471, 478 (D.C. Cir 2012).

178 *Id.*; *See, e.g*., *Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996); Beshear v. Avree*, 615 S.W.3d 780,816 (S. Ct. Ky 2020); *Hunter v. Commonwealth*, 587 S.W.3d 298 (S.Ct. Ky 2019); *D.F. v. Codell*, 127 S.W.3d 571 (S. Ct. Ky 2009.); Commonwealth v. Stumbo, 157 S.W.3d 621 (S. Ct. Ky 2005); *Steven Lee Enterprises v. Varney*, 36 S.W.3d 391 (S. Ct. Ky. 2000); *Stephens v. State Farm Mut. Auto. Ins. Co*., 894 S.W.ed 624, 627 (S.Ct. Ky 1995); .

179 2012 WL 5939228 (Fed. Cl. 2012).

180 *Id*.

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.[181] The court stated it "cannot say that the agency's approach is clearly unlawful, or that the approach lacks a rational basis."[182]

The court found that "an agency may rationally establish aspirational small business subcontracting goals for prospective offerors…." Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovate ways to structure and maximize small business subcontracting within their proposals.[183] 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…."[184]

4. Pending cases and informative recent orders (at the time of this report).

There are pending cases in the courts at the time of this report involving challenges to MBE/WBE/DBE type programs and federal social and economic disadvantaged business enterprise programs that may potentially impact and be instructive to the study, and key recent orders that are informative to the study including the following:

- **(i)** ***Greer's Ranch Café v. Guzman,*** 2021 WL 2092995 (N.D. Tex. 5/18/21).
- **(ii)** ***Faust v. Vilsack,*** 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).
- **(iii)** ***Wynn v. Vilsack,*** 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Fla.
- **(iv)** ***Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.,*** U.S. District Court for the Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.
- **(v)** ***Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.,*** Case No. 502018CA010511, In the 15th Judicial Circuit in and for Palm Beach County, Florida.
- **(vi)** ***CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport***

[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

***Authority, et al.*;** U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099.

- **(vii) *Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.*,** U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.

- **(viii) *Circle City Broadcasting I, LLC* ("*Circle City*") *and National Association of Black Owned Broadcasters* ("*NABOB*") (*Plaintiffs*) *v. DISH Network, LLC* ("*DISH*" *or* "*Defendant*"),** U.S. District Court for the Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.

The following summarizes the above listed pending cases and informative recent decisions**:**

(i). ***Greer's Ranch Café v. Guzman, Administration of the U.S. SBA,*** 2021 WL 2092995 (N.D. Tex. 5/18/21).

Plaintiff Philip Greer ("Greer") owns and operates Plaintiff Greer's Ranch Café—a restaurant which lost nearly $100,000 in gross revenue during the COVID-19 pandemic (collectively, "Plaintiffs"). Greer sought monetary relief under the $28.6-billion Restaurant Revitalization Fund ("RRF") created by the American Rescue Plan Act of 2021 ("ARPA") and administered by the Small Business Administration ("SBA"). See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003.

Background. Greer prepared an application on behalf of his restaurant, is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program's first twenty-one days from May 3 to May 24, 2021.

During that window, ARPA directed SBA to "take such steps as necessary" to prioritize eligible restaurants "owned and controlled" by "women," by "veterans," and by those "socially and economically disadvantaged." ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program's first twenty-one days, it "will accept applications from all eligible applicants, but only process and fund priority group applications"—namely, applications from those priority-group applicants listed in ARPA. Priority-group "[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements" as "an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.

Substantial Likelihood of Success on the Merits. Standing. Equal Protection Claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood

of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA's implementation of the "socially disadvantaged group" and "socially disadvantaged individual" race-based presumption and definition from SBA's Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

Strict scrutiny applied. The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is "narrowly tailored" and "furthers compelling governmental interests."

Compelling governmental interest. Defendants propose as the government's compelling interest "remedying the effects of past and present discrimination" by "supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic." To proceed based on this interest, the court said, Defendants must provide a "strong basis in evidence for its conclusion that remedial action was necessary."

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the "well-established principle about the industry-specific inquiry required to effectuate Section 8(a)'s standards." Thus, the court looked to Defendants' industry specific evidence to determine whether the government has a "strong basis in evidence to support its conclusion that remedial action was necessary."

According to Defendants, "Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA." The Defendants evidence was summarized by the court as follows:

- A House Report specifically recognized that "underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic," that "[w]omen –especially mothers and women of color – are exiting the workforce at alarming rates," and that "eight out of ten minority-owned businesses are on the brink of closure."

- Expert testimony describing how "[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses" because of "structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies," and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.

- Expert testimony explaining that "businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently," and that

minorities are less likely to have such relationships with lenders due to "pre-existing disparities in access to capital."

- House Committee on Small Business Chairwoman Velázquez's evidence offered into the record showing that "[t]he COVID-19 public health and economic crisis has disproportionally affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses" and that "minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit."

- Witness testimony that emphasized the "[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital" and noted that "[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th."

- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, "due to the heavy reliance on large banks, with whom they have had historically poor relationships."

- Evidence presented at other hearing showing that minority and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing "long-standing structural racial disparities in small business ownership and performance."

- A statement of the Center for Responsible Lending describing present-day "overtly discriminatory practices by lenders" and "facially neutral practices with disparate effects" that deprive minority-owned businesses of access to capital.

This evidence, the court found, "largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification." The court, quoting the Croson decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities, "[d]efining these sorts of injuries as 'identified discrimination' would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in "remedying the effects of past and present discrimination" in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an "important governmental objective" or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the Court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants' use of race-based and sex-based

preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs' motion for temporary restraining order, and enjoins Defendants to process Plaintiffs' application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

(ii). ***Faust v. Vilsack, Secretary of U.S. Dep't of Agriculture,*** 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021)

This is a federal district court decision that on June 10, 2021 granted Plaintiffs' motion for a temporary restraining order holding the federal government's use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The district court granted the motion, and at the time of this report is considering the Plaintiffs' Motion for a Preliminary Injunction.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, "Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA." It advises that, in June 2021, the FSA will begin to process signed letters for payments, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt."

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. "The government has a compelling interest in remedying past discrimination only when three criteria are met." (Citing, *Vitolo*, ––– F.3d at ––––, 2021 WL 2172181, at *4; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

"First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." *J.A. Croson Co*., 488 U.S. at 498, 109."

"Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co*., 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination...."

"Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government "shows that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of a local industry," then the government can act to undo the discrimination. *J.A. Croson Co*., 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles."

The court found that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry…. But Defendants cannot rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest." Citing, *J.A. Croson Co*., 488 U.S. at 498; see also Parents Involved, 551 U.S. at 731, (plurality opinion) ("remedying past societal discrimination does not justify race-conscious government action"). The court pointed out "Defendants' evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities."

The court concluded that: "Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts." "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way." Citing, *Vitolo*, ––– F.3d at ––––, 2021 WL 2172181, at *5. The court held "Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications."

In addition, the court found "Defendants have not established that the remedy is narrowly tailored. To do so, the government must show "serious, good faith consideration of workable race-neutral alternatives." Citing, *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, "they have not shown that Congress engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here. Citing, *Vitolo*, ––– F.3d at ––––, 2021 WL 2172181, at *6.

The court stated: "The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin."

The court found "Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race." On this record, the court held, "Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests."

Conclusion. The court found a nationwide injunction is appropriate in this case. "To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper."

This case remains pending at the time of this report. The court on July 6, 2021, issued an Order that stayed the Plaintiffs' motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (see below), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the Wynn case. For the same reason, the court dissolved the temporary restraining order and stayed the motion for a preliminary injunction.

Subsequently, the Defendants filed a Motion to Stay Proceedings, and the court granted the motion on August 20,2021, requirinng the Defendants to file a status report every six months on the progress of the *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.) case, which is a class action.

(iii). ***Wynn v. Vilsack, Secretary of U.S. Dep't of Agriculture, Wynn v. Vilsack (M.D. Fla. June 23, 2021),*** 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla..

Wynn v. Vilsack is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (N.D. Wis. June 10, (2021) case pending in the district court in Wisconsin.

The court in Faust granted the Plaintiffs' Motion for Temporary Restraining Order and the court in Wynn granted the Plaintiff's Motion for Preliminary Injunction holding: "Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court."

Background. In this action, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), which provides debt relief to "socially disadvantaged farmers and ranchers" (SDFRs). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120% of the indebtedness, as of January 1, 2021, of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section

1005 incorporates 7 U.S.C. § 2279's definition of an SDFR as "a farmer of rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." See also U.S. Dep't of Agric., American Rescue Plan Debt Payments, https://www.farmers.gov/americanrescueplan. White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005's provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys' fees and costs.

Application of strict scrutiny test. Compelling Interest. The court, similar to the court in Faust, applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action. The statistical and anecdotal evidence presented, the court said, appears less substantial than that deemed insufficient in *Eng'g Contractors v. Metro-Dade County* case (11th Cir. 1997), which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts.

The Government states that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination." In cases applying strict scrutiny, the court notes the Eleventh Circuit has instructed: "In practice, the interest that is alleged in support of racial preferences is almost always the same—remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest." Citing, *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994).

Thus, to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. *Id*. at 1565. The

law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty*., the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained:

"A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy. However, a governmental entity can justify affirmative action by demonstrating gross statistical disparities between the proportion of minorities hired and the proportion of minorities willing and able to do the work. Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." Here, to establish the requisite evidence of discrimination, the court said the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress' request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. This evidence consists of substantial evidence of historical discrimination that predates remedial efforts made by Congress and, to a lesser extent, evidence the Government contends shows continued discrimination that permeates USDA programs.

The court pointed out that to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to White farmers.

The court decided that nevertheless, "at this stage of the proceedings, the Court need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the Government's evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest."

Narrow Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court holds that Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. The narrow tailoring requirement ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson,* 488 U.S. at 493 (plurality opinion). "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must be only a 'last resort' option." *Eng'g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the

efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

Here, the court found, "little if anything about Section 1005 suggests that it is narrowly tailored." As an initial matter the court notes that the necessity for the specific relief provided in Section 1005—debt relief for all SDFRs with outstanding qualifying farm loans as of January 1, 2021—is unclear at best. The court states that as written, "Section 1005 is tailored to benefit only those SDFRs who succeeded in receiving qualifying farm loans from USDA, but the evidence of discrimination provided by the Government says little regarding how this particular group of SDFRs has been the subject of past or ongoing discrimination. … Thus, the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident."

More importantly, the court found, "Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group11 who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120% debt relief—and no one else receives any debt relief." Although the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, the court finds it is not. "Regardless of farm size, an SDFR receives up to 120% debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120% debt relief. Yet a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005."

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough Cnty*., 908 F.2d 908, 910 (11th Cir. 1990). The court in Cone Corp. pointed to several critical factors that distinguished the county's MBE program in that case from that rejected in Croson:

"(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in Croson, the county's program did not benefit "groups against whom there may have been no discrimination," instead its MBE program "target[ed] its benefits to those MBEs most likely to have been discriminated against . . . ." *Id*. at 916-17.

The court found that "Section 1005's inflexible, automatic award of up to 120% debt relief only to SDFRs stands in stark contrast to the flexible, project by project *Cone Corp*. MBE program." The court noted that in *Cone Corp*., although the MBE program included a minority participation goal, the county "would grant a waiver if qualified minority businesses were

uninterested, unavailable, or significantly more expensive than non-minority businesses." In this way the Court in *Cone Corp*. observed the county's MBE program "had been carefully crafted to minimize the burden on innocent third parties." (Citing *Cone Corp*., 908 F.2d at 911).

The court concluded the "120% debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the *Cone Corp*. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in *Croson* and other similar cases."

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. "It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship." The court found "Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination."

Finally, the Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. "The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA's discrimination against SDFRs…. However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers." However, the court stated, "the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race."

Thus, on the current record, the court held, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, Plaintiff is likely to show that Congress "failed to give serious good faith consideration to the use of race and ethnicity-neutral measures" to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a "last resort," but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest.

The court holds "it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradicate the evils of discrimination that remain following Congress' prior efforts to remedy the same." Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.

The case is pending in the district court. The Defendants filed a Motion to Stay Proceedings and a Motion to Stay Administratively Timely Deadlines. The court on August 2, 2021, denied the Motion to Stay Proceedings.

(iv). ***Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.,*** U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

This is a challenge to the Shelby County, Tennessee "MWBE" Program. In Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al., the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, l983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

In addition, Plaintiffs on February 17, 2020 filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020,

compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals has recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County's ability to present proof at trial due to the non-party MTA's failure to meet its discovery obligations, that nothing in the record attributes MTA's failure to meet its discovery obligations to the County, and that MTA's efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA's appeal to the Ninth Circuit.. The district court in Tennessee stated in a footnote: "Now that the Ninth Circuit has dismissed MTA's appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose."

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.

The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission. The County Commission voted on this matter in November, 2020 and approved settlement of the case with the County paying Plaintiffs $331,950 and agreeing to not enforce the MWBE program. The parties submitted a proposed Order of Settlement to the court to conclude the matter. The minority-owned business program appears will be changing from its current form.

The parties filed a Stipulation of Dismissal with Prejudice with the court on January 4, 2021. The federal court in Tennessee on January 4, 2021 issued an order and Judgment approving the settlement and dismissing the case.

(v). ***Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.,*** Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida

In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court denied a motion by AGC to be elevated to party status and to conduct discovery.

MTA had filed a Motion to Dismiss the Second Amended Complaint. The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in- camera inspection are exempted from the Public Records Act.

On February 1, 2021, the court issued a final order finding that the records of MTA sought by the County fell within the trade secret exemption of the state of Florida Public Records Act. The court thus held the County's Complaint for breach of contract and specific performance were dismissed as moot.

(vi). ***CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.;*** U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege this case arises from Defendant's MWBE Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis. Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs allege the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiffs allege the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority

Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of

Indian Affairs. The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

The court issued a Memorandum and Order, dated July 27, 2020, which provided the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation “immediately,” with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City also agreed for this case only to a rebuttable presumption that the plaintiffs in the case are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.

In addition, the City agreed that it will pay plaintiffs $15,000 in attorney's fees, and related orders. The City agreed that it will use best efforts to process Plaintiffs' certification applications and will provide a decisionon each application by August 2, 2021. If the Plaintiffs were not certified as an MBE under the revised October 2020 rules, Plaintiffs reserved their right to pursue all claims relating to the decision.

(vii). ***Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.,*** U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualifiified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants filed a Motion to Dismiss asserting *inter alia* that the court does not have jurisdiction. Plaintiff filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021 issued a Memorandum Opinion and Order granting in part and denying in part the Motion to Dismiss. The court held that plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part defendants' Motion to Dismss holding that plaintiff's 42 U.S.C. Section 1981 claims are

dismissed as that section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8 (a) Program.

The court on April 9, 2021 entered a Scheduling Order providing that defendants file an Answer by April 28, 2021 and set a Bench Trial for 10/11/2022 with Dispositive Motions due by 6/6/2022. Defendants filed their Answer to the Complaint on April 28, 2021. Plaintiffs on May 20, 2021 filed a Motion to Amend/Revise Complaint, Defendants filed their Response to Motion to Amend on June 4, 2021 and Plaintiffs filed on June 8, 2021 their Reply to the Response. The Motion is pending at this time.

(viii). ***Circle City Broadcasting I, LLC ("Circle City") and National Association of Black Owned Broadcasters ("NABOB") (Plaintiffs) v. DISH Network, LLC ("DISH" or "Defendant"),*** U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.

This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City. Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981. Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations located in and serving Indianapolis, Indiana and the surrounding areas.

NABOB is a nonprofit corporation. The Amended Complaint alleges that NABOB represents 167 radio stations owned by 59 different radio broadcasting companies and 21 television stations owned by 10 different television broadcasting companies. The Amended Complaint alleges NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country. Plaintiffs allege that as the voice of the African American broadcast industry for the past 42 years, NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success in broadcasting for African Americans and other minorities.

Plaintiffs claim that DISH insists on maintaining the industry's policies and practices of discriminating against minority-owned broadcasters and disadvantaged business by paying the non-minority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.

Plaintiffs assert that DISH's policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.

Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.

Circle City sues for retransmission fees at a fair market rate, actual and punitive damages, interest, attorneys' fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous "negotiations" with Circle City. NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.

The court issued an Order on May 18, 2021, regarding discovery and noted that it does not appear that settlement would be productive at this time; thus, the case will proceed with discovery. Circle City and NABOB and DISH on July 29, 2021 filed a Stipulation of Facts and Dismissal of NABOB dismissing with prejudice the claims made by NABOB against DISH. Circle City and DISH consented to NABOB withdrawing from the action via a dismissal. The court has set a pretrial conference in February 2022, and the case is pending at the time of this report.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, disparity studies, the Federal DBE Program and the implementation of the Federal DBE Program by state and local government recipients of federal funds, and federal social and economic disadvantaged programs, which are instructive to the study. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

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

1. *Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the U.S. SBA, 993 F.3d 353 2021 WL 2172181 (6th Cir. May 27, 2021).*

Background and District Court Memorandum Opinion and Order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") created the Paycheck Protection Program ("PPP"), a $349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act appropriated an additional $310 billion to the fund.

The district court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and women-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and women-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and women-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (the "ARPA"). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated $28,600,000,000 to a "Restaurant Revitalization Fund" and tasked the Administrator of the Small Business Administration with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. See id. § 5003. Under the ARPA, the Administrator "shall award grants to eligible entities in the order in which applications are received by the Administrator," except that during the initial 21-day period in which the grants are awarded, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the Small Business Administration announced that it would open the application period for the Restaurant Revitalization Fund on May 3, 2021. The Small Business Administration announcement also stated, consistent with the ARPA, that "[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals."

Antonio Vitolo is a white male who owns and operates Jake's Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the Restaurant Revitalization Fund through the Small Business Administration on May 3, 2021, the first day of the application period. The Small Business Administration emailed Vitolo and notified him that "[a]pplicants who have submitted

a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days."

On May 12, 2021, Vitolo and Jake's Bar and Grill, LLC initiated the present action against Defendant Isabella Casillas Guzman, the Administrator of the Small Business Administration. In their complaint, Vitolo and Jake's Bar and Grill assert that the ARPA's twenty-one-day priority period violates the United States Constitution's equal protection clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo's sworn declaration dated May 11, 2021, Vitolo and Jake's Bar and Grill request that the Court enter: (1) a temporary restraining order prohibiting the Small Business Administration from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the Small Business Administration from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict Scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the district court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the Government asserts that it has a compelling interest in "remedying the effect of past or present racial discrimination" as related to the formation and stability of minority-owned businesses.

Compelling Interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government's early attempts at general economic stimulus—i.e., the Paycheck Protection Program ("PPP")—disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice."); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000) ("The government's evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied."); *DynaLantic Corp v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012) (rejecting facial challenge to the Small Business Administration's 8(a) program in part because "the government [had] presented significant evidence on race-based denial of access to capital and credit").

The court said that the PPP—a government-sponsored COVID-19 relief program—was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow Tailoring found by District Court. The court then addressed the "narrow tailoring" requirement under the strict scrutiny analysis, concluding that: "Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.' "

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be "socially and economically disadvantaged" for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the TRO hearing that the SBA is using race as an absolute basis for identifying "socially and economically disadvantaged" individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA's processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant's implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs' motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address "any alleged inequities or past discrimination." However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had "a weaker income statement" or "a weaker balance sheet." But, the court noted, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the Government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the Government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be "socially disadvantaged." However, the court stated the race-based presumption is just that: a presumption. Counsel for the Government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003's broader definition of "socially and economically disadvantaged" was free to check that box on the application. ("[E]ssentially all that needs to be done is that you need to self-certify that you fit within that standard on the application, ... you check that box").) For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such. Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the Restaurant Revitalization Fund is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out for example, of Alaskan and Hawaiian natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii. This is not like the racial classification in Croson, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to "an Aleut citizen who moves to Richmond tomorrow." Here, the court found any narrowly tailored racial classification must necessarily account for the national scale of prior and present COVID-19 programs.

The district court noted that the Supreme Court has historically declined to review sex-or gender-based classifications under strict scrutiny. The district court pointed out the Supreme Court held, "[t]o withstand constitutional challenge, ... classifications by gender must serve

important governmental objective and must be substantially related to achievement of those "[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate Scrutiny applied to women-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting women-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The district court therefore stated it cannot conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of women-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between women-owned and man-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the record before it, the district court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: [W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." However, the district court did not conclude that Plaintiffs' constitutional rights are likely being violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The district court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants—which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits.

The district court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs' Motion for Preliminary Injunction. Subsequently, the court addressed the Plaintiffs' motion for a preliminary injunction. The court found its denial of Plaintiffs' motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant's additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the Paycheck Protection Program (the "PPP"): "As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses."

There was a written statement noting that "[m]inority and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program"; testimony observing that historical lack of access to capital among minority- and women-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties' briefing on Plaintiff's motion for preliminary injunction have not impacted the court's analysis with respect to the remaining preliminary injunction factors. Accordingly, for the reasons stated in the court's memorandum opinion denying Plaintiff's motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court's decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants' race or sex. Vitolo asked the district court to enjoin the race and sex preferences until his appeal was decided. The district court denied that motion too. Finally, the district court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. Vitolo v. Guzman, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using "these unconstitutional criteria when processing" Vitolio's application.

Standing and Mootness. The Sixth Circuit agreed with the district court that Plaintiffs had standing. The Court rejected the Defendant Government's argument that the Plaintiffs' claims were moot because the 21-day priority phase of the grant program ended.

Preliminary Injunction. Application of Strict Scrutiny by Sixth Circuit. Vitolo challenges the Small Business Administration's use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under the factors in determining whether a preliminary injunction should issue on the first factor the is typically dispositive: the factor of Plaintiffs' likelihood of success on the merits.

Compelling Interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government's asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And, the Court said, since "an effort to alleviate the effects of societal discrimination is not a compelling interest," the government's policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it

comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the district court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority-and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow Tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative, nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. But, the Court stated an "obvious" race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs "disproportionately failed to reach minority-owned businesses.". But, the Court found a simple race-neutral alternative exists again: The government could simply grant priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not. The government argues its program is not underinclusive because people of all colors can count as suffering "social disadvantage." But, the Court said, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is "plagued" with other forms of underinclusivity. The Court considered the requirement that a business must be at least 51% owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51%. But does that mean those owners did not suffer economic harms from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar, is 50% owned by a Hispanic female. It is far from obvious, the Court stated, why that 1% difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the Small Business Administration's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this "scattershot approach" does not conform to the narrow tailoring strict scrutiny requires.

Women-Owned Businesses. Intermediate Scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-owned restaurants. Like racial classifications, sex-based discrimination is presumptively invalid. overnment policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." Government policies that discriminate based on sex cannot stand unless the government provides an "exceedingly persuasive justification." To meet this burden, the government must prove that (1) a sex-based classification serves "important governmental objectives," and (2) the classification is "substantially and directly related" to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing women-owned restaurants serves an important governmental interest. The government claims an interest in "assisting with the economic recovery of women-owned businesses, which were 'disproportionately affected' by the COVID-19 pandemic." But, the Court stated, while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored "actually suffer[ed] a disadvantage" as a result of discrimination in a

specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government's prioritization system is not "substantially related to" its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the pandemic. Yet under the Act, the Court said, all women-owned restaurants are prioritized—even if they are not "economically disadvantaged." For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51% women-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is "substantially related" to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The plaintiffs are entitled to an injunction pending appeal. Since the government failed to justify its discriminatory policy, the plaintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or theapplicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted.

Dissenting Opinion. One of the three Judges filed a dissenting opinion.

Amended Complaint and Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Plaintiffs on June 1, 2021, filed an Amended Complaint in the district court adding Additional Plaintiffs. Additional Plaintiffs' who were not involved in the initial Motion for Temporary Restraining Order, on June 2, 2021, filed a Second Emergency Motion For a Temporary Restraining Order and Preliminary Injunction. The court in its Order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongul behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs' claims are moot.

The court thus denied the Additional Plaintiffs' motion for temporary retraining order and preliminary injunction. The court also ordered the Defendant Government to file a notice with the court if and/or when Additional Plaintiffs' applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id*. at 736. "If MBEs comprise 10% 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory

goals has been used to justify bureaucratic decisions which increase its impact on non-minority business." *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

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

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

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

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

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

5. Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams.

In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal voluntarily dismissed in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the struct scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found

persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature *prior* to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could have found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to *government procurement contracts* only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts *before* enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires fifteen percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C),

fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a fifteen percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the fifteen percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

Upon review of all factors together, the court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lac of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The case was appealed in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954. The appeal was voluntarily dismissed in March, 2021.

In the Court of Common Pleas, on March 11, 2021 the parties filed a Joint Motion to Dismiss Remaining Claims and Counterclaims Without Prejudice, and the Court of Common Pleas Ordered the dismissal of the remaining Counts of the Complaint and Counterclaim without prejudice.

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

Recent Decisions in Federal Circuit Courts of Appeal

1. H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010).

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id*.

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F.3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program against equal-protection challenges." *Id*., at footnote 1, *citing*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id*.

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the

statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, … for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses … [that] shall not be applied rigidly on specific contracts or projects." *Id*. at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set "contract-specific goals or project-specific goals … for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. *Id*.

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. *Id*. at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified by [the study] … that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." *Id*. at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id*. § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id*. Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically "fatal in fact." 615 F.3d 233 at 241. The Court pointed out that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id*. at 241 *quoting Alexander v. Estepp*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." *Id*., *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: "There is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense,* 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State's evidence of discrimination "must be evaluated on a case-by-case basis." *Id*. at 241. (internal quotation marks omitted).

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. "Instead, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id*. at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we "further require that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'" *Id*. at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the necessity for remedial action. *Id*. at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id*. at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *Id*. at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state's statutory scheme must also be "narrowly tailored" to serve the state's compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. *Id*. at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*., *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review. *Id*. at 242. The Court found that its "sister circuits" provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure "can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." *Id*. at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes "something less" than a 'strong basis in evidence,' the courts, … also agree that the party defending the statute must 'present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,…the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on "reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions." *Id*. at 242 *quoting Hogan*, 458 U.S. at 726.

Plaintiff's burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff "has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance." *Id*. at 243, *quoting West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the "disparity index," which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id*. In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id*. The closer the resulting index is to 100, the greater that group's participation. *Id*.

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id*. at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." *Id*. at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id*.

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F.3d 233 at 244, *quoting Eng'g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." *Id*., *citing Eng'g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id*. at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not

accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id*. at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id*. at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id*. at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id*. The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id*. For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id*. The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id*.

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id*.

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id*.

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative

effect on that firm's gross revenue of all the independent variables included in the regression model. *Id*. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id*.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id*. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id*. at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id*. at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id*. The Court concluded plaintiff did not offer any contrary evidence. *Id*.

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id*. at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id*. at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id*. at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at

247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id*. at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id*. at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id*. at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id*.

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id*. at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id*.

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id*. at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as

to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id*. at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id*. at 249. It was noted that the samples of the minority groups were randomly selected. *Id*. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id*. at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id*. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id*.

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id*. The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id*. at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id*. The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id*. at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] … every conceivable race-neutral alternative." 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id*. at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id*. at 252.

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

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

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

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

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

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

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

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

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

evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id*.

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

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

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

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

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

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

2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006).

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (i.e., those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id*. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id*.

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id*. Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id*. at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id*. at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id*. at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id*. at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id*. at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." *Id*. Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id*. at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id*. at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7th Cir. 2006).

In *Rapid Test Products, Inc. v. Durham School Services Inc*., the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

4. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion).

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id*.

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id*. On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id*.

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id*. The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id*. Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community." *Id*. The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id*.

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id*. The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id*.

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id*.

The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id*. at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id*. Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id*. Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id*. In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id*. In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the "District was only looking for 'black-owned firms.'" *Id*. Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id*.

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id*. at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id*. Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id*.

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id*. at 267. The court first questioned whether the identified government interest was compelling. *Id*. at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id*.

The court held the MVP was not narrowly tailored for two reasons. *Id*. First, because no evidence existed that the District considered race-neutral alternatives to "avoid unwitting discrimination." The court found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake." *Id*., *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id*. at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id*. at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id*. "[R]ace conscious … policies must be limited in time." *Id*., *citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id*. at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused

Virdi to lose a contract that he would have otherwise received. *Id*. Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id*. at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id*.

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id*. at 270.

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

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

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

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id*. at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id*. In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the

program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id*. at 956-57.

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

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

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

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

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

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

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

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

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

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id*.

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id*. at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that

responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id*.

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

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

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

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

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate

treatment within the last five years while engaged in business activities. The survey also posed the following question: "How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements … also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?" Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were "seldom or never" used on non-goals projects. *Id*.

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

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

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

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

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

a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id*.

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

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

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

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

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court

held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id*.

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

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

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

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

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

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt. Id*. at 975. In *Shaw,* a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id*., *quoting Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id*. at 976, *quoting Shaw*, 517 U.S. at 910. The City can satisfy this condition by

identifying the discrimination, "'*public or private,* with some specificity.' " *Id*. at 976, *citing Shaw*, 517 U.S. at 910, *quoting Croson,* 488 U.S. at 504 (emphasis added). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id*. at 976.

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

Consistent with the court's mandate in *Concrete Works II,* the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." *Id*. The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id*., *quoting Croson,* 488 U.S. at 492.

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

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation.

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

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

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra,* the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id*. at 978.

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

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies

measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id*. at 979-80.

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

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

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

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

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be

appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id*. at 982.

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

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

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

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

Consistent with the court's mandate in *Concrete Works II,* at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id*. at 984, *quoting Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id*. at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id*. at 985.

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

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some

support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id*. at 987-88.

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

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

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

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

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

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

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

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

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

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

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id*. The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend

gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action …" and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, *quoting* in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women's "set aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F.3d at 644-645.

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

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

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

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

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

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

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

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% 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 participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

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

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

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

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision

might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15% DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

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

8. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997).

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

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

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

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

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id*. at

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

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

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

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

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

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

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id*. at 901. The

County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County Commission would make the final determination and its decision was appealable to the County Manager. *Id*. The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. Id.

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

On appeal, the Eleventh Circuit considered four major issues:

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

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

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

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

Id. at 903.

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

> "In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is

> usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest."

Id. (internal citations omitted).

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

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

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

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

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE

firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id*. at 912.

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

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

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

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

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

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

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

The Eleventh Circuit then explained the burden of proof:

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

Id. (internal citations omitted).

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

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

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

The expert stated:

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

The Eleventh Circuit then summarized:

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

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id*. A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and

firm size." *Id*. (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id*.

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

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. Id. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id*. The Eleventh Circuit held that this decision was not clearly erroneous. *Id*.

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

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

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

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

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

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

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

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

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

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

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id*.

Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id*. at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id*., *quoting Croson*, 488 U.S. at 501, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

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

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

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

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

further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id*. at 922.

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

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

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

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

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

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

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-

MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project. *Id*. at 924-25.

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

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id*. However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id*. In her plurality opinion in Croson, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified." *Id*., *quoting Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*. at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id*. at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id*.

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

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

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id*. at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four

factors provide "a useful analytical structure." *Id*. at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id*.

The Eleventh Circuit flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id*., *citing Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") … Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment. *Id*. at 927.

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

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

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

> [T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past

> societal discrimination and neglect … The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting Croson, 488 U.S. at 509-10.

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

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

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

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

10. Contractor's Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996).

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court's judgment declaring that the City's DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), affirming, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City's Ordinance sought to increase the participation of "disadvantaged business enterprises" (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by "socially and economically disadvantaged" persons. "Socially and economically disadvantaged" persons are, in turn, defined as "individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and

whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition "includes only individuals who are both victims of prejudice based on status and economically deprived." Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than $5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation "goals" for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance's participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the "lowest responsible, responsive contractor" received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed "the highest goals" of DBE participation at a "reasonable price" did not exert good faith efforts, and the contract was awarded to the "lowest, responsible, responsive contractor" who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court's ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors*. Id., citing, Contractors II,* 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did "not provide a sufficient evidentiary basis" for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id. citing*, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the "strict scrutiny" standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance's preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been

unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no "strong basis in evidence" for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was "not 'narrowly tailored' to even the perceived objective declared by City Council as the reason for the Ordinance." *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to "strict scrutiny" review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant;" race-based preferences cannot be justified by reference to past "societal"

discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not "fit" the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of

persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. The court found Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only

25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin's testimony:

> [Macklin] went to the contract files and looked for contracts in excess of $30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility." 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." Like the Supreme Court in *Croson*, the Court stated the district court found significant the City's inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a

system of private discrimination. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors*

II, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id., citing,* 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black

firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study "mixed data," the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He "mixed" this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of $667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court's suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City's Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a "sheltered market" basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated

percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated "[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms." *Id.* at 606, *citing*, 488 U.S. at 502 . Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City's Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set–aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for

discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race–neutral or less burdensome to non–minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or

minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

11. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994).

The court considered whether the City and County of Denver's race- and gender-conscious public contract award program complied with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. ("Concrete Works") appealed the district court's summary judgment order upholding the constitutionality of Denver's public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance ("Ordinance") to enable certified racial minority business enterprises ("MBEs")1 and women-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." *Id*. at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id*. at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id*. Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action,

seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id*.

In 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id*. With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id*.

Standing. At the outset, the Tenth Circuit on appeal considered Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *Id*. at 1518. The court concluded that Concrete Works demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id*.

Specifically, the unequal nature of the bidding process lied in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id*. In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id*. Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id*. at 1519.

In addition to demonstrating "injury in fact," Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver's race- and gender-conscious contract program. *Id*.

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance's race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id*. Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id*.

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509, The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id*. *citing*, *Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued Croson would allow Denver only to use data describing discrimination within the City and County of Denver. *Id*. at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id*. at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id*.

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id*. The record revealed that over 80 percent of Denver Department of Public Works ("DPW") construction and design contracts were awarded to firms located within the Denver MSA. *Id*. at 1520. To confine the permissible data to a governmental body's strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id*.

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver's contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id*. at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id*.

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id*.

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id*. at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id*. The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id*. Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id*.

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id*. at 1520, *quoting*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly

endorsed the inclusion of personal accounts of discrimination. *Id*. at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id*.

C. Post–Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id*. In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id*. at 1521, *quoting, Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id*.

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id*. at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id*. This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id*.

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id*. at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal treatment is necessary. *Id*. Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id*.

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id*. at 1521, *citing, Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments "must identify that discrimination ... with some specificity before they may use race-conscious relief." *Id., citing Croson*, at 504. The court said that the Supreme Court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation was whether there exists a "*strong basis in evidence* for [the government's] conclusion that remedial action was necessary." *Id*., *quoting, Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id*. at 1521, *citing, Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id*. at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Id*. at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id*. That, the court stated, must be evaluated on a case-by-case basis. *Id*.

The court said that the adequacy of a municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id*. at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id*. Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program. *Id*.

Notwithstanding the burden of initial production that rests with the municipality, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id*. at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver's evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id*. at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver's Ordinance would be appropriate. *Id*.

E. Evidentiary Predicate Underlying Denver's Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid–1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id*. at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id*. at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id*. at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id*. at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id*.

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id*. at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id*. In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id*. Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id*.

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id*. at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id*.

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id*. at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id*. Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id*. at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id*. In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id*.

(b) Denver's Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id*. at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court

said, showed strong evidence of underutilization of MBEs and WBEs. Id. Based on this Report's description of the approximately $85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id*. The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id*.

To undermine this data, Concrete Works alleged that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. *Id*. at 1525. However, the court concluded the Report's description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id*. Thus, the court said this line of attack by Concrete Works was unavailing. *Id*.

Concrete Works also advanced expert testimony that Denver's data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id*. Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid–1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. Id. at 1526. Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." *Id*.

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id*. Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id*. at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id*. at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id*. For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id*. For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id*.

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id*. at 1526, n.19, *quoting, Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id*. at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id*. But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id*. Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id*. The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id*. Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id*.

Empirical data. The third evidentiary item supporting Denver's contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id*. at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id*.

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id*. From 1985 to 1988 (prior to the 1989 modification of Denver's program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id*. However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id*. at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id*.

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id*. at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id*. This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id*.

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id*. at 1528. Although Denver's data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id*. The court said that uncertainty about the capacity of MBEs and WBEs in the local

market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id*.

The court agreed with the other circuits which had at that time interpreted Croson impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id*. at 1527 *citing, Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp*., 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id*. at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id*.

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id*. The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id*.

Denver presented several responses. *Id*. at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id*. DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id*. at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id*. Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id*.

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id*. at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions

in the overall Denver MSA construction industry between 1977 and 1992. *Id*. at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id*.

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id*. The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id*. This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id*.

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id*. at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id*. But, the court said that such a request ignored the lesson of Croson that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Id., quoting*, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id*. at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id*.

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id*. The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id*. at 1529, *quoting, Croson*, 488 U.S. at 492.

The court concluded that Croson did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. Id. at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. Id. at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id*. at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of

affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id*.

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id*. at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id*.

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id*. at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id*. at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id*.

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id*. at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id*. The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id*. Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id*. Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id*.

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id*. at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id*. The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. Id. In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id*. at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard—i.e. that

the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id*. at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id*. at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

12. Contractor's Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993).

An association of construction contractors filed suit challenging, on equal protection grounds, a City of Philadelphia ordinance that established a set-aside program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City's motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d. Cir. 1991), affirmed in part and vacated in part the district court's decision. *Id*. On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id*.

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id*. at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17–500. Id. The Ordinance established "goals" for the participation of "disadvantaged business enterprises." § 17–503. "Disadvantaged business Disadvantaged business enterprises" (DBEs) were defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to

compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id*. at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17–501(11)(a), but that a business which has received more than $5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id*. at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing,* 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id*. Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson,* the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id*. at 995, *quoting,* 735 F.Supp. at 1295–98. The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id*. at 995; 735 F.Supp. at 1298–99. The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id*. at 995 *citing,* 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the

Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id*. at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id*. at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id*. at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id*. at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id*. at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id*. Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance's classification scheme is spelled out in its definition of "socially and economically disadvantaged. *Id*. The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition's economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id*. Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *Id*. at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is "narrowly tailored" to a "compelling government interest." *Id.* at 999. Under intermediate scrutiny, a law must be "substantially related" to the achievement of "important government objectives." *Id.*

The Court agreed with the district court that the definition of "socially and economically disadvantaged individuals" included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those "whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged." *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance

foreclosed the City's argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id*. at 1000, *citing*, *Hogan* 458 U.S. at 728. The Ordinance, the Court stated, is such a program*. Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, *Coral Constr. Co. v. King County,* 941 F.2d 910, 930 (9th Cir.1991), *cert. denied,* 502 U.S. 1033 (1992); *Michigan Road Builders Ass'n, Inc. v. Milliken,* 834 F.2d 583, 595 (6th Cir.1987), *aff'd mem.,* 489 U.S. 1061(1989); *Associated General Contractors of Cal. v. City and County of San Francisco,* 813 F.2d 922, 942 (9th Cir.1987); *Main Line Paving Co. v. Board of Educ.,* 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson,* which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County,* 908 F.2d 908 (11th Cir.), *cert. denied,* 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id*. at 1000, citing 735 F.Supp. at 1307. That standard validates the classification if it is "rationally related to a legitimate governmental purpose."*Id*. at 1001, citing Cleburne, 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id*.

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Id*. at 1001-2. The Court noted that in Croson, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id*. at 1002, quoting, 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id*. at 1002, *quoting*, 488 U.S. at 492.

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* 488 U.S. at 502.

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id*. at 1002, *quoting,* 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime

contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting,* 1295–98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a "*passive participant* " in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." *Id*. at 1002, n. 10, *quoting*, 488 U.S. at 492.

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id*. at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Id*., *quoting*, 488 U.S. at 480.

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson,* it discounted this evidence because "other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers." *Id*. at 1002, *quoting,* 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id*. at 1003, *quoting, Coral Constr.,* 941 F.2d at 919 ("anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson,* it is insufficient here. *Id*. But because the combination of "anecdotal and statistical evidence is potent," *Coral Constr.,* 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the "pre-enactment" evidence), and evidence developed by the City on remand (the "post-enactment" evidence). *Id*. at 1003.

Pre–Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 percent of City contract dollars during the preceding three years, 1979

through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id*. at 1003. Under *Croson*, available minority-owned businesses comprise the "relevant statistical pool." *Id*. at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post–Enactment statistical evidence. The "post-enactment" evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the "relevant statistical pool" needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id*. at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson. Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the "disparity index." The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the "population" of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id*. at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*'s evidentiary burden is satisfied. *Id*. Disparity indices are highly probative evidence of discrimination because they ensure that the "relevant statistical pool" of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, *citing, Cone Corp.,* 908 F.2d at 916 (10.78 disparity index); *AGC of California,* 950 F.2d at 1414 (22.4 disparity index); *Concrete Works,* 823 F.Supp. at 834 (disparity index "significantly less than" 100); *see also Stuart,* 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare O'Donnell,* 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the

disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. Id.

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that "[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program." *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. *Id*. Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id*. at 1006. *Croson*'s reference to an "inference of discriminatory exclusion" based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City's statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a "neutral explanation" for the disparity, "showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data." *Id.* at 1007. A *fortiori,* this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors' objections to the study were properly presented to the trier of fact. *Id*. Accordingly, the Court found the City's statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian–Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction

companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian–American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15% of the available firms and Asian–American, Pacific–Islander, and "other" minorities represented 0.12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that 0.27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the "significant statistical disparity." *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent. *Id.* at 1008. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," *Id*. at 1008, *quoting,* 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian–American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id*. In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance's racial preference was "narrowly tailored" to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id*. at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective "race-neutral measures," such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified

regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition's programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City's prior consideration of race-neutral programs to withstand summary judgment. *Id*. at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses "to ensure adequate competition and an expectation of reasonable prices on bids or proposals," and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after "a good faith effort to comply with the goals for DBE participation." *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won $5 million in city contracts. *Id.* Also unlike the Richmond program, the City's program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs "within the Philadelphia Standard Metropolitan Statistical Area." *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored*. Id.*

The Court said a closer question was presented by the Ordinance's fifteen percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id. Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." *Id., quoting,* 488 U.S. at 507.

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id*. Given the strength of the Ordinance's showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was "narrowly tailored." *Id*.

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." *Id*., at 1009.

The City contended the gender preference was aimed at the "important government objective" of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Id.* at 1009. The Court held it could uphold the construction

provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id*. at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id*. at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination *Id.* at 1011.

Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination

against handicapped individuals. *Id., citing* 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is "rationally related to a legitimate government purpose," *Id., citing*, *Cleburne,* 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe,* 509 U.S. 312–43 (1993), indicating that "a [statutory] classification" subject to rational basis review "is accorded a strong presumption of validity," and that "a state ... has no obligation to produce evidence to sustain the rationality of [the] classification." *Id.* at 1011. Moreover, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id*. at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negativing every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian–American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

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

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

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 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 interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id*. at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id*. at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id*. at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id*. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id*. And, the City found that large statistical disparities existed

between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id*. at 1414.

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

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

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id*. at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id*.

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id*. at 1416.

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

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

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

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id*. at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id*. at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id*. at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id*. 1418.

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

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

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

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

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

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

classification to justify the denial of a Motion for Summary Judgment. *Id*. at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

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

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

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

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

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id*. at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id*. at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id*. Thus, the court

required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id*. The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id*. The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id*.

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

A second indicator of a program's narrowly tailoring is program flexibility. *Id*. at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id*. at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 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

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

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

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

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to

comment on the validity of the disparity study. *Id*. at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id*. The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id*.

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

District court order adopting Memorandum & Recommendation of Magistrate Judge.

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

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id*. at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id*. As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id*. Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

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

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

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

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

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

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

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

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

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id*. at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 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*. The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

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

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

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

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

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

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

for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id*. at *5.

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

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

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

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

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

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely

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

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

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

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

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

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

protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 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.

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

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

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

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id*. An individual target for MBE participation was set for each project. *Id*.

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id*. The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed.

But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore,

the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq*. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id*. NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id*.

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in Croson made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id*. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

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

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

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

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

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

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

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id*. at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id*. at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id*.

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

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

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

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

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

the plaintiffs did not produce evidence of a "discriminatory motive." *Id*. at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id*.

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

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

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

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

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

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

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

willing and able to work" may justify an affirmative action program. *Id*. at *7. The court also stated that anecdotal evidence is relevant to the analysis.

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

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id*. at *8. Noting that affirmative action is permitted only sparingly, the court found: "[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit." *Id*. The court held in conclusion, that the plaintiffs were "substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause." *Id*. at *9.

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

19. Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F. Supp.2d 1305 (S.D. Fla. 2004).

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County* is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of

their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 .3d 950 (10th Cir. 2003). See discussion, *infra.*

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id*. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id*. The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id*. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id*. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id*. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id*.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id*. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id*. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id*. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id*.

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

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

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id*. at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id*. at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id*. at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." *Id*. at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. *Id*. (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." *Id*.

The County presented both statistical and anecdotal evidence. *Id*. at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id*. Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id*. The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id*. Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id*. For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id*.

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id*. Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id*. Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the

firm's gender and/or ethnic classification. *Id*. at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id*. Dr. Carvajal's results remained substantially unchanged. *Id*.

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id*.

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id*. The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id*. The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id*.

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id*. at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id*. at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id*. at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id*. The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id*. at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id*.

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id*. (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id*.

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id*. at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id*. at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished … it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id*.

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id*. Instead, the Commissioners voted to continue the HBE program. *Id*. The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id*. at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id*. However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id*. Under either scenario, the HBE program could not be narrowly tailored. *Id*.

The court found the waiver provisions in the HBE program inflexible in practice. *Id*. Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id*. The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id*. at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id*. at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id*. at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id*.

The court held that the County was liable for any compensatory damages. *Id*. at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated

"clearly established statutory or constitutional rights of which a reasonable person would have known … Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional. " *Id*. at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs … were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*]." *Id*. at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id*. Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id*. Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id*.

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id*. at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id*. For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

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

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

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

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity ("OSD") to assist MBEs to become suppliers of commodities, services and construction to the

state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

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

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

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

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

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the

agency met its utilization plan. The court held that based on these factors, although alleged to be "permissive," the statute textually was not.

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

21. The Builders Ass'n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003).

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

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority- and Women-Owned Business ("MWBE") Program. The court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the "graduation" revenue amount for firms to graduate out of the program was very high, $27,500,000, 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).

22. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp.2d 749 (D. Md. 2002).

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its

individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or controversy" in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

23. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001).

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act ("MBE Act"). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id*. at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id*. at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following Adarand VII, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id*. The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. *Id*. at 1240. Therefore, the district court

concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id*.

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." *Id*. Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." *Id*. The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. *Id*. at 1240, *citing* to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." *Id*. at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." *Id*. In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. *Id*.

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id*. at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id*.

The court also found that the Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id*. The district court stated that the Intervenors did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id*. The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id*. at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in

'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id*. at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id*. at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id*. at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id*.

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id*. at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in Adarand VII identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id*. at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id*. at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id*. at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id*. at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id*. at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id*. at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id*. at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id*. at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id*. at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id*. Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id*. The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id*.

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id*. Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id*. at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court

concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id*. at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id*. at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id*. at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id*.

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id*. at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id*. In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id*. at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id*. at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id*. at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id*. The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state's Central Purchasing Act with no time limitation. *Id*.

In terms of the "under- and over-inclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id*. at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at

all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id*.

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

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

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

24. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000).

Plaintiff Associated Utility Contractors of Maryland, Inc. ("AUC") filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance ("the Ordinance"). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. ("MMCA") opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment ("the December injunction"). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for Minority-and Women–Owned Business Enterprises ("MWBEs"), which had been established at 20% 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 ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination." *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and "contract authorities" and to annually specify goals for each separate category of contracting "such as public works,

professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate." *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% 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 remedying identified past and present race discrimination within their borders. *Id.* at 619, *citing Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 619, *quoting Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

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

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that " 'narrowly tailor' any preferences based on race to meet their remedial goal." *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on "narrow tailoring" as follows:

> The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, *quoting Maryland Troopers Ass'n*, 993 F.2d at 1076–77 (citations omitted).

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

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

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

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

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

Court has established the standard that preenactment evidence must provide the "strong basis in evidence" that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O'Connor, held that a state entity "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.* at 621*, quoting Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20% 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 & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that "post enactment evidence is admissible to determine whether an affirmative action program" satisfies Croson. *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the "strong basis in evidence" inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case. the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20% 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.

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

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case

also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

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

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id*. at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id*. at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id*.

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id*. at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id*., *citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id*. at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id*. at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id*. at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id*. Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id*. The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id*. However, the court found that the Brimmer-Marshall Study contained no such data. *Id*.

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id*. at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id*. The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id*.

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

> Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id*. at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id*. at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id*. at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id*. Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id*. (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id*. at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id*. The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id*. The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id*.

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id*. at 1380, *citing Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a

race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id*., *quoting Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id*. at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id*. The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity …. *Id*.

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id*. The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id*. at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id*.

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id*. The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id*.

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id*. at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id*.

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id*. On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

26. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998).

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

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

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

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments Instructive to the Study

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

Recent Decisions in Federal Circuit Courts of Appeal

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

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

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

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of "Black American" and "Native American" are void for vagueness. The district court dismissed' the claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations' requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor's claims against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor's discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color or state law" as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor's claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well founded reason" to question Taylor's membership claims, and that Taylor did not qualify as a "socially and economically disadvantaged individual." Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants

on Taylor's equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

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

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

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

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

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

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

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

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

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

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

San Diego v. California DOT, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 997-999.

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

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

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

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

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

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project

that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id*. Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

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

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

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

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

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages

against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

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

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting, Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

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

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

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not

explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

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 *sub*contractors to the proportion of *prime* contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

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

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

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

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11.

3. Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

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

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

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

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

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

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

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

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

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

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

The district court noted that Midwest Fence's challenge to the Tollway's program paralleled the challenge to IDOT's program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT's program, the Tollway's program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals

held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

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

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

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

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires "a close match between the evil against which the remedy is directed and the terms of the remedy." *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) "the necessity for the relief and the efficacy of alternative [race-neutral] remedies," (b) "the flexibility and duration of the relief, including the availability of waiver provisions," (c) "the relationship of the numerical goals to the relevant labor [or here, contracting] market," and (d) "the impact of the relief on the rights of third parties." *Id.* at *7 *quoting United States v. Paradise*, 480 U.S. 149,

171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under- inclusiveness. *Id.* at *7.

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

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

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

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

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

Midwest Fence argued that a "mismatch" in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal

regulations, the court noted, states' overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals "*only* on those [USDOT]-assisted contracts that have subcontracting possibilities." *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

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

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

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

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

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is

actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence's criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in

enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at *13. The study found that DBEs made up 25.55% 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.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

4. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing

to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (See 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (See summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over $52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77%. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id*. at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id*. Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id*. Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id*.

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In

addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over $52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, *quoting*, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national

construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id*. The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other

bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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

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

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

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

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

> "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination."

Id. 1191, *citing Western States Paving Co*., 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id*. at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id*. The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id*. An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id*. An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

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

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

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006

period, but not for the state funded contracts. *Id*. at 1192. Thus, the Court stated: "state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data." *Id*.

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

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id*.

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id*. at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and women-owned firms. *Id*. The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id*.

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

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

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

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

The Court, however, held that the AGC did not establish associational standing. *Id*. at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id*. at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id*. at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id*. at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id*. at 1195-1200.

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

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

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

A. Application of strict scrutiny standard articulated in Western States Paving. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving.* The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those

minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (*quoting Western States Paving,* 407 F.3d at 997–99).

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

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id*. (*quoting Western States Paving,* 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id*. at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id*. The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id*. (*citing Western States,* 407 F.3d at 1000).

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

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

argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

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

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

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

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

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

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

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

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

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id*. at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

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

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

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

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

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

6. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012).

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause**.**

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182*. All six firms that bid on the prime contract received the maximum 5

points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id*. DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182*.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183*.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id*.

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id*.

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186.* The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187.* The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186.*

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id*. at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id*. The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id*. at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id*. at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id*. The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id*.

IDOT typically adopted a new DBE plan each year. *Id*. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id*. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id*. The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id*. This initial list was corrected for errors in the data by surveying the D&B list. *Id*. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id*. The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id*. IDOT considered this, along with other data, including DBE utilization on IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id*. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id*.

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id*. at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id*. at 720-21, *citing Western*

States Paving Co., Inc. v. Washington State DOT, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government …. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id*. at 721, *quoting Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id*. The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id*. at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id*. at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id*. The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id*. at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id*. at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id*. at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id*. at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id*. First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id*. NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id*. The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id*. at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id*. (*citing* 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT

contracts. *Id*. The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id*. The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id*.

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id*. The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id*. According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id*.

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id*. at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id*. at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id*. According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id*.

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id*.

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id*.

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id*. at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id*. The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id*. TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id*.

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id*. at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id*. (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id*. at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id*. (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id*. (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id*. (citing regulation).

A prime contractor must use "good faith efforts" to satisfy a contract's DBE utilization goal. *Id*. (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id*. (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. *Id*. at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id*. The prime contractor expressly stated that he rejected plaintiff's bid due to the minority utilization requirement. *Id*.

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id*. The district court rejected both of plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of

discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id*. at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id*. Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id*.

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id*. at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." *Id*. at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." *Id*. at 991, *citing City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." *Id*. at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id*. However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id*. The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id*. at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id*.

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id*. at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id*. The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id*. at 996; *see also* Br. for the United States at 28 (April 19, 2004) ("DOT's regulations … are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id*. at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id*. However, the Eighth Circuit did consider whether the states'

implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id*. The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id*. (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id*. at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id*. However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id*. Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id*. at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id*. at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id*. at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id*. at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id*. In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id*., *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id*. at 998-99, *citing Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id*. at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id*. WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id*. WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id*. Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements.

Id. at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id*. WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id*.

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id*. at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id*.

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id*. It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id*. The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id*. The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id*. The court also found the State conceded as much to the district court. *Id*.

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id*. The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id*. However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id*.

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id*. at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id*. The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id*. Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id*. at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

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

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

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

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

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

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a

national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

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

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

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

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

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

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 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*.).

10. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001).

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

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

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court's vacation of the Tenth Circuit's dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). The court's evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id*. at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

"Compelling Interest" in race–conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III,* 515 U.S. at 237; *see also Shaw v. Hunt,* 517 U.S. 899, 909, (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (citing *Croson,* 488 U.S. at 498–506)). Interpreting *Croson,* the court recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ' "passive participant" in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.' " *Concrete Works of Colo., Inc. v. City & County of Denver,* 36 F.3d 1513, 1519 (10th Cir.1994) (*quoting Croson,* 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Id.*

Evidence required to show compelling interest. While the government's articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered

by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id*. at 1166.

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.' " *Concrete Works,* 36 F.3d at 1521 (quoting *Croson,* 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, *citing Concrete Works,* 36 F.3d at 1520–21.

After the government's initial showing, the burden shifted to Adarand to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (quoting *Wygant,* 476 U.S. at 277–78, (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* at 1166, *quoting, Concrete Works,* at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, *citing*, *Concrete Works,* 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id* at 1166-67 citing, *Concrete Works,* at 1523, 1529, and *Croson,* 488 U.S. at 492 (Op. of O'Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, *citing, Appendix—The Compelling Interest for Affirmative Action in Federal Procurement,* 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) ("*The Compelling Interest* ") (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works,* the court noted that:

> Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."

> *Croson,* 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Id. at 1167, *quoting*, *Concrete Works,* 36 F.3d at 1529. Unlike *Concrete Works,* the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. Id. at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government's evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest,* 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors' unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. Id. at 1169. The court stated that the government's evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id*. at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government's evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 1172.

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government's evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court's decision in *Croson,* numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government's review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest,* 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." *Id. quoting*, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

The court said that it was mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 1172, *quoting, Croson* at 501–02. But the court found that here, it was unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. Id. At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works,* the court stated that "[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a

municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion," and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, *citing, Concrete Works*, 36 F.3d at 1528. Although the government's aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson,* 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id*. at 1174, *quoting*, *Croson,* 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson,* 488 U.S. at 500 (quoting *Wygant,* 476 U.S. at 277).

Adarand's rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their "ultimate burden" of introducing credible, particularized evidence to rebut the government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that "racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets." *Id.*

The government's evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id*. at 1176.

The court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id*. at 1176. If Congress had valid evidence, for example that Asian–American individuals are subject to discrimination because of their status as Asian–Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* "Race" the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* at 1176, note 18, *citing,* 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was unrebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id*. The court reiterated that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (quoting *Wygant,* 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (quoting *Wygant,* 476 U.S. at 293, 106 S.Ct. 1842 (O'Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government's initial showing stands. *Id.*

In sum, guided by *Concrete Works,* the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest,* 61 Fed.Reg. 26,050, more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id*. The court therefore affirmed the district court's finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id*. at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

> [i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, *quoting*, *Paradise,* 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, "the availability of waiver" is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id., quoting, Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers',* 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a "rigid numerical quota," the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, *citing, Croson*, 508, As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove,* 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O'Connor's majority opinion in *Croson* added a further factor to the court's analysis: under– or over-inclusiveness of the DBE classification. *Id*. at 1177. In *Croson,* the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Id., quoting*, *Croson,* 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III,* where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the

instant case: (1) "[c]onsideration of the use of race-neutral means;" and (2) "whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate." *Id.* at 1177, *quoting, Adarand III,* 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*'s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over– or under-inclusiveness*. Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

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

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id*. at 1185-1186.

The court stated that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id*. The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id*.

Holding. Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III* 's strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id*. at 1178.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id*. at 1187-1188. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

Recent District Court Decisions

11. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id*. at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id*. The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id*.

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id*. Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id*. Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a

"member of a designated disadvantaged group," the court stated Mr. Taylor "must demonstrate social and economic disadvantage on an individual basis." *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and "articulated a rational connection between the facts found and the choices made." *Id*. at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE "program requires states to extend benefits only to those who are actually disadvantaged." *Id., citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was "actually disadvantaged" or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12*, citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations "weigh adversely and disproportionately upon" mixed-race individuals, like Mr. Taylor. *Id*. This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim,

the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of "Native Americans" now

"includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." *Id., citing,* 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

12. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017).

In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. Id at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately $2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of $1.89 million." *Id.* at 746.

These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746.

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss—challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id at 754.* Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.*. The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755*, citing,* 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v.* Maxwell, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id*. at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a "commercially useful function." *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that "[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation." *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was "ambiguous" and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

> the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, *quoting, United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

> [b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a "commercially useful function."

Id. at 756, *quoting*, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was "fronted" as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant's final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government's exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id., citing,* 49 U.S.C. § 322(a) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); 23 U.S.C. § 304 (The Secretary of Transportation "should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system."); 23 U.S.C. § 315 ("[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.").

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny review," with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757*, citing*, *Midwest Fence Corp.*, 840 F.3d at 942 (*citing Western States Paving Co. v. Washington State Dep't of Transportation,* 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant's motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of $85,221.21; and a $30,000 fine. The case also was terminated on March 13, 2018.

13. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016). [185]

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

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

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

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made

[185] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"), and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

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

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id*. The court took judicial notice of the existence of Congressional hearings and

reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id*.

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority-and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726*.* Sixty-four of the studies had previously been presented to Congress. *Id*. The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id*. The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726*.* The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.,* 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727*, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id*. Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that

courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from

subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id*. at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id*. Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT,* the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, *citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in

conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730.The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731.For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under $500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal–Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under $500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal–Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non–DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race–neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project

management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over $36 million in contracting dollars. *Id*. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id*.

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as–applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal

regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. *See*, 840 F.3d 932 (7th Cir. 2016) discussed above.

14. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014).

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The

Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id*.

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id*.

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id*. Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non–DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id*.

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id*. Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id*. at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id*.

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id*. at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id*. Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id*.

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id*. at *12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id*. at *12, *quoting Grutter v. Bollinger,* 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id*. at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id*.

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id*. *13, *quoting Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id*. at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id*.

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id*. at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-

enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id*. The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id*.

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id*. at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id*. *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id*. *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id*. at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id*. at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id*. *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id*. at *5.

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

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

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

discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id*. Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id*.

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

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

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

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

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id*. at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id*. Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id*. at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id*. at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id*.

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without

overconcentration. *Id*. The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id*.

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id*. at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id*. The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id*. In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id*.

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id*. at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id*. If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id*.

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id*. Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id*.

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id*. at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id*. at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id*. at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id*. at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id*. at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id*.

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id*. at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id*.

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id*.

D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id*. at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id*. at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id., quoting Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id*. at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id*.

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id*. at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence

that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id*. at *18, *quoting Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id*. at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id*. at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id*. at *18, *quoting Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id*. at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id*. at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id*. at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id*. Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id*. But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id*. Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id*. Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id*.

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id*. at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id*.

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id*. at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id*. After conducting a disproportionality comparison,

the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id*. at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id*.

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id*. at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id*.

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id*. at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id*. at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

15. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

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

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

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

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

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

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

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of

the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

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

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

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

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of 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.

16. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013).

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id*.

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .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.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id*. at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id*.

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id*. at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious

program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination…", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id*. at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id*. at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id*. at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id*. at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id*. at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id*. at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

18. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010).

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id*.

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id*. at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id*.

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id*. at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id*. All groups other than Asian DBEs were found to be underutilized. *Id*.

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id*. at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id*.

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id*. at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id*. In determining the base figure, the

consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id*. at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id*. at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id*. The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id*.

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id*. at 649-650. The availability rates were then "calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id*. The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id*.

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id*. at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id*. at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id*. at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in comparison to similarly situated non-DBEs. *Id*. The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id*. The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id*.

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id*. at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id*. The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id*.

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id*. at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id*. at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id*. The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id*. at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id*. at 652, *citing Geod v. N.J. Transit Corp*., 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id*. at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id*. at 652 *quoting Northern Contracting*, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id*. at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id*. at 652-653, *quoting Northern Contracting*, 473 F.3d at 722 and *citing also Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id*. at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id*. at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id*. at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the

affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id*. at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id*. at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id*. The court held that NJT followed the goal setting process required by the federal regulations. *Id*. The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id*. at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id*.

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id*. at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id*.

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id*. at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id*. at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id*. at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id*. at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id*. at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id*. at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id*. at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id*. at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id*. at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id*. at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id*. at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id*. at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id*. at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id*. at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id*. at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id*. at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id*. at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying Western States Paving. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id. at 656*, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31*. Id. at 656*. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms*. Id. at 656*. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id*. In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id*.

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id*. at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id*. at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id*. at 656.

The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id*. at 656, *citing Sherbrook Turf*, 345 F.3d at 972 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id*. at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id*. at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id*. at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id*. at 657, *citing Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id*.

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id*. at 657.

19. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009).

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly

tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id*.

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id*. The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id*. The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id*.

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id*.

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id*.

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id*. at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id*.

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id*., *citing Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id*.

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id*.

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id*. at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id*. at *6, *citing Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id*. at *6, *citing* 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id*. The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id*. at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id*. Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id*. at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id*. at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id*.

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of

material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id*. at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id*. at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id*. A decomposition analysis was also performed. *Id*.

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id*.

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id*. at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id*.

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id*. at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id*. at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id*. Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the

plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

20. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id*. at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id*. at 1338.

Ninth Circuit Approach: *Western States.* The district court analyzed the Ninth Circuit Court of Appeals approach in Western States Paving and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in Western States Paving held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in Western States Paving to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in Western States Paving concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to

have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id*. In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id*. The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these

Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id*.

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

21. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163 (W.D. Wash. June 23, 2006) (unpublished opinion).

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and

improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d *et seq*.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of … Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

22. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007).

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra.* The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a

declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept, 8, 2005).

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

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id*. at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id*.

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id*. at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id*. at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id*.

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

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

amount of government work and contracts as a result of their inability to obtain private sector work. *Id*.

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

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

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

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

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

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

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

4. "Unbundling" large contracts; and

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

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

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

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id*. The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id*. The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id*. A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id*. at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." *Id*. at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id*.

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id*. Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id*. A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id*. at *15.

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

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

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id*. at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." *Id*. The plaintiff also alleged the calculations of the DBE

utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id*. Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id*.

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

The court further found:

> That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables … [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.'

Id. at *21, *citing Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

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

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

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

need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id*. at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id*. at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id*. The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id*.

The court found "[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." *Id*. at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id*. The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id*., *citing Adarand Constructors, Inc. v. Slater "Adarand VII"*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT's DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

23. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004).

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), see above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (i.e., the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE

Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing* and *quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds $750,000.00, 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.

24. Sherbrooke Turf, Inc. v. Minnesota DOT, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), affirmed 345 F.3d 964 (8th Cir. 2003).

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

> by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id*. at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id*. at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the

court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id*.

25. Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), affirmed 345 F.3d 964 (8th Cir. 2003).

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

26. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp.2d 1296 (D. Kan. 2002).

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015).

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id*. The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id*. Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id*.

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, *quoting* 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court

distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008).

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantages individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its

Order on remand from the Federal Circuit Court of Appeals decision in *Rothe,* 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the contract. *Id*. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id*. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id*. at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id*. at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id*. at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id*. at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id*. at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id*. at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id*. The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id*. The court declined to adopt a "bright-line rule for determining staleness." *Id*.

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id*. at n.86. The court also stated that it

"accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id*. at 839, *quoting 61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id*. at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id*. at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id*. at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id*. at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id*. at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id*. at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id*. at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id*. at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id*.

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id*. The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit

in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id*., *quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and

3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id*. The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id*. The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id*. at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id*.

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id*. at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id*. at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id*. The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id*.

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing* to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id*.

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity

percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id*.

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id*. at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id*. at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id*.

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id*. However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id*. at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id*. The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id*. at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id*. at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id*. at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id*. The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id*. The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id*.

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the

course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in Croson that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in Concrete Works noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and "should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no 'precise mathematical formula' to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 545 F.3d at 1049, *quoting W.H. Scott Constr. Co*., 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination." 545 F.3d at 1049-1050.

3. Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016).

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense ("DOD") and the U.S. Small Business Administration ("SBA") (collectively, "Defendants") challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id*. at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% 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.

4. DynaLantic Corp. v. United States Dept. of Defense, et al., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014).

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id*. at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id*. at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id*.

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. "Socially disadvantaged" individuals are persons who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13

CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.,* 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id*. at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than $250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an "aspirational goal" for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 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 Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 *quoting Concrete Works of Colorado, Inc. v. City and County of Denver,*

321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, *citing Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id*. The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to

fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id*.

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id*.

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to

establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence

approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id*. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id*. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id*.

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37.

Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic,* at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id*. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id*.

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the

Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id*.

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 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 Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007).

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its

2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007**).**

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id*. Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id*. at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id*. at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id*. at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id*. at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id*. The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could

not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id*. at 267.

APPENDIX C.
Quantitative Analyses of Marketplace Conditions

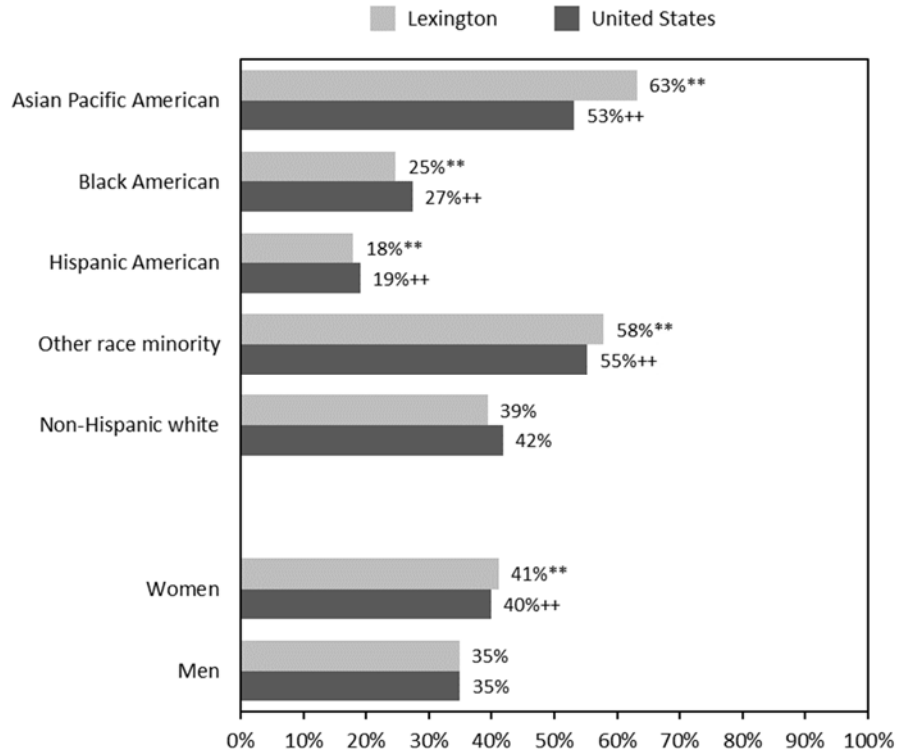
BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in the Lexington area to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the marketplace in which the Lexington-Fayette Urban County Government (LFUCG) operates. The project team defined the relevant geographic market area (RGMA) for LFUCG's construction and professional services work as the *Bluegrass Area Development District*, which comprises Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nicholas, Powell, Scott, and Woodford Counties in Kentucky. We defined the RGMA for LFUCG's goods and non-professional services work as the *Bluegrass Area Development District* plus Boone, Campbell, Grant, Jefferson, Kenton, Oldham, Pendleton, and Shelby Counties in Kentucky. The study team made those determinations based on the fact that LFUCG awards the vast majority of its contract and procurement dollars to businesses located within those geographical areas.

BBC examined local marketplace conditions in four primary areas:

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

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a four-year degree in Lexington and the United States. 2015-2019



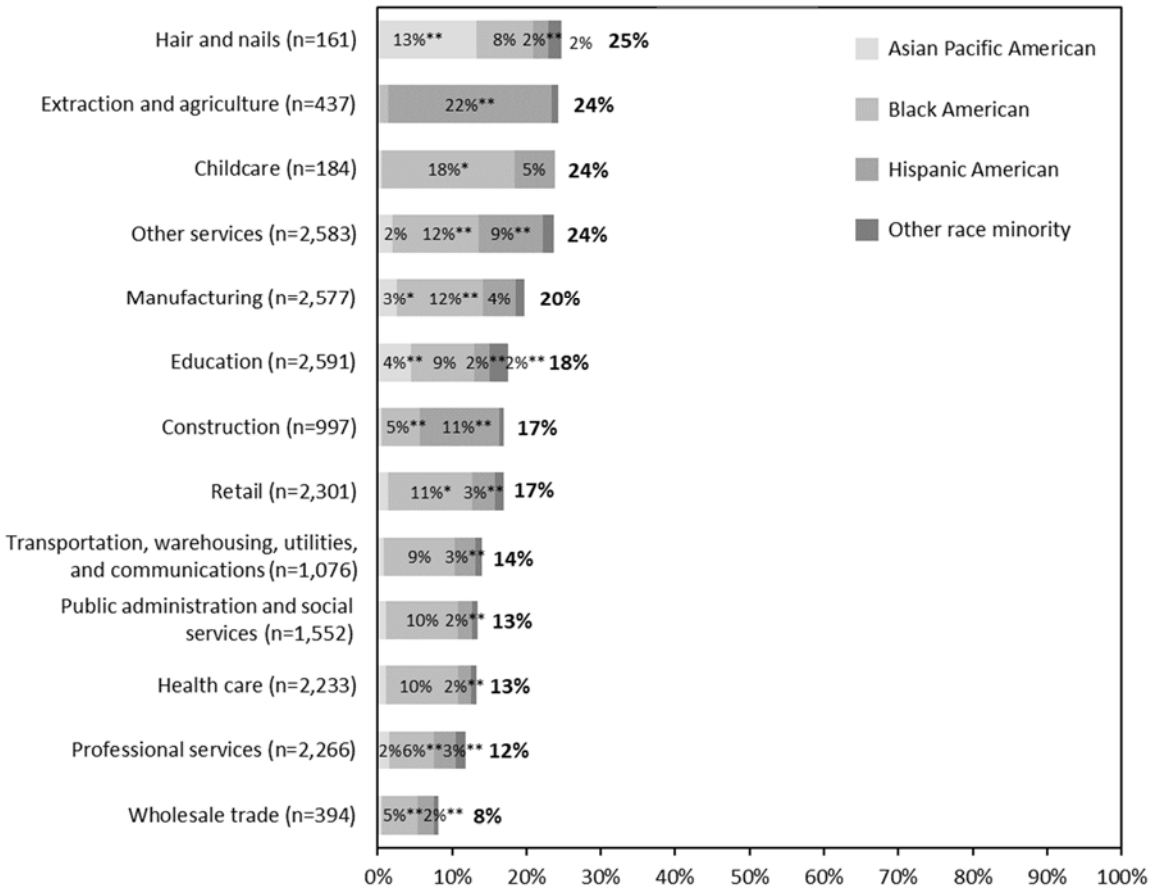
Note: **/++ Denotes statistically significant differences from non-Hispanic whites (for minorities) and from men (for women) at the 95% confidence level for Lexington and the United States as a whole, respectively.

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

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

Figure C-1 indicates that smaller percentages of Black American (25%) and Hispanic American workers (18%) in the Lexington region have four-year college degrees than non-Hispanic white workers (39%).

Figure C-2.
Percent representation of minorities in various industries in Lexington, 2015-2019



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

The representation of minorities among all Lexington workers is 2% for Asian Pacific Americans, 9% for Black Americans, 5% for Hispanic Americans, 1% for Other race minority and 17% for all minorities considered together.

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

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

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

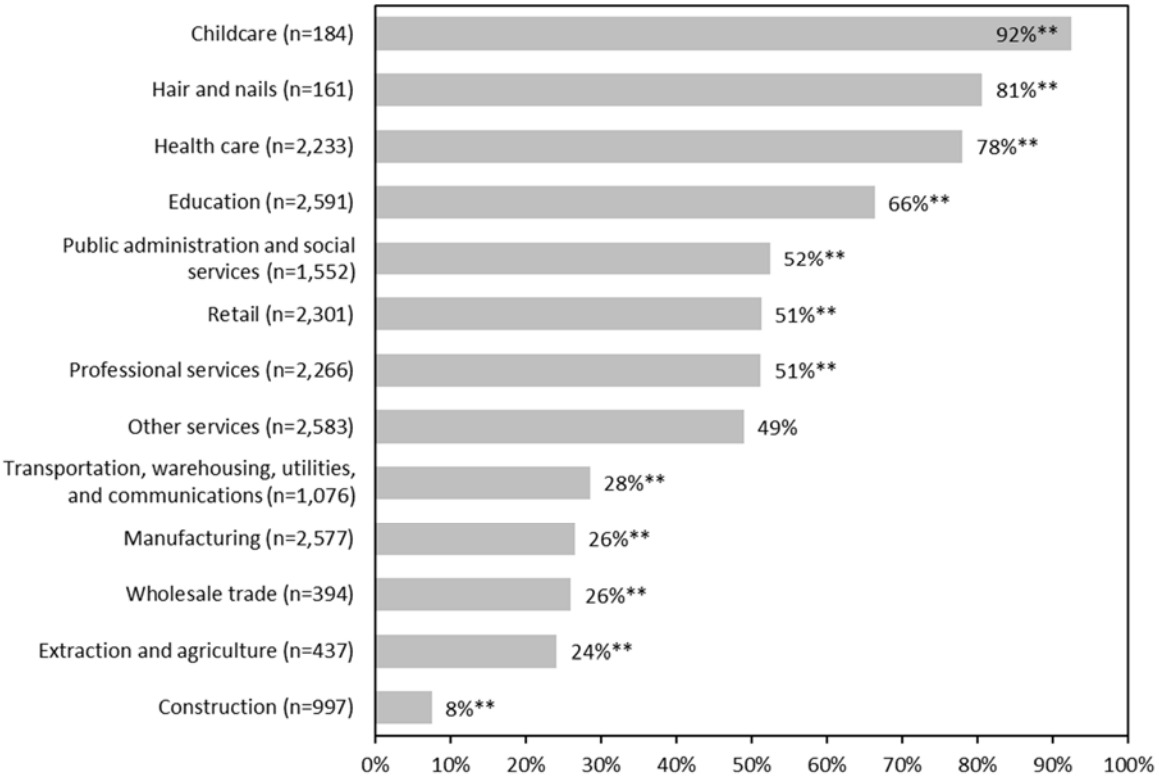
Workers in child day care services, barber shops, beauty salons, nail salons, and other personal were combined into one category of childcare, hair, and nails.

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

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

Figures C-2 indicates that the Lexington area industries with the highest representations of minority workers are hair and nails, extraction and agriculture, and childcare. The Lexington area industries with the lowest representations of minority workers are health care, professional services, and wholesale trade.

Figure C-3.
Percent representation of women in various industries in Lexington, 2015-2019



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

The representation of women among all Lexington workers is 48%.

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

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

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

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

Figures C-3 indicates that the Lexington area industries with the highest representations of women workers are childcare, hair and nails, and health care. The industries with the lowest representations of women are wholesale trade, extraction and architecture, and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries, Lexington and the United States, 2015-2019

Lexington Group	All Industries C & PS RGMA (n=19,515)	All Industries G & SS RGMA (n=55,290)	Construction (n=997)	Professional Services (n=598)	Goods and other services (n=529)
Race/ethnicity					
Asian Pacific American	1.9 %	1.9 %	0.5 % **	1.9 %	1.2 %
Black American	9.5 %	12.4 %	5.2 % **	9.8 %	11.7 %
Hispanic American	4.6 %	4.6 %	10.6 % **	1.6 % **	4.5 %
Other race minority	1.2 %	1.4 %	0.7 %	0.4 % **	2.9 %
Total minority	**17.2 %**	**20.2 %**	**17.0 %**	**13.7 %**	**20.3 %**
Non-Hispanic white	82.8 %	79.8 %	83.0 %	86.3 % *	79.7 %
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender					
Women	48.4 %	48.3 %	7.6 % **	41.5 % **	17.8 % **
Men	51.6 %	51.7 %	92.4 % **	58.5 % **	82.2 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**

United States Group	All Industries (n=7,818,941)	Construction (n=485,217)	Professional Services (n=276,001)	Goods and other services (n=79,491)
Race/ethnicity				
Asian Pacific American	5.0 %	1.8 % **	5.7 % **	2.3 % **
Black American	12.6 %	5.9 % **	13.2 % **	10.2 % **
Hispanic American	17.3 %	28.6 % **	12.2 % **	20.7 % **
Other race minority	3.0 %	1.9 % **	3.7 % **	2.0 % **
Total minority	**37.9 %**	**38.3 %**	**34.7 %**	**35.2 %**
Non-Hispanic white	62.1 %	61.7 % **	65.3 % **	64.8 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**
Gender				
Women	47.2 %	9.7 % **	44.9 % **	17.1 % **
Men	52.8 %	90.3 % **	55.1 % **	82.9 % **
Total	**100.0 %**	**100.0 %**	**100.0 %**	**100.0 %**

Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 90% and 95% confidence level, respectively.

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

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

Figure C-4 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans (0.5% as compared to 1.9%) and Black Americans (5.2% as compared to 9.5%), work in the Lexington area construction industry. In addition, a smaller percentage of women (7.6% as compared to 48.4%) work in the Lexington area construction industry.
- Smaller percentages of Hispanic Americans (1.6% as compared to 4.6%) and other race minorities (0.4% as compared to 1.2%) work in the Lexington area professional services industry. In addition, a smaller percentage of women (41.5% as compared to 48.4%) work in the Lexington area professional services industry.

- A smaller percentage of women (17.8% as compared to 48.3%) work in the Lexington area goods and other services industry.

Figure C-5.
Percentage of workers who worked as a manager in each study-related industry, Lexington and the United States, 2015-2019

Notes:

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

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

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

Source:

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

Lexington

Group	Construction	Professional services	Goods and other services
Race/ethnicity			
Asian Pacific American	0.0 % †	0.0 % †	0.0 % †
Black American	1.6 % **	5.2 %	5.1 %
Hispanic American	0.0 % **	3.9 % †	0.0 % †
Other race minority	36.4 % †	0.0 % †	0.0 % †
Non-Hispanic white	5.5 %	5.9 %	4.8 %
Gender			
Women	1.7 % **	4.7 %	1.3 % **
Men	5.1 %	6.3 %	5.2 %
All individuals	**4.8 %**	**5.6 %**	**4.4 %**

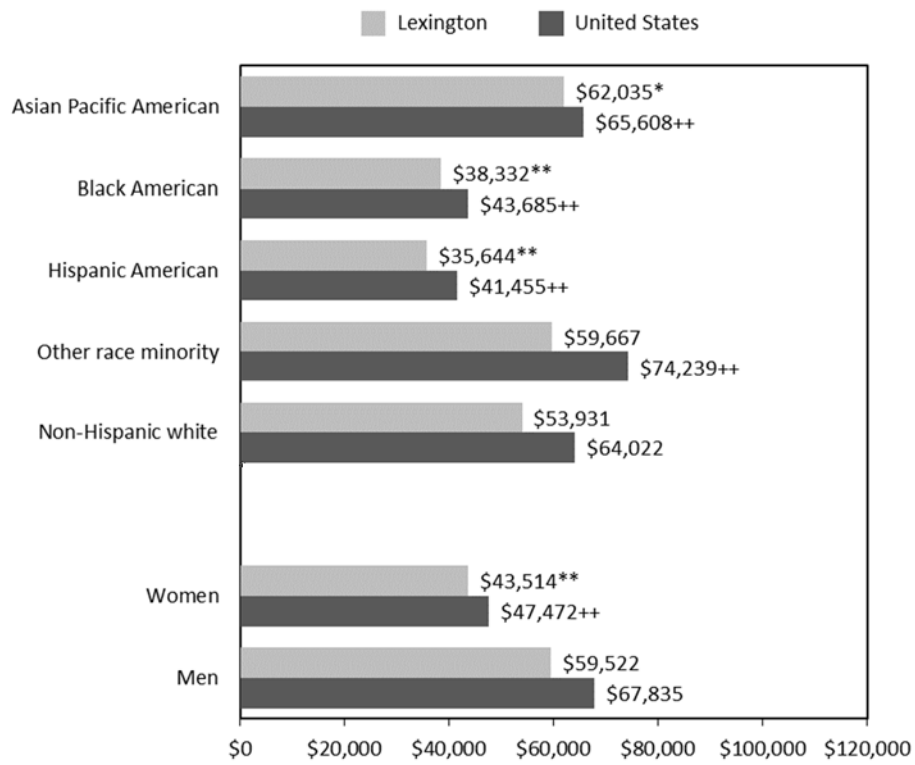
United States

Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	8.1 % **	3.6 % **	3.1 %
Black American	3.4 % **	2.3 % **	1.0 % **
Hispanic American	2.6 % **	2.7 % **	1.0 % **
Other race minority	5.8 % **	4.7 %	1.8 % **
Non-Hispanic white	9.2 %	5.1 %	3.1 %
Gender			
Women	6.4 % **	3.5 % **	1.8 % **
Men	6.8 %	4.9 %	2.5 %
All individuals	**6.7 %**	**4.3 %**	**2.4 %**

Figure C-5 indicates that:

- Compared to non-Hispanic whites (5.5%), smaller percentages of Black Americans (1.6%) and Hispanic Americans (0.0%) work as managers in the Lexington Area construction industry. In addition, compared to men (5.1%), a smaller percentage of women (1.7%) work as managers in the Lexington area construction industry.
- Compared to men (5.2%), a smaller percentage of women (1.3%) work as managers in the Lexington area goods and other services industry.

Figure C-6.
Mean annual wages, Lexington and the United States, 2015-2019



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

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

**/++ Denotes statistically significant differences from non-Hispanic whites (for minorities) and from men (for women) at the 95% confidence level for Lexington and the United States as a whole, respectively.

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

Figure C-6 indicates that, compared to non-Hispanic whites, Black Americans and Hispanic Americans in the Lexington region earn substantially less in wages. In addition, compared to men, women earn less in wages.

Figure C-7.
Predictors of annual wages (regression), Lexington, 2015-2019

Notes:

The regression includes 11,056 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

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

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

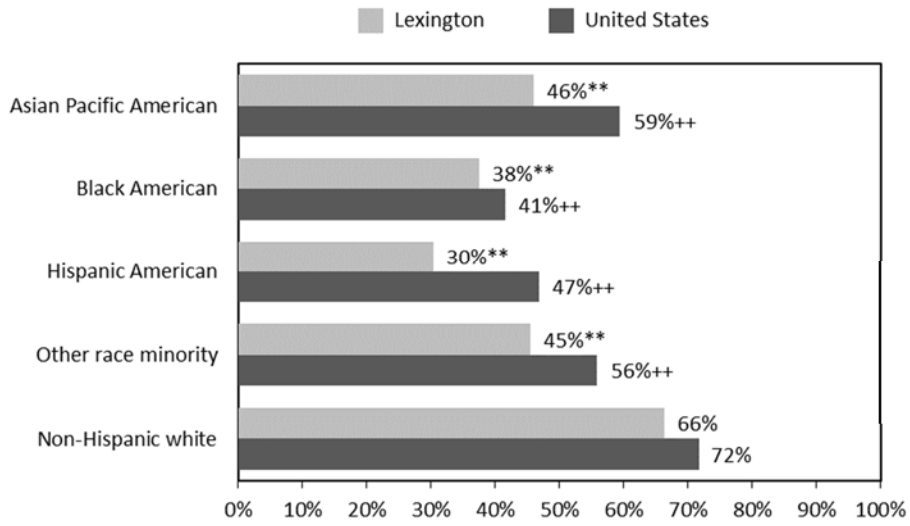
Source:

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

Variable	Exponentiated Coefficient	
Constant	12,243.280	**
Asian Pacific American	0.925	
Black American	0.872	**
Hispanic American	0.903	**
Other race minority	0.943	
Women	0.794	**
Less than high school education	0.872	**
Some college	1.198	**
Four-year degree	1.577	**
Advanced degree	2.132	**
Disabled	0.801	**
Military experience	1.043	*
Speaks English well	1.046	
Age	1.045	**
Age-squared	1.000	**
Married	1.156	**
Children	1.010	
Number of people over 65 in household	0.904	**
Public sector worker	1.015	
Manager	1.293	**
Part time worker	0.375	**
Extraction and agriculture	0.780	**
Construction	0.829	**
Wholesale trade	0.963	
Retail trade	0.664	**
Transportation, warehouse, & information	0.924	**
Professional services	0.931	**
Education	0.667	**
Health care	0.989	
Other services	0.632	**
Public administration and social services	0.756	**

Figure C-7 indicates that, compared to being a non-Hispanic white American in the Lexington area, being Black American or Hispanic American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that for every dollar that a non-Hispanic white American makes, being Black American is associated with making approximately $0.87 and being Hispanic American is associated with making approximately $0.90, all else being equal.) In addition, compared to being a man in the Lexington area, being a woman is related to lower annual wages (the model indicates that being a woman is associated with making approximately $0.79 for every dollar that a man makes, all else being equal).

Figure C-8.
Home Ownership Rates, Lexington and the United States, 2015-2019



Note: The sample universe is all households.

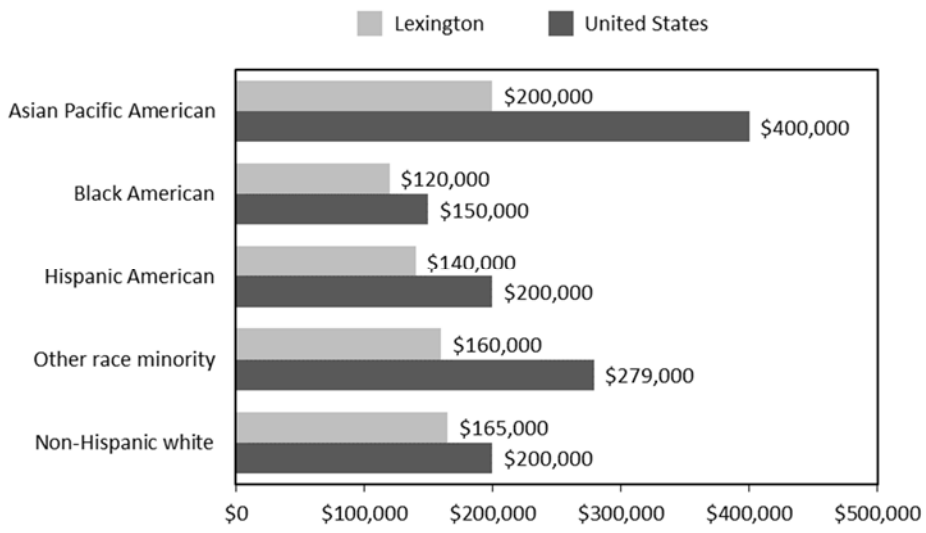
**/++ Denotes statistically significant differences from non-Hispanic whites (for minorities) and from men (for women) at the 95% confidence level in Lexington and the United States as a whole, respectively.

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

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

Figure C-8 indicates that all relevant minority groups in the Lexington region exhibit homeownership rates lower than that of non-Hispanic whites.

Figure C-9.
Median home values, Lexington and the United States, 2015-2019



Note: The sample universe is all owner-occupied housing units.

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

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

Figure C-9 indicates that Black American, Hispanic American, and other minority homeowners in the Lexington region own homes that, on average, are worth less than those of non-Hispanic white homeowners.

Figure C-10.
Denial rates of conventional purchase loans for high-income households, Lexington and the United States, 2019

Note:

High-income borrowers are those households with 120% or more of the HUD/FFIEC area median family income (MFI). The MFI data are calculated by the FFIEC.

Source:

FFIEC HMDA data 2019. The 2009 raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: https://www.consumerfinance.gov/data-research/hmda/. The 2019 raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: https://ffiec.cfpb.gov/data-browser/.

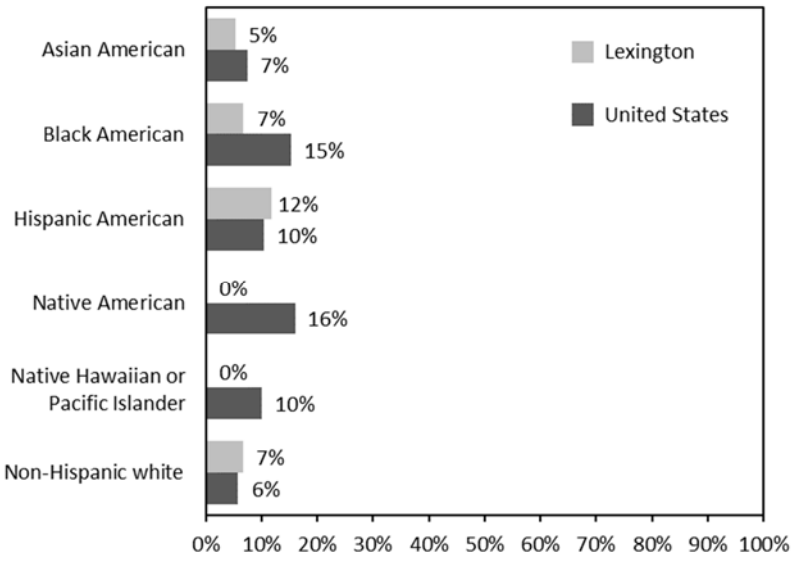
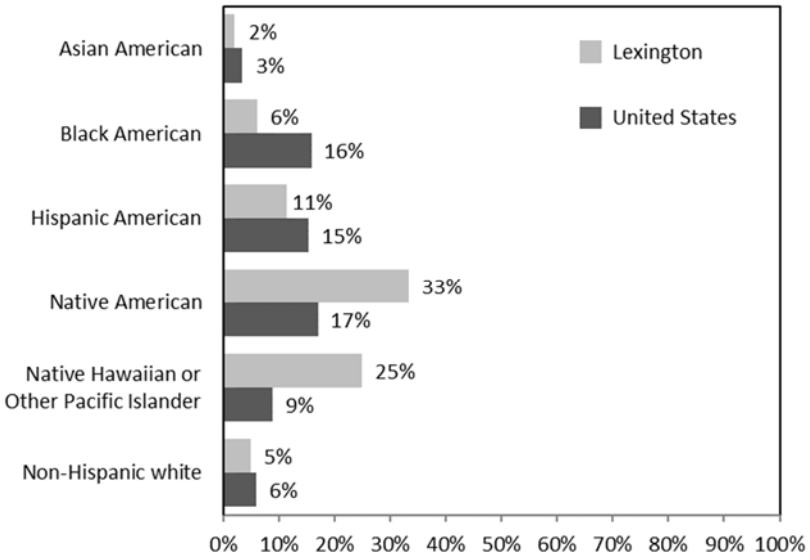


Figure C-10 indicates that Hispanic Americans (12%) in the Lexington region appear to be denied home loans at higher rates than non-Hispanic whites (7%).

Figure C-11.
Percent of conventional home purchase loans that were subprime, Lexington and the United States, 2019



Note:

Subprime loans are those with a rate spread of 1.5 or more. Rate spread is the difference between the covered loan's annual percentage rate (APR) and the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set.

Source:

FFIEC HMDA data 2019. The 2009 raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: https://www.consumerfinance.gov/data-research/hmda/. The 2019 raw data extract was obtained from the Federal Financial Institutions Examination Council's HMDA data tool: https://ffiec.cfpb.gov/data-browser/.

Figure C-11 indicates that Hispanic Americans (11%), Native Americans (33%), and Native Hawaiian or Other Pacific Islanders (25%) in the Lexington area receive subprime conventional home purchase loans at greater rates than non-Hispanic whites (5%).

Figure C-12
Business loan denial rates, East South Central Division and the United States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East South Central Division consists of Alabama, Kentucky, Mississippi, and Tennessee.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

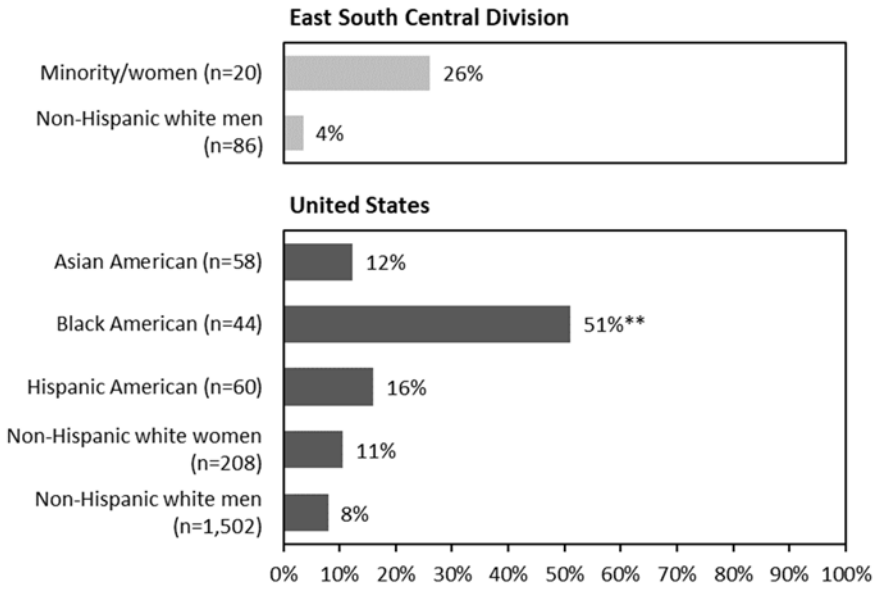


Figure C-12 indicates that in 2003 in the United States, Black American-owned businesses (51%) were denied business loans at greater rates than businesses owned by non-Hispanic white men (8%).

Figure C-13. Businesses that did not apply for loans due to fear of denial, East South Central Division and the United States, 2003

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East South Central Division consists of Alabama, Kentucky, Mississippi, and Tennessee.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

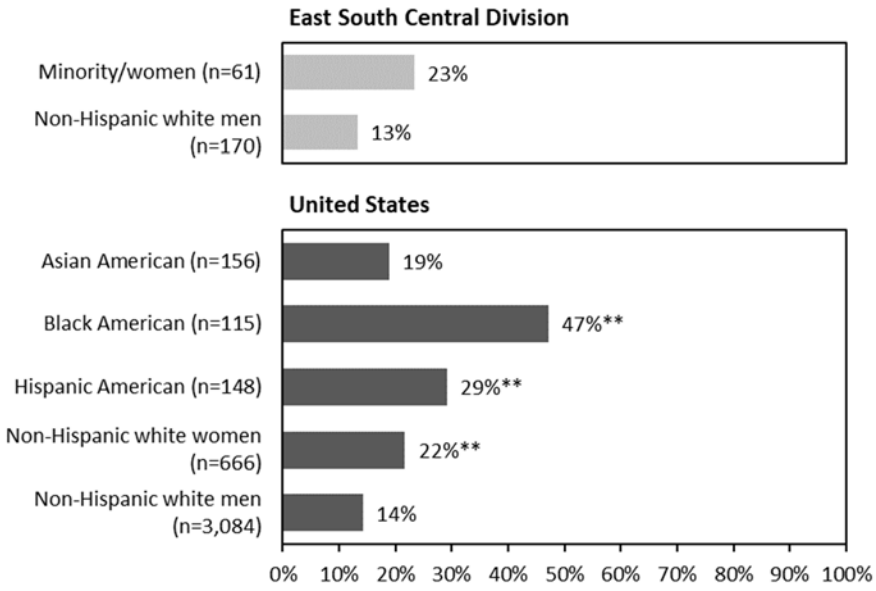
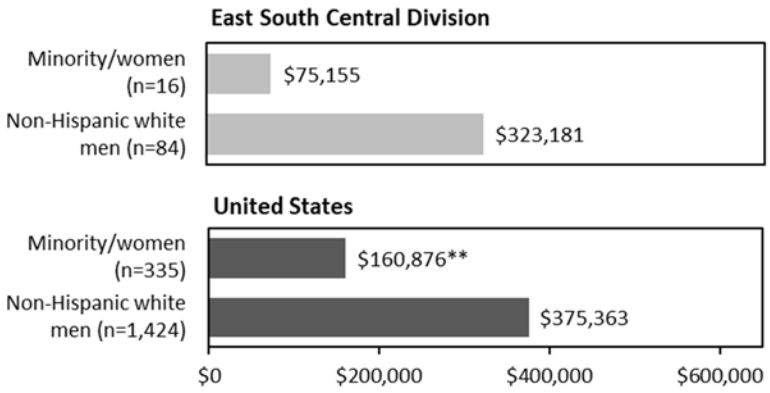


Figure C-13 indicates that in 2003, Black American-owned businesses (47%), Hispanic American-owned businesses (29%), and non-Hispanic white woman-owned businesses (22%) in the United States were more likely than businesses owned by non-Hispanic white men (14%) to not apply for business loans due to a fear of denial.

Figure C-14.
Mean values of approved business loans, East South Central Division and the United States, 2003



Note:

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

The East South Central Division consists of Alabama, Kentucky, Mississippi, and Tennessee.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

Figure C-14 indicates that in 2003, minority- and woman-owned businesses in the United States as a whole that received business loans were approved for loans that were worth less than loans received by businesses owned by non-Hispanic white men.

Figure C-15.
Business ownership rates in study-related industries, Lexington and the United States, 2015-2019

Note:

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

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

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

Source:

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

Lexington Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	8.0 % †	2.2 % †	0.0 % †
Black American	14.9 % **	0.0 % **	2.4 %
Hispanic American	22.4 %	6.8 % †	2.4 % †
Other race minority	24.8 % †	0.0 % †	0.0 % †
Non-Hispanic white	27.1 %	15.1 %	5.8 %
Gender			
Women	12.0 % **	10.9 %	0.6 % **
Men	27.0 %	14.7 %	6.0 %
All individuals	**25.9 %**	**13.2 %**	**5.0 %**

United States Group	Construction	Professional Services	Goods and other services
Race/ethnicity			
Asian Pacific American	22.5 % **	10.3 % **	8.0 % **
Black American	16.4 % **	6.7 % **	3.9 % **
Hispanic American	17.8 % **	8.2 % **	7.0 % **
Other race minority	20.7 % **	10.2 % **	9.1 % *
Non-Hispanic white	25.3 %	16.7 %	10.5 %
Gender			
Women	16.0 % **	11.0 % **	6.7 % **
Men	23.2 %	16.0 %	9.5 %
All individuals	**22.5 %**	**13.8 %**	**9.0 %**

Figure C-15 indicates that:

- Compared to non-Hispanic whites (27.1%), Black Americans (14.9%) working in the Lexington area construction industry own businesses at a lower rate. In addition, compared to men (27.0%), women (12.0%) working in the Lexington area construction industry own businesses at a lower rate.
- Compared to non-Hispanic whites (15.1%), Black Americans (0.0%) working in the Lexington area professional services industry own businesses at a lower rate.
- Compared to men (6.0%), women (0.6%) working in the Lexington area goods and other services industry own businesses at a lower rate.

Figure C-16.
Predictors of business ownership in construction (regression), Lexington, 2015-2019

Note:

The regression included 892 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Asian Pacific American omitted from the regression due to small sample size.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-3.2398 **
Age	0.0354
Age-squared	-0.0001
Married	-0.0368
Disabled	0.0999
Number of children in household	0.1036 *
Number of people over 65 in household	0.2484 *
Owns home	0.1588
Home value ($000s)	0.0007 *
Monthly mortgage payment ($000s)	-0.0397
Interest and dividend income ($000s)	0.0047 **
Income of spouse or partner ($000s)	0.0010
Speaks English well	1.0643 **
Less than high school education	0.1917
Some college	-0.1019
Four-year degree	-0.0180
Advanced degree	0.0621
Asian Pacific American	0.0000 †
Black American	-0.4320
Hispanic American	0.3737 *
Other race minority	-0.4852
Women	-0.8156 **

Figure C-16 indicates that being a woman is associated with a lower likelihood (81% as likely) of owning a construction business in the Lexington area compared to being a man.

Figure C-17.
Disparities in business ownership rates for Lexington construction workers, 2015-2019

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	12.4%	35.8%	35

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-17 indicates that women own construction businesses in the Lexington area at a rate that is 35 percent that of similarly situated non-Hispanic white men.

Figure C-18.
Predictors of business ownership in professional services (regression), Lexington, 2015-2019

Note:

The regression included 507 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Black American and Other race minority omitted from the regression due to small sample sizes.

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient	
Constant	-4.3871	**
Age	0.0520	
Age-squared	-0.0002	
Married	-0.2736	
Disabled	-0.2340	
Number of children in household	-0.3025	**
Number of people over 65 in household	0.0582	
Owns home	-0.2200	
Home value ($000s)	0.0004	
Monthly mortgage payment ($000s)	0.3762	**
Interest and dividend income ($000s)	0.0117	
Income of spouse or partner ($000s)	0.0011	
Speaks English well	0.2792	
Less than high school education	0.3209	
Some college	1.1860	*
Four-year degree	1.0827	
Advanced degree	1.8021	**
Asian Pacific American	-0.3595	
Black American	0.0000	†
Hispanic American	0.3760	
Other race minority	0.0000	†
Women	0.0370	

Figure C-18 indicates that, after statistically accounting for various factors, neither being a minority nor a woman is related to a lower likelihood of owning a professional services business in the Lexington area relative to being white or a man, respectively.

Figure C-19.
Predictors of business ownership in goods and other services (regression), Lexington, 2015-2019

Note:

The regression included 450 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Speaks English well, Asian Pacific American, and Other race minority omitted from the regression due to small sample sizes.

The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Coefficient
Constant	-2.6626 **
Age	0.0073
Age-squared	0.0003
Married	0.0424
Disabled	-0.6986
Number of children in household	-0.0026
Number of people over 65 in household	-0.0562
Owns home	-0.6782 **
Home value ($000s)	0.0018 **
Monthly mortgage payment ($000s)	0.2053
Interest and dividend income ($000s)	0.0109
Income of spouse or partner ($000s)	-0.0003
Speaks English well	0.0000 †
Less than high school education	0.8817 **
Some college	-0.0364
Four-year degree	0.0877
Advanced degree	0.9592
Asian Pacific American	0.0000 †
Black American	-0.2039
Hispanic American	-0.4147
Other race minority	0.0000 †
Women	-1.4467

Figure C-19 indicates that, after statistically accounting for various factors, neither being a minority nor a woman is related to a lower likelihood of owning a goods and other services business in the Lexington area relative to being white or a man, respectively.

Figure C-20.
Rates of business closure, expansion, and contraction, Kentucky and the United States, 2002-2006

Note:

Data include only non-publicly held businesses.

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

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

Source:

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

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

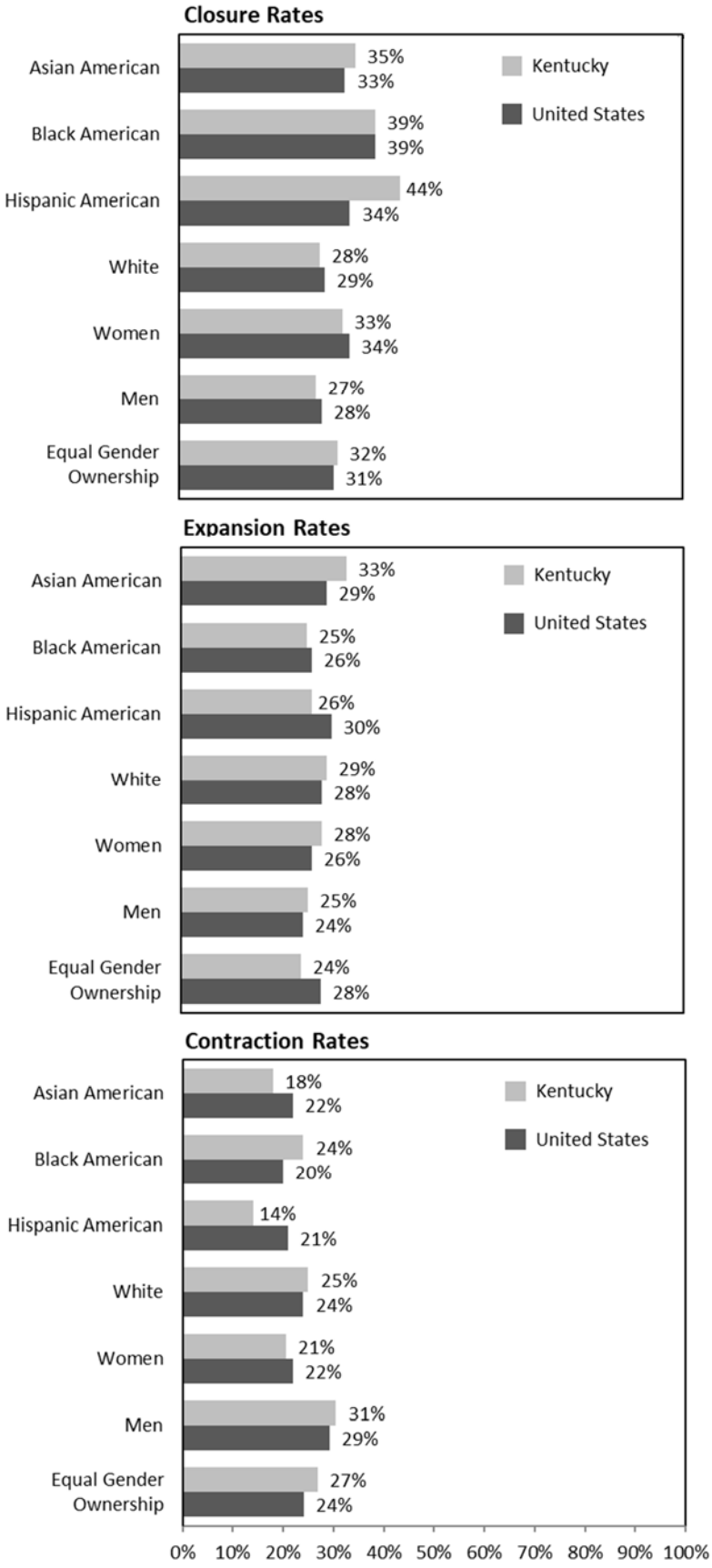
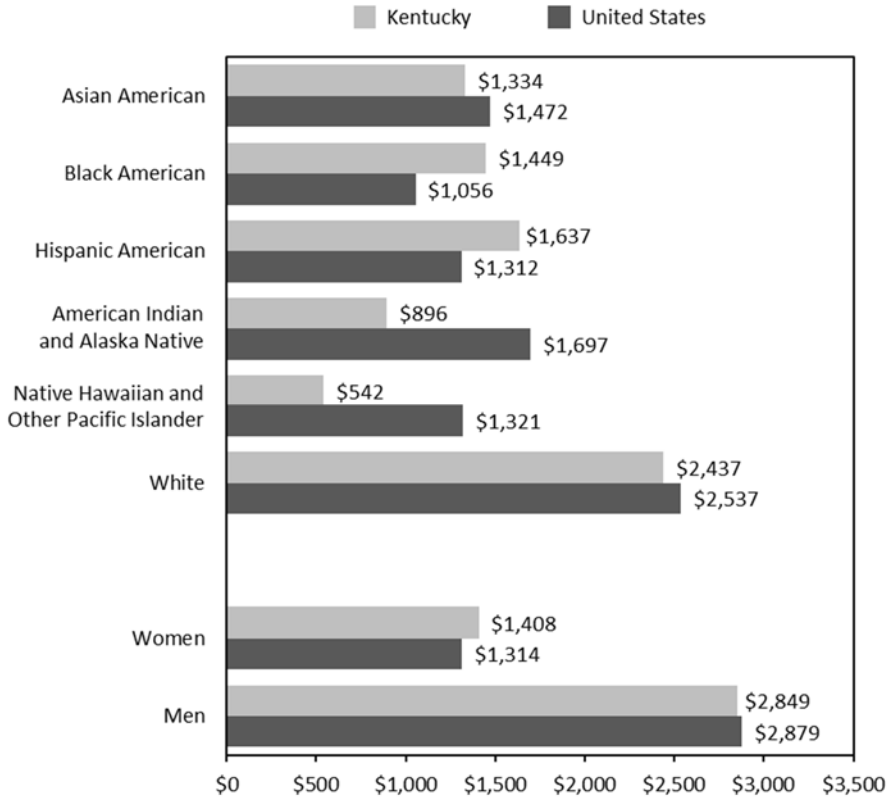


Figure C-20 indicates that Asian American- (35%), Black American- (39%), and Hispanic American-owned businesses (44%) in Kentucky appear to close at higher rates than non-Hispanic white-owned businesses (28%). In addition, woman-owned businesses (33%) appear to close at higher rates than businesses owned by men (27%). With regard to expansion rates, Black American- (25%) and Hispanic American-owned businesses (26%) in Kentucky appear to expand at lower rates than non-Hispanic white-owned businesses (29%).

Figure C-21.
Mean annual business receipts (in thousands), Kentucky and the United States

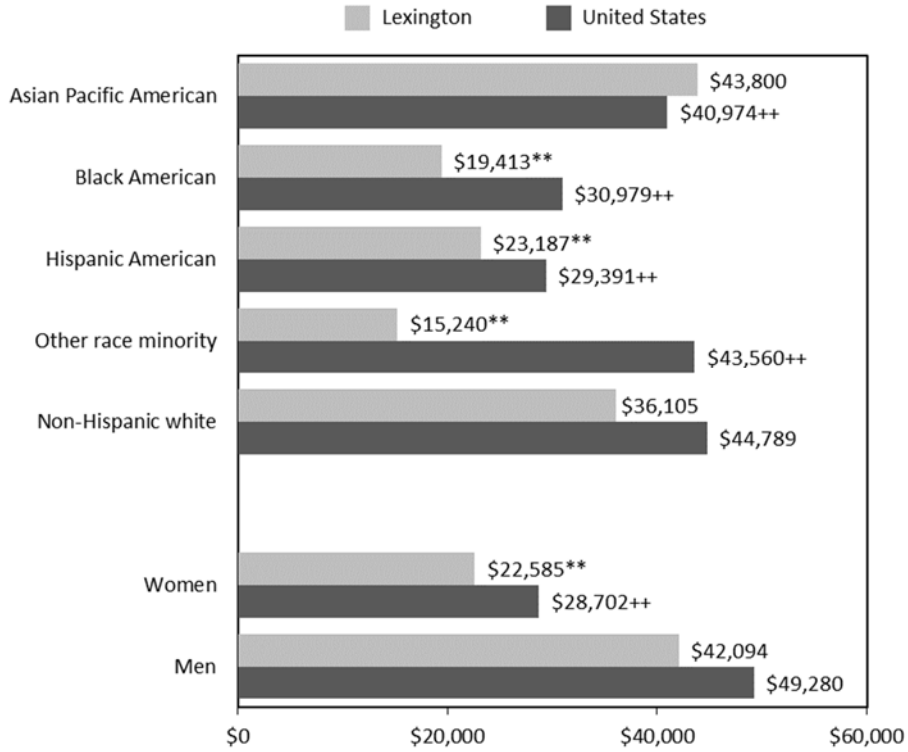


Note: Includes employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Source: BBC Research & Consulting from 2018 Annual Business Survey.

Figure C-21 indicates that in 2018 all relevant minority-owned business groups in the Lexington area showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses in the Lexington area showed lower mean annual business receipts than businesses owned by men.

Figure C-22.
Mean annual business owner earnings, Lexington and United States, 2015-2019



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

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minorities) and from men (for women) at the 95% confidence level for Lexington and the United States as a whole, respectively.

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

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

Figure C-22 indicates that the owners of Black American-, Hispanic American-, and businesses owned by other race minorities in the Lexington region earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in the Lexington region earn less on average than businesses owned by men.

Figure C-23.
Predictors of business owner earnings (regression), Lexington, 2015-2019

Notes:

The regression includes 1,129 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:

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

Variable	Exponentiated Coefficient	
Constant	2,080.193	**
Age	1.102	**
Age-squared	0.999	**
Married	1.336	**
Speaks English well	0.698	
Disabled	0.502	**
Less than high school	0.789	
Some college	0.966	
Four-year degree	1.414	*
Advanced degree	1.554	**
Asian Pacific American	1.095	
Black American	0.812	
Hispanic American	0.898	
Other race minority	0.602	
Women	0.511	**

Figure C-23 indicates that, compared to being a male business owner, being a woman business owner in the Lexington area is related to lower business earnings (for example, the model indicates that being a woman business owner is associated with earning $0.51 for every dollar that a male business owner earns, all else being equal).

APPENDIX D.
Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information that BBC Research & Consulting (BBC) collected from business owners and other stakeholders as part of the 2021 Lexington-Fayette Urban County Government (LFUCG) Disparity Study. Appendix D summarizes the key themes that emerged from their insights, organized into the following sections:

A. **Introduction** describes the process for gathering and analyzing the anecdotal information summarized in Appendix D;

B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;

C. **Ownership and certification** presents information about businesses' statuses as disadvantaged, minority-, and woman-owned businesses, certification processes, and business owners' experiences with the Kentucky Finance and Administration Cabinet's (FAC) and the Kentucky Transportation Cabinet's (KYTC) certification programs;

D. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;

E. **Doing business as a prime contractor or subcontractor** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with disadvantaged, minority-, and woman-owned businesses;

F. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with LFUCG and local agencies and identifies potential barriers to doing work for them;

G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in the local marketplace and what it takes for businesses to be successful;

H. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;

I. **Information regarding effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects disadvantaged, minority-, or woman-owned businesses;

J. **Insights regarding business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in the Lexington area;

K. **Insights regarding race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs; and

L. **Other insights and recommendations** presents additional comments and recommendations for LFUCG to consider.

A. Introduction

Throughout the study business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with LFUCG and other organizations in the region. That information was collected through the following methods, which the study team facilitated between August 2021 and May 2022:

- In-depth interviews (37 participants);
- Availability surveys (234 participants who submitted anecdotal information);
- Focus groups (2 focus groups with 6 participants);
- Oral or written testimony during a public forum (5 participants); and
- Written testimony via fax or e-mail (1 participant).

1. In-depth interviews. From August 2021 to May 2022, the study team conducted 37 in-depth interviews with owners and representatives of local businesses. The interviews included discussions about interviewees' perceptions of, and experiences with, the local contracting industry, FAC's and KYTC's certification programs, and businesses' experiences working, or attempting to work, with public agencies in the Lexington area.

Interviewees included individuals representing construction businesses, professional services businesses, and goods and other services suppliers. BBC identified interview participants primarily from a random sample of businesses stratified by business type and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. All of the businesses that participated in the interviews conduct work in the Lexington area.

All interviewees are identified by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a Small Business Enterprise- (SBE-), Disadvantaged Business Enterprise- (DBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Veteran-owned Business Enterprise- (VBE-), or other certified business.

2. Availability surveys. The study team conducted availability surveys for the disparity study from September to October 2021. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the Lexington-Fayette marketplace. A total of 234 businesses provided anecdotal information as part of the surveys. Availability survey comments are denoted by the prefix "AV".

3. Focus groups. The study team conducted two focus groups, one for disadvantaged, minority-, and woman-owned business representatives and one for construction business representatives. During the focus groups the study team asked participants to share their insights about working in the Kentucky marketplace and with public sector and private sector organizations. Comments from the focus groups are denoted by the prefix "FG."

4. Public forums. LFUCG and the study team solicited written and verbal testimony at two virtual public forums for the disparity study held in Lexington, Kentucky. The meetings were held on August 25 and 27 of 2021. The study team reviewed and analyzed all public comments from the two meetings and included relevant comments in Appendix D. Those comments are denoted by the prefix "PT."

5. Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. Written testimony is denoted by the prefix "WT".

B. Background on the Construction, Professional Services, and Goods and Other Services Industries

Part B includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size of businesses;
5. Growth of the firm; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, from well-established firms to newly established firms, and worked on small-to-large contracts in the Lexington-Fayette marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 16 construction firms, 14 firms providing professional services, and 3 firms supplying goods and services.

Sixteen firms worked in the construction industry [#1, #13, #14, #15, #17, #19, #2, #21, #29, #31, #32, #4, #5, #6, #FG1, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Construction management, general contractor. As far as our individual jobs, we do a lot of interior, commercial [construction]. That involves a lot of new office space, restaurant space, or housing, currently." [#1]
- The Black American owner of a DBE-certified construction company stated, "I'm a general contractor." [#13]

- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "We do electrical, concrete, general contracting, and facilities maintenance." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "General contracting services. So, construction services." [#15]
- A representative of a majority-owned construction company stated, "We offer anything from ground-up construction to re-models." [#17]
- The Middle Eastern American owner of a majority-owned construction company stated, "[We do] radon testing, radon mitigation for residential and commercial properties." [#19]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We have two companies that are housed under the [primary] company, one... which is a R&D manufacturer of aerospace sealing devices and systems. And our other divisional area... is a contractor for supply chain management and logistics, so we do for hire trucking, and that's the truck, so we're a contractor, construction for other industries, primarily for construction and waste management. Like supply chain management, construction, and logistics, so we have a service where we... If I make a long story short, we purchase things and supply them for construction projects, and we provide the services for moving things in with our trucks, and we support cleanup and things, so waste services as well as waste... Waste services and waste disposal, and then removal of waste from construction sites, things like that too." [#2]
- The Black American owner of a professional services company stated, "Construction management and home inspection." [#21]
- The Black American owner of a construction company stated, "I'm trucking." [#29]
- A representative of a majority-owned construction company stated, "Crushed aggregate asphalt. That's our main line is highway construction, heavy highway." [#31]
- The owner of a majority-owned construction firm stated, "Renovating, remodeling and excavation." [#32]
- The owner of a majority-owned construction company stated, "We're a general contractor, involved in contract construction for principally non-residential structures and some site work associated with those structures. So, we kind of do a little of everything. Site work is considered a little different because it's not actually working on the building itself, but almost most all site work is in support of a building." [#4]
- The owner of a WBE-certified construction company stated, "I'm a painting and decorating contractor. I have a degree in interior design, and I do some interior design, but I mostly operate as a contractor." [#5]
- A representative of a majority-owned construction company stated, "[We do] heavy highway asphalt paving. We do site development as well." [#6]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "[I am a] general contractor." [#FG1
- A representative from a focus group consisting of construction companies stated, "Ninety percent of our work is in the municipal water and wastewater area." [#FG2]

- A representative from a focus group consisting of construction companies stated, “Mainly we do pumps, pipes, and valves.” [#FG2]

Fourteen firms worked in the engineering and professional services industry [#11, #12, #18, #22, #24, #27, #28, #3, #30, #33, #34, #37, #7, #FG1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Landscape architecture and civil engineering.” [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Civil engineering, surveying.” [#12]
- A representative of a majority-owned professional services firm stated, "Architecture, engineering, planning services.” [#18]
- A representative of a majority-owned professional services firm stated, "We provide engineering services to the architects.” [#22]
- The owner of a majority-owned professional services company stated, "We're architecture and interior design.” [#24]
- A representative of a woman-owned professional services firm stated, "Professional engineer.” [#27]
- A representative of a majority-owned professional services company stated, "Environmental consulting.” [#28]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "We help business leaders say the right things to the right people at the right time. It's marketing and public relations firm.” [#3]
- The male co-owner of a woman-owned professional services company stated, "What we do is environmental consulting.” [#30]
- The woman owner of a professional services company stated, "I'm an advertising firm, so I manage my clients' media buy, their budgets for advertising.” [#33]
- The Black American co-owner of a professional services company stated, "Advancing money for disasters.” [#34]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "A design firm.” [#37]
- The Subcontinent Asian American woman owner of a professional services company stated, "It's IT staffing and solutions.” [#7]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "We are a professional services consulting firm. We provide engineering design and building commissioning.” [#FG1]

Three firms worked in the goods and services industry [#35, #36, #FG1]. Their comments are as follows:

- A representative of a majority-owned goods and services company stated, "I work for a company that allows me to take these items that women in lower income areas, minority women, have hand created and then sell those." [#35]
- The Black American woman owner of a goods and services company stated, "I do consignment." [#36]
- The Black American male owner of an MBE-certified goods and services company stated, "We do a lot of security guard services, things of that nature." [#FG1]

Years in business. Thirty-one businesses reported their date of establishment. The majority of firms (21 out of 31 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Four out of the 31 businesses had been in business for between five and ten years. Six firms were newly established, having been in business for less than four years.

Six firms reported they had been in business for fewer than four years [#1, #19, #21, #32, #34, #36]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "A little over four and a half, or right at four and a half years." [#1]
- The Middle Eastern American owner of a majority-owned construction company stated, "Since 2020." [#19]
- The Black American owner of a professional services company stated, "Three years." [#21]
- The Black American co-owner of a professional services company stated, "This company's been in business since 2021." [#34]
- The Black American woman owner of a goods and services company stated, "My doors opened in March 2019." [#36]

Four firms reported they had been in business for five to ten years [#7, #9, #30, #FG1]. Their comments are as follows:

- The Black American owner of a DBE- and MBE-certified construction company stated, "I started this from scratch in 2017." [#9]
- The male co-owner of a woman-owned professional services company stated, "Since the beginning of 2017." [#30]
- The Black American male owner of an MBE-certified goods and services company stated, "We started in 2015." [#FG1]

Twenty-one firms reported they had been in business for more than ten years [#10, #11, #12, #13, #14, #15, #17, #18, #2, #22, #24, #28, #3, #31, #33, #35, #37, #4, #5, #6, #FG1]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "I began my business May of 2012 after working in a privately owned sector." [#10]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "We've been [in business] since 2012, so 11 years." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Fifteen [years]." [#12]
- The Black American owner of a DBE-certified construction company stated, "I've been in business for 26 years." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Thirty years." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Sixteen years." [#15]
- A representative of a majority-owned construction company stated, "We have been open since 2002." [#17]
- A representative of a majority-owned professional services firm stated, "Forty-two years." [#18]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "For 13 years." [#2]
- A representative of a majority-owned professional services firm stated, "We've been in business since '69." [#22]
- The owner of a majority-owned professional services company stated, "This particular firm, we founded in 1995. So, 25 years, going on 26." [#24]
- A representative of a majority-owned professional services company stated, "More than 30 years." [#28]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Twenty-one [years]." [#3]
- A representative of a majority-owned construction company stated, "Roughly 85 years." [#31]
- The woman owner of a professional services company stated, "It'll be 24 years September." [#33]
- A representative of a majority-owned goods and services company stated, "Eleven years." [#35]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "We've been in business since probably over 25 years now." [#37]
- The owner of a majority-owned construction company stated, "Thirty-six years. And I had a small company before that for maybe another six years. So, we'll say somewhere right around 41, 42 years." [#4]
- The owner of a WBE-certified construction company stated, "I began my business in 1982. I had a significant other at that time, who had gone bankrupt in a business, and he didn't feel like he could ever run another business. So, I opened this business and hired him and most of his employees." [#5]

- A representative of a majority-owned construction company stated, "Twenty to 30 years." [#6]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I've been in business 20 plus years for the service arena." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Been in business since 2004." [#FG1]

2. Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses. This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement [#1, #10, #11, #17, #19, #2, #21, #26, #28, #29, #3, #32, #33, #34, #37, #4, #8, #9, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I started in the industry through college back in 1996. I've had internships in the construction industry since then. Went full time in the construction industry in 2002 with a general contracting firm out of Cincinnati. Was with them for five years. We did all commercial construction. Larger projects between schools, state facilities, some smaller projects such as churches. From there, went with a miscellaneous steel contractor, which we were given a lot of specialty steel fabrication that involved such things as cages for zoos, unique situations with unique structural reinforcement, dental offices, commercial stairs, stuff of that nature. And then, I went with a general contractor/site development contractors. I was with them for three and a half years doing a lot of work with Ohio State University infrastructure, and the CODA transportation system out of Columbus, Ohio. After that, went to Toyota as a contract construction manager in a lot of equipment installation oversight for about six months. Then, I decided to go out on my own what made me want to start the business, I've always thought about it, but I wanted to make sure I was rooted enough in the industry, had enough education in the industry. But when it boiled down to the amount of the time and effort I was putting in at Toyota, I just decided I can do it on my own. My wife supported me." [#1]
- The Black American woman owner of a goods and services company stated, "I began my business May of 2012 after working in a privately owned sector. And then working previously before that in corporate salons. Wanted to venture out on my own. Saw that there was need for something different and that I was able to provide it, being a sole proprietor and opening up a space specifically for textured hair of all ethnicities and showcasing hair education, hair loss solutions, events, different things like that." [#10]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "Well, I started out working for someone and over the years got experienced and licensed and all those things. And we merged with a few other firms... And then, at some point, one of the partners at that firm left and we decided we wanted to restructure the partnership. And so, we did

that in 2012 and that's when we became [our current company] and I became part of the ownership of the new company at that point when we started." [#11]

- A representative of a majority-owned construction company stated, "They were basically childhood friends who had kept in touch after they graduated school. Both of them were in the construction industry. And I think it was a conversation over a few drinks saying, 'Let's start a business together.' So, they pooled their money. That pool is more like a puddle, it was about $500. And that's how they started." [#17]
- The Middle Eastern American owner of a majority-owned construction company stated, "I was helping a friend of mine. Then I left my previous job, and that was the perfect opportunity to start an LLC and start this on my own." [#19]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "I'm the founder of the company. We started it. It's grassroots, we started it from zero. My background is I worked for corporate for about 22, 25 years, so my professional career, my undergraduate studies, my graduate studies is in manufacturing business, it's a difference with the focus in manufacturing execution systems. Working there as a minority, you're always looking to progress within corporate, because a lot of times it doesn't go the way you want, or you can't get, so you devise a way on how you're going to progress because of the uniqueness of our family. My sister and I found ourselves in a situation where we had to provide a plan on how we could create the flexibility and the financial means to be able to raise some kids and still live a good, productive life. We opted to start a business. It started out, working little night opportunities, consulting with a different company, small businesses, and individuals, and next thing I knew, I had 30, 40 clients. And the first year, made about 80, 90 working in the evening, and I was like, well, this is something that's sustainable. I resigned from my position, and then my family went in the direction of being self-sustained and independent. Doing that, I came across a company, one of the companies that I was consulting with, and generally was looking for a succession plans or a secession where in rubber, and I was like, okay, rubber because my background is more on the technology, like robotics, integration. But as I got into it, I realized that a lot of... There was not a lot of young people in it, and at that time, I was much younger, so I saw an opportunity. It was something I didn't know about, and I love learning, so I was all in it. And then I was like, so from there, that's where we had come together to say, well, maybe there's an opportunity for us to do something together. And the plan was to buy him out of his manufacturing, and that was here in Kentucky. He had a partner. And his partner, both white males, his partner did not want to sell to me because I was black. The partner was like, 'Well, why don't you start your own thing and then I'm going to go ahead and purchase the rest of this out, and then after a while, I can sell the company to you or sell you a piece of it.' Well, that never came to fruition, so basically, I found myself with this ground floor company and having to figure how to grow it myself." [#2]
- The Black American owner of a professional services company stated, "I've been in construction for about 20, 25 years and I worked for [another company], which is a construction company as well, that's minority owned for 20 something years." [#21]
- The owner of a WBE- and DBE-certified professional services firm stated, "I've worked as a consultant, doing civil engineering and land surveying in the past, and have moved states four times because I married an academic, and since he is now faculty at [a local university],

when he became faculty there and we permanently landed somewhere, I knew. Well, I worked for a local firm, oddly doing just Eastern Kentucky work for the first year that we were here. Once we knew that his job was permanent, I knew that there was no place in town that was going to let me go to the C-suite, because I'm not from here and because I have no history here. I knew that I wasn't going to be respected or given that opportunity to be a part of the upper-level management if I didn't create the opportunity for myself. And I also just didn't like the way that any other firm had treated women in general. And so, I wanted to create something that was different." [#26]

- A representative of a majority-owned professional services company stated, "We initially started out as part of our parent company, and we changed locations. When we moved, we actually broke off into environmental arms." [#28]
- The Black American owner of a construction company stated, "My company was in business underneath another name, because my brother and my dad were partners with me." [#29]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "This is my second company; my first company I had with a partner. So, it was a 50/50 business and we decided to go our separate ways in 2011. We started in 2000. Due to the economy and just different dreams and plans, we decided to split. So, I rebooted in 2011. How did I come to? I had already been in consulting and decided that I had enough of a reputation and wanted to do things my way, and that's why I started my own business." [#3]
- The owner of a majority-owned construction firm stated, "All I needed is support my family. So, I open the business and trying to survive. About three more years, two more years. That similar, I did renovating, remodeling, and excavation." [#32]
- The woman owner of a professional services company stated, "Throughout my life, the different jobs I had gave me training to be able to start my own business." [#33]
- The Black American co-owner of a professional services company stated, "I only do really two or three things. Disaster recovery work is one of them, and so I've always built companies around disaster recovery work, whether it's a construction company, whether it's tech companies. The sort of core theme throughout my career is disaster recovery." [#34]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "That's pretty much been my background. I just fell into the industry and grown to love urban planning and design and architecture and the built environment and so it's been my passion ever since. From my previous work experience with other companies, I felt like I could always, owning my own business was always a dream of mine and so I eventually thought that I could strike out and go out on my own. And so, it's been pretty successful so far and it's worked out." [#37]
- The owner of a majority-owned construction company stated, "I started the business after working, after I got out of college with an engineering degree from UK, I worked for another contractor for a short time because I was waiting for an offer from... I wanted to go out of the country and work and seek my fortune, but that didn't work out. And so, I stayed with them longer than I intended. And then that company was bought out and I left. I was the shareholder of that company. And when they were bought out, I exited the company and

started this company, and that was in the mid '80s. So yeah. So, we're... I came to kind of bootstrapped it, which is a term for when you don't have any money and you just kind of bare bones it." [#4]

- The Black American woman owner of a professional services firm stated, "There was a need for notary publics to actually close loans, because the interest rate on houses had dropped down to like one and 2 percent. And so, a lot of people were taking advantage of that opportunity to refinance their homes at that time, and to get lower payments. And I got certified to, with the National Notary Association, to actually close the loans, and went from there. Just signed up with some services and those closings are sent to me daily. And so, I pick and choose which companies I choose to work for. Whether it's a refinance, or it's a new buyer or a new seller or a cash only, or home equity line of credit. Could be auto refinancing, construction loans, there's all different kinds. But basically, they need someone that knows how to look at the documents and explain those to, as much as you can, to the clients and close the loans and send those packages back to the type of company." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "My grandfather started this work, had his own business back in '69. So, my dad and him joined in the mid-70s. My grandfather retired somewhere around mid-80s, late 80s, and so my dad took over from there. So, I've been doing this type of work, or been around it pretty much my whole life. Because there was some visions that I had that he didn't have. For one, like what we're doing now with the minority program, I tried to introduce him to that years ago, but I'll just be honest with you, I'm sure you can understand this, that he looked at me like I was crazy and said that... his exact words to me was, 'If you think that there's some program that's going to help Black people get some money, you're out of your mind. The only way you're going to get any money is put on these Red Wing boots and go out here and pour this concrete and stop talking that crazy suff.' That's what he told me. He said, 'Get out there and put them boots on and go to work. Stop. All that ain't going to happen, and this is what you do.' So, I worked for a company that was a minority company over in Indiana, so I knew about the program and how they worked somewhat when I was young. I tried to introduce that, but he wasn't hearing it. So, later on when I got ready to do it, me and him tried to work it together. It just didn't work out because he's very old school, so that just didn't work out. So, I started this from scratch in 2017." [#9]
- A representative from a focus group consisting of construction companies stated, "The business was started by my mother probably about 40 years ago, and as a contractor with Department of Transportation. It wasn't until probably about 10 years after that that she started getting into the municipal, mainly Louisville MSD, and then eventually Lexington. What we were running into was that there was so much minority participation that they wanted us over into the material side. So about 10 years after she started, she got over into the materials part of the construction business, heavy materials, pipes, pumps, and valves. That's been really good for us. It's stretched us. So, we ventured over into that, and it's been a good thing. Another big help, with any company, and I think about my own company, it was started in 1974 by a guy who worked for two other contractors before. He learned the business and he got a second mortgage on his house and started this business and started building barns. We're a large contractor now because of his diligence and conservative practices and what he learned. But working for somebody else and learning the business, it's not that hard to learn. It's any business." [#FG2]

Other motivations. There were also other reasons and motivations for the establishment of their business [#13, #15, #30, #36, #7, #8]. Their comments are as follows:

- The Black American owner of a DBE-certified construction company stated, "We used to call them sponsors in college. I played college football at University of Kentucky, and he owned an insurance company. After I graduated, I went to graduate school and then he said to me one day ... We were out eating dinner. He said, 'You ought to become an 8(a),' he said, 'Since you didn't make it in NFL,' because I almost signed a professional contract. He introduced me to this company, and this company kind of mentored me and that's how I got started in construction." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I had several years of administrative experience, executive level experience and in various fields. Then we moved into the construction industry, myself, and my brother as the vice president, he has several years in construction industry as well." [#15]
- The male co-owner of a woman-owned professional services company stated, "[I was previously an] archeologist. The last company I worked for before starting this company was down in Richmond at an environmental company, and I was there for three and a half years." [#30]
- The Black American woman owner of a goods and services company stated, "I did the consignment business because I served in active-duty army for 12 years. I did not retire for the military, I was not receiving a retirement check, and upon me getting hired, I got hired for a government job. And upon me getting hired that's when I realized that I needed to have some clothes, I did not have a lot of money to spend. So, I took to the local consignment stores that were here at that time, and it was kind of like my first time doing that. So, years later, when I knew that I wanted a business owner for myself, consignment was what came to mind, because I enjoyed what I received out of going to the local consignment stores once I had transitioned out of the army. So that was something I wanted to offer, not just to soldiers transitioning, but to families that may not have the money or the resources to get nice clothing, but to provide those types of things, nice items for a reasonable price." [#36]
- The Subcontinent Asian American woman owner of a professional services company stated, "We have had opportunities with the state of Kentucky to provide a staffing solution, and one of our employees has been working for the state of Kentucky for some time, so it was right opportunity for us to create our own entity to provide staffing solutions." [#7]
- The Black American woman owner of a professional services firm stated, "Well, I'm an accountant so I just wanted to do something different and heard about it. And I've been a notary maybe 30 years or more. And saw a way that I could actually turn it into a business. And so, I did. There's other types of things that you could do as well. It's called, apostle, where there's people who need notarizations to take place, or out of the country, things like that. So, it's just been really interesting. Just something different to do other than accounting, but somewhat related to accounting. And I've always been interested in the real estate market, so it was kind of a way to tap into that with not actually being like an agent or anything. And just looking at real estate market differently. I learned a lot." [#8]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Two firms reported working on contracts with an average value under $100,000 [#21, #32]. Their comments are as follows:

- The Black American owner of a professional services company stated, "Probably 50 and under. $50,000 and under." [#21]
- The owner of a majority-owned construction firm stated, "Small jobs for now. No, nothing big yet." [#32]

Five firms reported working on contracts with an average value between $100,000 and $500,000 [#1, #7, #12, #30, #37]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Right now, we're bonded to be able to bid up to a single $2 million job. That is under review to be extended. Majority of our jobs that we bid are awarded currently right now around from $250 to $400 thousand." [#1]
- The Subcontinent Asian American woman owner of a professional services company stated, "The biggest contract has been with [a large private utility] and it was $300,000." [#7]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Whatever pays, man, from a thousand bucks to hundreds of thousands, whatever it is." [#12]
- The male co-owner of a woman-owned professional services company stated, "In fact, I'm working on something now that's as small as $1,000, and [our current government] contract is $180,000. So, we're a small company, and we're young, so it's like starting out in a job, you have to take anything kind of comes your way." [#30]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "We've got a pretty wide range. It goes from $20,000 contracts, all the way up to a couple hundred thousand dollars contracts." [#37]

Three firms reported working on contracts with an average value between $500,000 and $5 million [#13, #14, #15]. Their comments are as follows:

- The Black American owner of a DBE-certified construction company stated, "I would say from $50,000 to a million." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "It's a range. It varies from $800,000 on down." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "As far as we've done contracts, usually under $1,000,000." [#15]

Two firms reported working on contracts with an average value between five and ten million dollars [#4, #17]. Their comments are as follows:

- The owner of a majority-owned construction company stated, "Our biggest job is probably the $7 million that we did last year." [#4]
- A representative of a majority-owned construction company stated, "They can be from something, I just completed three little projects, which was around $50,000, on up to $10 million." [#17]

One reported working on contracts with an average value between ten and fifty million dollars [#31]. Their comments are as follows:

- A representative of a majority-owned construction company stated, "From a range standpoint, oh my gosh, we do jobs as small as $10,000 and we do jobs as large as $50 million. We like the bigger jobs. Our specialty is the larger jobs. We're equipped to handle those jobs where not a lot of folks are. But if that work is not out there and going on, we start looking at smaller contracts." [#31]

One firm reported working on contracts with an average value above 50 million dollars [#11]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I'm just finishing up a project that was an $80,000 construction project and then working on one that's a $250 million project." [#11]

Most firms reported working in the Lexington-Fayette marketplace and with clients outside of the state [#1, #14, #15, #19, #21, #24, #31, #37, #6, #8, #2, #7, #11, #12, #17, #18, #26, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Right now, we're just in the Kentucky region. Majority of our bids right now are probably within 100-mile radius. We'll entertain further into Indiana, Tennessee, or Ohio. Depending on the job and the project, size of the project if I go any further than that. And if I have a relationship with a potential client, or other vendor that's going to be on that project." [#1]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Yes, we do most, maybe 65 percent of our work down in Georgetown, at the Toyota facility, as far as the contracting work, and the remaining 30, 35 percent here in Lexington and the surrounding counties." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Regional." [#15]
- The Middle Eastern American owner of a majority-owned construction company stated, "It's Lexington and surrounding counties. The furthest I went was Mt. Sterling, but a little challenging for me right now is having a reliable van to reach for the further areas, let's say like E-town, Louisville. If I have a newer van, I would've, but I don't want to push my luck." [#19]
- The Black American owner of a professional services company stated, "Surrounding counties as well." [#21]

- The owner of a majority-owned professional services company stated, "We have worked in five states. We have tried to pare it back to where we are almost exclusively in Kentucky now. Just to cut the travel down." [#24]
- A representative of a majority-owned construction company stated, "We probably look at it more from a geographical standpoint. If it's in the central Kentucky area and its highway work, we're going to bid it. We tend to not travel. We've got a little small area here in central Kentucky that we try to do everything that we can within that area. We don't like to travel outside of that area very often." [#31]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "A lot is heavily based in Lexington and sometimes we'll venture out and get some work out of, let's say little outside the Southeast region. We've been fortunate to get some work here and there, but a lot of our work still comes out of Lexington." [#37]
- A representative of a majority-owned construction company stated, "Here in Lexington and other locations throughout Central Kentucky." [#6]
- The Black American woman owner of a professional services firm stated, "No, for the most part, most of those things are set. So, I will, whereas I might have gone to Frankfort, I might not go to Frankfort now. I'll really try to go to like Georgetown and Lexington, or someplace close. But if it's Shelbyville, I'm not going, I'm not doing it." [#8]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We make the majority of all of our money outside the area, DC, Maryland. And the reason why is because I think the diversity and the mindsets are totally different, even down to, like I said, this really interesting dynamic amongst minorities and minorities in this area isn't that way so much when you move outside of the area. You find more help from another minority outside of the area than you do up here." [#2]
- The Subcontinent Asian American woman owner of a professional services company stated, "No, it's just same business having licenses here, SC, and Washington." [#7]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "We work all over Kentucky and then we have sought business in Ohio and Indiana as well. We've done a couple of projects in Tennessee and West Virginia, but primarily kind of, I would say within about a 200-mile radius." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Kentucky and really Ohio, Southern Ohio ... Really Kentucky, yeah. All over Kentucky." [#12]
- A representative of a majority-owned construction company stated, "It's regional. Lexington, or Kentucky, Tennessee, Ohio, Indiana. We've reached as far as Kansas." [#17]
- A representative of a majority-owned professional services firm stated, "We do it all over the Eastern part of the US and out to Texas." [#18]
- The owner of a WBE- and DBE-certified professional services firm stated, "We did $725,000 last year. 500 of it was in Kentucky, 250 was in Georgia. Well, 200 was in Georgia and the rest was spread across the remainder of nine states." [#26]

- A representative of a majority-owned construction company stated, "We work in Tennessee and Kentucky, all through Tennessee and all through, well, mainly the eastern end of Kentucky." [#FG2]

4. Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (20 out of 24 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

Thirteen businesses had 1-10 employees [#11, #13, #19, #2, #24, #28, #29, #3, #30, #32, #33, #36, #7]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Six total." [#11]
- The Black American owner of a DBE-certified construction company stated, "Five." [#13]
- The Middle Eastern American owner of a majority-owned construction company stated, "From time to time, there's someone that would help me, but usually it's a one-man show." [#19]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Nine." [#2]
- The owner of a majority-owned professional services company stated, "We're down to two of us here. We got hit hard in the mid-2000s. It wasn't the pandemic; it was the economic slump. We made a collective decision at that time. There at one time we were eight, but just have not had any desire to hire back up and take on the headaches of feeding staff again." [#24]
- A representative of a majority-owned professional services company stated, "Right now, we've got four. And we've all been here in excess of 26 years. Or more, in fact." [#28]
- The Black American owner of a construction company stated, "As of right now? It's just me." [#29]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "There are six employees in our company." [#3]
- The male co-owner of a woman-owned professional services company stated, "We have five people that are W-2 employees, but because of our industry, we don't have any full-time staff. They're all project-specific staff." [#30]
- The owner of a majority-owned construction firm stated, "Just me." [#32]
- The woman owner of a professional services company stated, "It's just me." [#33]
- The Black American woman owner of a goods and services company stated, "It's just me. I do have volunteers, but no one I would be able to consider an employee. They're not on, I don't have anybody on paper." [#36]

- The Subcontinent Asian American woman owner of a professional services company stated, "It's both full-time and part-time. Three full-time, two part-time." [#7]

Four interviewees reported that their businesses had 11-25 employees [#1, #4, #5, #14, #15, #16, #34, #37]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Full time employees is seven, and I have six contract employees. And one part time employee." [#1]
- The owner of a majority-owned construction company stated, "I have about 25 employees." [#4]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Right now we have 15 employees." [#15]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "We have about 11 employees on staff right now." [#37]

Three businesses had 26-50 employees [#12, #17, #27]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "40 employees." [#12]
- A representative of a majority-owned construction company stated, "We have about 45 employees." [#17]
- A representative of a woman-owned professional services firm stated, "Usually about 30 to 40 employees." [#27]

Two businesses had 51-100 employees [#18, #35]. Their comments are as follows:

- A representative of a majority-owned professional services firm stated, "We have about 55. Actually, it's probably closer to 60. We just had a few more come on, so 60 employees." [#18]
- A representative of a majority-owned goods and services company stated, "There's about 60 employees." [#35]

Two interviewees indicated that their firm had more than 100 employees [#6, #31]. Their comments are as follows:

- A representative of a majority-owned construction company stated, "Around 250 employees." [#6]
- A representative of a majority-owned construction company stated, "Of course that fluctuates with the seasons, but on average you could say 300 employees." [#31]

5. Growth of the firm. Business owners and managers mentioned the growth of the firm over time [#1, #11, #12, #13, #14, #15, #16, #17, #18, #19, #27, #28, #29, #30, #34, #4, #5, #6]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "My growth, it started off slow. But over the last ... I tell you, it's very surprising. Prior to COVID, what's that make it, 2019, I had two project managers and one admin. Due to people's lifestyle, I went down to one project manager and one admin right at COVID. And our work picked up, and I hired two project managers, and one superintendent right at the same month COVID hit and been growing ever since. It's been on the fast pace of growth. I've been trying to control that a little bit, depending on the projects and the jobs. And also, just trying to find the resources, the right growth pattern of the individuals that I hire. Compared to the numbers that I shared with you earlier, we pretty much tripled over the last 16 months as far as employees. I do a lot of relationship building with other companies that I feel are on the same scale as we are or used to be on the same scales. They all tell me I'm doing well. Growing pretty good. A lot of it really depends on the jobs. Some say it's not necessarily fast, but a little bit better than others typically do before hitting that five-year mark. We have had quite a growth boom a little early, since our conception, compared to others. From what I hear, mostly, most people were where I am after the five to seven, within the five-to-seven-year mark." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I would say it's fairly typical, but I will say, I think in the last several years, we've really seen some traction from our WBE status. I think that really took a couple years before that started to happen. And I think that's as a result of different owner entities taking those requirements more seriously and just kind of getting our name out there a little bit further, but I would say we've either kind of kept track with the industry growth or done a little bit better than that, compared to where we started." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think we've been growing above average. I don't know the statistics, but we ... [the owner] started out as one in '06 and then in '11 when I came on, we were at three and then quickly grew to doubling that. Now we're to 40, so pretty fast growth." [#12]
- The Black American owner of a DBE-certified construction company stated, "I think I had up to like 35 people at one time, 25, 35 people at one time, and this has been about three or four years ago. I kind of gradually laid them off or quit doing as much work, but as I'm building back up, I'm starting to get more people and use more subcontractors, especially subcontractors. That's how I ended up being successful, is that right off the bat I saved my money in the bank, and I finished contracts. The bonding companies saw that I had money in the bank, and I was finishing contracts, and they helped me build my bonding capacity, which was great. Because I got up to 25 million probably in a couple years. That's how fast I grew." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "The growth has been great on the purchasing side, as far being like procurement, purchasing. We purchase stuff for different companies with minority certifications, and resale, and all that types of things. That growth has been great. The construction and siding, it's steady growth, but labor issues, and a lot of those things, we tend [to grow less]." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "The growth of our firm? I think it's, I would say it's, probably below average. Access to capital, access to barriers to entry, to larger opportunity." [#15]

- A representative of a majority-owned professional services firm stated, "It's been increasing, actually. And that's primarily due to acquisitions." [#16]
- A representative of a majority-owned construction company stated, "A little faster, actually. Yeah. Historically, we've been at about a 20 percent growth rate yearly. Of course, that varies. There's a lot of different factors. We meet as a leadership team and talk about what our growth strategies are. We do that twice a year. And then we meet weekly, which sounds like a little overkill, but it's really helped us to stay focused on what our targets are. We establish [KPIs] to help us really focus in on what our targets are." [#17]
- A representative of a majority-owned professional services firm stated, "It sounds to me like we've been growing, we've been doing really well, and it sounds like we're... I would say maybe above average in our growth from what I understand." [#18]
- The Middle Eastern American owner of a majority-owned construction company stated, "When I first started, didn't do that great. It was good for somebody new. This year was way better, so next year would be better. It's just a process. Even though I'm good with what I do, people don't know about me yet. It takes time to put your name out there." [#19]
- A representative of a woman-owned professional services firm stated, "It's not that we're not against growing, but we also don't try to grow. When you start growing, you've got to find people to work that. I typically have seven to eight people working for me. Right now, I'm down to six." [#27]
- A representative of a majority-owned professional services company stated, "We remain relatively constant. Initially when we incorporated, we were doing significantly less. I'm talking about revenue-wise. We had more clients, but we were doing a lot less revenue-wise. Over the past 15 years we grew, but over the past 10 or so, we remained relatively constant. For the consistency, we're having to sacrifice the growth side of things." [#28]
- The Black American owner of a construction company stated, "I'm already growing because I just bought a couple pieces of equipment, and we're getting ready to start... I'm getting ready to start hiring people, because of my nephews... I got a bunch of nephews, and they're starting to help me with some things, and we mow grass, and we starting to do septics again, because I keep up with my license with the health department down here in Jefferson County." [#29]
- The male co-owner of a woman-owned professional services company stated, "We have been growing slowly, but part of that has been on us, because last thing we wanted to do is grow too quickly. And one of the things... Because I've been in this field for about 20 years and worked for a slew of companies, and a lot of companies, they start getting some fairly good-sized contracts, and they start getting offices, and they start hiring people full-time and this, that, and the other, and then a year or two goes by, and they aren't getting contracts like they normally do, and next thing you know, they're laying off people, and they have to sell their office. And so, we've been trying to grow slowly." [#30]
- The Black American co-owner of a professional services company stated, "Right now we are the market leader." [#34]
- The owner of a majority-owned construction company stated, "Like every contractor we bid work and the more work we got, the more we able, we added to our capital. I've never

drawn anything out of the company except to pay taxes, left all the money in there. And I'm a salaried employee of my company. So, I wasn't dependent on profit to pay my salary. That's an important distinction because some contractors just want a job. And so, they bid to profit and that's what they live on. That's what they pay themselves. And we wanted to have a company where the profit was secondary that I was salaried the same as any other. And then whatever we had left over, we just left in the company. So, the short answer is we were able to grow it by making careful decisions and doing well on jobs, not making mistakes, and earning profit. And that led to our ability to grow company, because we would buy equipment and pay for it over time with proceeds from jobs and money that we put in jobs. And then we would accumulate the equipment and then just kept going. And that's what really has fueled the growth of the company, is the fact that we were able to buy things and that made us more competitive and so forth." [#4]

- The owner of a WBE-certified construction company stated, "When I started in 1982, I thought I would do $50,000 worth of business a year. I wasn't very sure of myself. By 1990, I had started doing between $800 and $1,000,000 a year. So, in the more recent years, I'm in the $1,000,000 to two million range a year. As I've done it for a number of years I've acquired clients, and clients that I have worked with the entire time, and that has caused growth because those clients, as I did work with a general contractor, if some of the people from that general contractor went to another firm, often they would call and say, 'Would you mind giving us a bid on this?' Or 'Would you do this?' And as the contact basis has grown, so has the business." [#5]
- A representative of a majority-owned construction company stated, "We went from just a paving company in central Kentucky to a company that does paving, grading, drainage work, concrete work. That's the bulk of the scope of services that we provide. We, over the years had to grow take on more employees. We've purchased some other companies." [#6]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals [#1, #10, #11, #12, #13, #14, #16, #18, #19, #21, #23, #24, #27, #32, #33, #5, #7, #8, AVWGS]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Right now with marketing ourselves, I like to do a little bit more marketing. A lot of it face-to-face events, gathering, a little bit of door knocking. We're trying to push into the social media, but being that we're mostly commercial, social media just give more of a reflection of the work that we've done. But majority, like I said, in marketing wise, it's just networking, and trying to build a relationship, and complete the job that we currently have on task and on time, and make sure that the owner's happy." [#1]
- The Black American woman owner of a goods and services company stated, "It's been word of mouth, honestly, when I first started, like I said, I love teaching, and helping people, and serving my community. So, I would put on a lot of workshops. So, it was me and another group of ladies when we first started. That was how a lot of people heard about me, was the workshops that I was putting together. And that I was well, probably 2011. And then from there, an article might have been written, or I might have did a blog, or a national article, or whatever. And so that's how it came about. But now with the marketing, because of the

financing, I've been able to hire a digital marketing company. So that helps with the social media. I don't buy ads. I don't buy advertisements. Everything is organic. So, I just try to be there and do good." [#10]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I always say that the best marketing is established relationships with other professionals, but we also have hired a firm that seeks RFQs, RFPs and things for us to find, look at, and pursue. And then marketing is a little bit more challenging since COVID. It's not like we go to events all that often or anything anymore, but maybe again sometime, but when those things are available, like Commerce Lexington, and those types of things, we'll go to some of those meet and greets, too. But a lot of it is just established industry relationships and then seeking out some strategic new contacts." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Just getting out at conferences. You know the drill, the relationships, receptions. It's not so much website or anything like that. It's mainly getting out and teaming, being on as many teams as you can, and getting relationships through your work. So really relationships is what drives it." [#12]
- The Black American owner of a DBE-certified construction company stated, "Throughout the years the way I marketed myself, while I was in the 8(a) program a lot of times what happens is that companies don't market themselves. So, I would call agencies and some agency would pass my name along to other agencies. I would set up meetings and go and introduce myself and give them a statement of capabilities what I can do. I would get on their bid reports, and they would send me RFPs for projects. That's kind of how I marketed, and I guess it's just getting their numbers, and calling them and setting up meetings and going to events. A lot of times the government have events, so Lexington-Fayette Urban County used to have events. I used to go to their events also and just pass out cards and my statement of capabilities." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Basically word of mouth, and continuing past customers, just continuous work." [#14]
- A representative of a majority-owned professional services firm stated, "We use the conventional methods that other firms like ours would use. We attend conferences and then as part of responding to RFPs, we provide marketing material. We do also put on training workshops for municipalities and private industries. So those would be the main ways." [#16]
- A representative of a majority-owned professional services firm stated, "We do a lot of face-to-face through conferences, meetings with owners. We have a lot of repeat business, so we keep up with the people that we've worked with before, and then we have really good relationships with our sub consultants as well." [#18]
- The Middle Eastern American owner of a majority-owned construction company stated, "Well, the first year is always the toughest year, regardless of minority owned business. And plus, everything has changed, you need to spend more time or more money on someone doing your SEOs. And as I said, I built my website, I work on my SEOs and right now that's how people find businesses. And plus, the industry that I'm in, it's more referral versus

people getting online and looking. Because it's related to the realtor and the home inspector. Let's say if you're buying a house, and you run into a radon issue, usually the realtor gets asked, or the home inspector, if they know somebody. My first year was all referrals. This year it was people finding me because I spent more time on Google. I tried the Google AdWords. Nothing came out of it but my competitors hitting the link. Normal Facebook, some online directories, stuff like that. Google by far is the best to put you out there. But as marketing and getting... For what I do, it didn't get me any leads, but it put me out there. So, what happened with Google is, whenever you pay your ad is... Let's say you put, 'Radon mitigation Lexington, Kentucky.' When you're advertising with them, they're going to put your name up there. So, you're paying for that visibility. Traditional ways, it works, but not as good as sending flyers or putting flyers on doors. The issue with radon is no one knows what radon is, and we're not educated on it. When you tell people, 'Yeah. It causes lung cancer.' Some of them, they'll get interested and the other would be like COVID, 'It's a hoax.' It's how they look at it. And got nothing to do with any ethnicity or anything. There's people that are highly educated that don't believe in radon." [#19]

- The Black American owner of a professional services company stated, "I market online and word of mouth." [#21]
- A representative of a WBE- and DBE-certified goods and services company stated, "We have a pretty prominent presence on social media. We try to update that every day and we share it with people who obviously have they're audience. And then as many people that are seeing it, passing through, we've gained a lot of followers through Alignable, Facebook. And then we're also posting our jobs out there on other job posting boards. We send out faxes to all the local area churches to share with their congregation. Our owner's part of quite a few different Lexington groups where they meet in person. So, a lot of interaction with people like that, who are like mind who share context and referrals back and forth as well. There's a lot of networking." [#23]
- The owner of a majority-owned professional services company stated, "A lot of it is word of mouth. A lot of it, even more is repeat clientele, because you focus your time and effort on not selling them schmoozing them but delivering. Fortunately, I encounter people who are focused on that also, and they understand that. We use our service as our marketing." [#24]
- A representative of a woman-owned professional services firm stated, "We mostly have repeating customers once you get into a client, you get things worked out, and they're your client and they don't usually go shopping around. Some of those co-ops do like to shop around. We'll give them bids." [#27]
- The owner of a majority-owned construction firm stated, "I posted on the Facebook that I do business. So, whoever contacts me I go look at a job." [#32]
- The woman owner of a professional services company stated, "Since COVID, I have had to invest in my ad agency, so I do radio interviews and stuff like that as the expert in my field. Just like I follow the recipe, I guess you could say, for what I do for my clients, that I've done for myself. I am receiving a return on my investment. It's hard again, to come up with the money to invest in yourself when everything is challenged financially with my business due to the COVID shutdown." [#33]

- The owner of a WBE-certified construction company stated, "I've acquired clients, and clients that I have worked with the entire time, and that has caused growth because those clients, as I did work with a general contractor, if some of the people from that general contractor went to another firm, often they would call and say, 'Would you mind giving us a bid on this?' Or 'Would you do this?' And as the contact basis has grown, so has the business." [#5]
- The Subcontinent Asian American woman owner of a professional services company stated, "We do social media marketing. We have not participated in any vendor fairs. We, being a small entity, it's again, I don't know how to put it, but it is the outreach. Smaller entity, financial circumstances, or how much we can spend on all these outreach programs." [#7]
- The Black American woman owner of a professional services firm stated, "I signed up with the National Notary Association, which they will get you connected as a, they have something called signingagent.com. And so, you just kind of put your information out there, the type of loans that you've closed, they just give you the information. You just put the information out on the website and then some of the companies can actually seek you out. So, a lot of times they don't, if you don't have the qualifications then you won't even get the opportunity to even try to get the loan. But now I'm considered a preferred notary and a preferred agent. So, a lot of times they just send them directly to me and say, 'Can you accept this?' Trying to minimize errors and making sure that I get the documentations back to them in a timely manner. Just trying to, following the instructions that they send you on what they want, what they need and how they need it. And making sure I follow the rules. I set up a website. And of course, the signing agent portal is one of those places where you just kind of put what type of signings you've done. And then when they go through to maybe put in a zip code, who's in the Lexington area, then they can actually see, she's done this, and she's closed these types of loans. Or if I haven't, then I don't put it on there. But at this point I've closed almost 500 loans. So, I got quite a bit of experience. I network with some people every morning at 6:00 AM in the morning on Clubhouse. So, I don't know if you've heard of Clubhouse. But I get on in the morning, there's some networking opportunities there, and we just kind of share and collaborate with each other about best practices, things that work and don't work. Companies that we can sign up with to get going. So yeah, I've networked with those. And then there's some on Facebook. I don't really get on Facebook much, but primarily the networking that I've done has been on Clubhouse." [#8]
- A representative from a woman-owned goods and services company stated, "We have started advertising in Lexington area including billboards." [#AV217]

C. Ownership and Certification

Business owners and managers discussed their experiences with the Kentucky Finance and Administration Cabinet (FAC) and the Kentucky Transportation Cabinet (KYTC), and other certification programs. This section captures their comments on the following topics:

1. FAC, KYTC, and other certification statuses;
2. Advantages of certification;
3. Disadvantages of certification;

4. Experiences with the certification process; and

5. Comments on other certification types.

1. FAC, KYTC, and other certification statuses. Business owners discussed their certification status with the Kentucky Finance and Administration Cabinet, the Kentucky Transportation Cabinet, and other certifying agencies and shared their opinions about why they did or did not seek certification.

Ten firms interviewed confirmed they were certified as DBE, MBE, or WBE [#1, #11, #12, #18, #21, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "[We're] DBE certified with the state of Kentucky's Transportation Cabinet. I have the DBE certification with Indiana and Ohio on the state level. Minority certification with Tri-State TSMSDC, which gives a certification in Kentucky, West Virginia, Tennessee." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "We are WBE certified with WBENC, which is WBENC certified with the Finance Cabinet and the Transportation Cabinet. And then the City of Lexington, City of Louisville, Louisville Metro, I think those were kind of the major certifications. I think that probably the first one we achieved was WBENC and I would say that was maybe '14 or '15. So, let's just say maybe six, seven years." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Kentucky Transportation Cabinet. Also, we have the ... it's the Tri-State." [#12]
- The Black American owner of a professional services company stated, "I'm working on my MBE now. Yeah, I already sent all the paperwork in. I'm waiting on the visit." [#21]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I just got my MBE, so I've never been able to use that." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I was going to say I have the Department of Transportation certification with the state, and when you re-certify, it can be a bit intrusive. And you have people that are asking you questions about your business that are subjective. I can see where that would be a little bit intimidating, stuff like that. But my overall experience with the DOT certification has been good. I was able to land some contracts with some larger highway contractors, and that's been going well. But I think really, any of these certifications is just maybe a door that can open for you. It's always going to fall back on your past performance, and how you perform work no matter what." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I got certified through the state of Kentucky. I didn't use any third-party thing. It was a long process, but also it was COVID. It was all the way through the process of COVID. I guess it was a long process. I've never really used it, so I wasn't really trying to speed up the process, or things of that nature." [#FG1]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "I'm certified with the finance department in Frankfort, and it's a long-winded process." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I don't know if it's worth the headache." [#FG1]

One firm interviewed was not certified but was in the process of applying [#8]. Their comment is as follows:

- The Black American woman owner of a professional services firm stated, "Within the next year, I definitely going to do it." [#8]

Seventeen business owners and managers explained why their firms had not pursued certification. Many uncertified firms were unaware of the certification or its benefits [#10, #19, #25, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #4, #6, #7, #8]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "I think initially there might have been maybe some parameters that I really wasn't ready for, because I know it's pretty tedious and they do everything with the fine comb, as far as things that. So, I just hadn't done it. It probably seemed a little scary, because even with the SAM, that took me three months to complete that one because there's so much. it's overwhelming. And then, too, maybe for me, I was just like, 'I don't know. Do I really want to pay X amount of dollars for this? Is it really worth my time to really get certified? Does it make a difference if I were certified or not?' as far as is it worth the money and the time to have the certification? Because how many people actually benefit? Because when I was at the meeting at the city, this has been years ago, majority of the people that were in that room were white. Some were women, but majority of them were white." [#10]
- The Middle Eastern American owner of a majority-owned construction company stated, "What's that? Do you have any information that you can share with me via email how I do that?" [#19]
- A representative of a majority-owned construction company stated, "I can't say they have an MBE, but I do know that it is a major topic for our company. So, I don't know where it actually stands if there's or not." [#25]
- A representative of a woman-owned professional services firm stated, "[We're] a woman owned [business]. I don't know if they ever went through the certification or not." [#27]
- A representative of a majority-owned professional services company stated, "Not specifically. We got... In the attempt to actually be recognized as a small business, [but] somehow or another I got my wires crossed, and we ended up getting approved for systems and boards management, which is a government entity. Well, it's for bidding on government contracts, which we don't do that type of work, but my intent was to do whatever certification is required to be recognized as a small business entity through the SBA or something. Found out when I started this process through the SBA, I was directed to SAM, systems, and boards management. That's the certification that we got." [#28]

- The Black American owner of a construction company stated, "No, no. But I've been to a lot of the meetings and stuff. I was trying to get certified, but my business, where I've changed entities, hasn't been in business long enough to get certified. My business now, since I changed entities, had to be in business for two years before I could get certified. And I've been in business more than two years since I've started back. I just haven't had time to try to follow up and fill out all the other paperwork. It's just the time constraints." [#29]
- The male co-owner of a woman-owned professional services company stated, "We are a woman-owned business. It's one of the things where it takes a couple of years before you're eligible to apply. And then we've actually been really busy with the Lexington project to actually take time to do that. We absolutely need to do that, especially to expand but as of yet, haven't actually gotten around to doing it." [#30]
- A representative of a majority-owned construction company stated, "We do not, to the best of my knowledge." [#31]
- The owner of a majority-owned construction firm stated, "I don't know anything about that." [#32]
- The woman owner of a professional services company stated, "I've heard about it, but I didn't know how to do that. I didn't know it was a thing, but I'd love to do that. I think it's a great idea." [#33]
- The Black American co-owner of a professional services company stated, "We are not [certified]. I have never used my 8(a)-certification eligibility in part because I think you got to be really actually strategic when you use it. I mean, it can only be used once in a lifetime, and so I was always sort of pragmatic about it like, 'Okay. Is this the right company to use it for?' So that you could then really get the highest benefit out of the certification. That's how I try and think about it. I don't see the ROI. Like, 'Okay. You're going to spend 20 hours working on this MBE certification and the knock-on impact is you're going to receive X.' I can't quantify it, and frankly, I think all the supplier diversity people get off because they don't have to do what business owners have to do, which is like, 'Oh, I have to get a return on the time that I'm spending.' So, a lot of it's wishy-washy hogwash sort of stuff, and this is not just the people who have their certification and they believe that that's a really great viable way of doing business, but I would argue that it's not the certification that they're benefiting from. They're benefiting from the relationships that they have, and then they're using the certification as a sort of credential on top of that. Right? So, they built these really great relationships, and then in turn, they have this credential that helps smooth everything onward. Frankly, none of our clients care about that. It doesn't matter when you get to scale, and so where I try to stay focused on, get big. Right? Then it won't matter. That's why I don't generally agree with certification because I'm like, 'Hmm.' [My mentor] got a big business on the back of his relationship with them, but if I've noticed anything, I've noticed that it is the relationships that are driving that, not the certification. The same thing is true." [#34]
- A representative of a majority-owned goods and services company stated, "I have not heard that term before." [#35]
- The Black American woman owner of a goods and services company stated, "I don't want to say that I haven't, I may have, because of different things that I've dived in. Then, I'm always

receiving emails and I'm like, 'What is this for? Who is this from?' But I don't want to say that I haven't, but those names do not stand out." [#36]

- The owner of a majority-owned construction company stated, "No, I don't have any special certifications for DBE or any of those. We are considered a small business based on our size. And that's about the only thing that sets us apart from any other company. I mean, doesn't set us apart because that's a lot of the companies. I think to be perfectly candid, they used to have some small business certifications, but they've opened up the small business so big, I don't even know, and I don't pay any attention to it, so I'm not aware of any." [#4]
- The Subcontinent Asian American woman owner of a professional services company stated, "No, it is woman and minority-owned, but we're not certified. We have made contact with this state, but we have yet to provide some documentation requested. Hard to understand and the need for the paperwork itself, right? Sometimes, establishing that you are a woman-owned business and the minority, sometimes you don't understand the purpose of it while you think it's very easy to establish you are a minority and woman-owned but it's not as easy. … First things is I would say being an international, cultural barriers, how to work, how to get the things done and the cultural barriers, and sometimes language barriers." [#7]
- The Black American woman owner of a professional services firm stated, "No, not yet, but it is on my list to do." [#8]

2. Advantages of certification. Interviewees discussed how DBE/MBE/WBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification [#11, #13, #21, #23, #3, #37, #7, #8, #9, #FG1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "The WBE status has opened doors for us in trying to establish new relationships with, say, architects that we haven't worked with before, or even public entities. I'll just use U of L as an example. They put a strong emphasis on that and we're still kind of trying to break in there some, but I feel like with certain entities, we wouldn't have even gotten a foot necessarily in the door without the WBE status. [There are] definitely benefits. I think both being state agencies, that's sort of a nice umbrella that helps you to be listed as a WBE with different municipalities. So, I'm thinking of Metro, Metro having the Finance Cabinet designation, it kind of gives you [an option] just go through the paperwork and everything, but at that point, they figure that you have been vetted and so that facilitate sort of a reciprocity for WBE designation in different areas. I will say there are definitely certain entities that put more emphasis on inclusion of WBEs and DBEs in selecting teams or selecting consultants… U of L is very stringent about that. Metro is. LFUCG is, but I don't think we see that level of emphasis at, say, the Finance Cabinet or some of the other universities." [#11]
- The Black American owner of a DBE-certified construction company stated, "I ended up getting a lot of IDIQs and MATOC contracts right at the beginning, multiple-year contracts. That kind of helped me grow and be able to save money up for bonding and to hire more people. But I found out that really if it wasn't for the 8(a) program and I was so successful in it, I don't think that I could have competed with these other contractors." [#13]

- The Black American owner of a professional services company stated, "I haven't expanded to public yet. I'm trying, that's why I'm getting my certification." [#21]
- A representative of a WBE- and DBE-certified goods and services company stated, "For the client, on the other hand now, that's where we turn on, we're woman-owned. There are tax breaks for them. I know that when you get certified and it shows up on this website for companies coming to Kentucky or ones looking, I know that it shows up for them. So, for us, it's getting the client that way. For the applicant, that's the part that I don't see a benefit there, but we try and turn that into letting the client know that anything they do with us is the Kentucky state, the way the laws are set up for business, anybody that's a woman-owned or minority-owned and we can prove it, then they can go back to the governmental contracts where they're getting government monies and they can put that they have a percentage of their staffing or supplies or whatever. They get that money back and coffers of money that we never see, but they benefit. So, we just try and push that to our clients. And it's worked and we actually saved one client one year, I think it was over $550,000." [#23]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "We had been hired as a small woman-owned business before, if we were certified, but the first business that I gained after becoming certified was with the city. And it was as a subcontractor, to another company, out of state company that was doing work in Lexington. And they invited us to be their partners because we brought capabilities that they didn't have. And so that was a real positive opportunity for us to get into the city, which is where I wanted to do some work. And since that time, we have also earned business with the University of Kentucky, another contract with the state. Those weren't necessarily because we were DBEs. So, we've been continuing to grow our government business, which has helped provide some stability to the company. And so, we went from just me to now six employees, which is huge, in my view. I'm getting over my fear of hiring people." [#3]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "Without it, because there's a lot of times when I'll be honest that, coming to just simply put us on their team because we're a DBE or we meet that certification requirement. So, it is what it is when it comes to that." [#37]
- The Subcontinent Asian American woman owner of a professional services company stated, "If there are contracts that could be based on the certification, certainly." [#7]
- The Black American woman owner of a professional services firm stated, "Well, I mean, I think it's probably necessary. You need to prove that you really are a minority because people will take advantage of it. Situation. So, I understand why they're doing it, but then there should be some help there available for people to help walk them through the process." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "Here's what the certification does. The certification helps black people because now you don't have every Tom, Dick, and Harry bidding against you. You don't have white people bidding against you. That certification says, 'I'm certified.' If you're not certified, you ain't going to be able to bid on this work. If you want to bid on this work, get certified. It helps the city to be able to see who's certified and who's not. If you're not certified, why are you

not certified? Are your taxes messed up? If your taxes and everything is messed up, most of the time what do you think is going to happen when you get out there and start doing this work, when you get out here and start doing the work and you can't get no credit?" [#9]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "I think it's mostly effective for subcontracting. That's mostly where I'm asked to fill that box. To do a scope of work, but also to fill that role so that the whole team doesn't get penalized their 10 points, or five points, or whatever." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "They're good to have because at some point, in my case working as a sub, the GCs are going to want you to be able to check as many boxes as possible so that they fulfill the requirements. And if you can't help them do that, then you're probably at a disadvantage in the state arena I think." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "From the federal perspective, a lot of the time that's helpful when they do set aside contract." [#FG1]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#15, #2, #3, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "It doesn't matter if you... I've never got a job, I've been certified for 15 years, and I've never got a job, because of my certification, not one job, not out of all the 100s of 1,000s of jobs I bid, no job that said, oh, you're certified, you can obtain... That is irrelevant to if the prime wants to award you the job or not." [#15]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "It definitely doesn't give you what they advertise it gives you. Just because you're MBE or something like that doesn't do anything for you. You'd probably get more benefit being a WBE than you do an MBE. And again, that's because it's not with a WBE, it's not all black. A lot of times, minorities end up being, most of the time, the largeness of Black populations. I've even had people that have led diversity organizations, large diversity organizations, encourage me to go get my WBE rather than my MBE because in their travels, they don't see it being that beneficial." [#2]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "[My former business partner] said, 'I don't want the government to know my business.' They knew she was a woman, but you have to submit all of your financials, But I mean, it's tax information. The government has it anyway, for the most part, so I don't see it as a barrier. It may also be philosophical from the standpoint of treating certain people differently. She may have not felt as a woman-owned business, we should get special treatment. I look at it as a way to help small businesses grow, and that helps the economy. So, I'm okay with it, and I'll look for any help that I can get in growing the business." [#3]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I personally am struggling with my WBE certification. I have it. I'm struggling with what to do with it. I'm not really sure that I'm the best candidate to answer this question. Because I've learned that if you develop your sales process around your

certification, then your business is not externally marketable in the event that you want to build it to sell it. And that's what we're working towards, so I'm not really ... I'm actually not wanting people to call me for that reason. I'm wanting people to call me because they value the services we offer. And so, I do know I do get phone calls because we are WBE. And they're very few in my industry, but again, I'm at this point right now where I'm struggling with what to do with it." [#FG1]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "You want people that want you for the work that you do, not because you have a certification." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I would just like to be known for, even if they use an app [to pick you] just for the quality of work, or the services that [you offer] versus just having a certification. Because I've had my certification for 10 years [now], and I can count on one hand how many times [I've used it]." [#FG1]

4. Experiences with the certification process. Businesses owners shared their experiences with FAC's and KYTC's certification processes [#1, #11, #37, #9]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "The certification process is long drawn out. There's a lot of paperwork to it, lot of it is repetitive. I'll tell you; I will say some people say, 'Why do I need to fill out a piece of paper to tell you I'm a minority?' You know, right? So, I don't really get into that, but it's paperwork. And like I told you before, I don't have an issue with paperwork. I guess some people do. I know a lot of non-minorities don't like the paperwork, right? And it is intimidating, but it's like getting into the industry." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "We have to do those annual recertifications for the WBE. So those questions are so tedious. This is not. I shouldn't say 'tedious,' but they get very into detail about you do this and what do you do, and you do and you do and you do? I think that the process is a bit difficult if you're coming into it, not familiar with the paperwork and what they're looking for. And I will say, after being rejected by the Finance Cabinet either once or twice, their folks are very helpful and they said, 'Hey, we can have a meeting with you. We can review your application and tell you where things are lacking or where we need more information.' And so, they really helped us through that process. The Transportation Cabinet is a bit more hands off, but it was helpful once we got the Finance Cabinet designation. That did make the Transportation Cabinet process, I think it helped that process. It's still the same paperwork and everything, lots and lots of financial statements and paperwork and all that kind of stuff annually, but it's nothing terribly difficult." [#11]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "It's costly. It's a lot of work, especially when you got to run the business. It requires a lot of tension to detail. They ask for a lot of information and I can see why some people say it's not worth it. It's pretty invasive. I'll be honest as far as, they want to look at your taxes and W2s, things like that. So, it gets to be pretty invasive for some of those certifications. And so, I could easily see why someone would choose not to do it." [#37]

- The Black American owner of a DBE- and MBE-certified construction company stated, "Ma'am, I tell you, I filled out 90 percent of it by myself. I filled all of it out but the financial part. I really wasn't working at that time because I had to get all these certifications. That's what I was doing then, I already had one of them done. I just got it done. I was working on another certification. Listen, any Black person that says that the certification is too hard, he's a fool. Why would you want to be doing something where there's no certification involved? The city can't tell who's who then. If the city starts getting people like that, this whole thing is going to get a bad rap real fast. If you don't have your Ts crossed and your Is dotted, if you ain't went through the fire, you ain't going to appreciate it, you ain't going to appreciate the other side. It's not going to mean that much to you, you're not going to protect it." [#9]

Four businesses owners described their experiences with the certification process in negative terms [#2, #7, #23, #FG1]. Their comments are as follows:

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Now, if you're talking about another issue or thing that hinders this, the amount of paperwork and the time it takes to get these certifications, and then they don't produce some result, that's discouraging and frustrating." [#2]
- The Subcontinent Asian American woman owner of a professional services company stated, "The knowledge. The knowledge of getting advantages for minority and women and still we are yet to register. The knowledge is basically key, and we did not have any idea of how to register and get certified for any minority benefits, minority and women benefits." [#7]
- A representative of a WBE- and DBE-certified goods and services company stated, "It was long and that's what our accountant manager and then our owner, they're the ones that have gone through it and just said it's just so long and tedious. So, if that was ever streamlined, that would be awesome. I mean, if we can do it for the federal government, should be easier for the state but not always." [#23]
- The owner of a WBE-certified professional services company stated, "My experience with the Kentucky one was the most humiliating thing I've ever been through. I'm sorry. I'm going to get emotional talking about it. They came back and started asking me questions. I've been in this position for 20 years. I run a business. I run it through ups and downs. I hire, I fire, I do all the things, and they told me that I couldn't be a WBE for one of my services because I don't have an engineering degree. And anyway, I just don't understand how I can own, operate, manage, and control all those elements of my business, and not be a WBE for that segment of my business. It's the only time I've really felt very angry about the process." [#FG1]

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process [#10, #11, #12, #30, #34, #37, #7, #8, #9]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "I see it because businesses, and governments, and things they have money set aside for funding for particular businesses. But in conversations before, sometimes some people were like, 'Well,

you're paying this amount of money, but are you actually guaranteed a contract?' Because the money was going towards certain organizations." [#10]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Well, I think particularly when you're first applying that it would be nice if they were faster in their reviews, because you go through multiple steps of reviews, and it can be three and four months between each one. And it can take nine months just to find out that you are being rejected for XYZ reason on your application. So, if it was a bit more streamlined and faster review process, that would be helpful, I think." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think having a webinar, seminar type, and they may already be doing this, I don't know, but just having some sort of educational component to show them the steps and, you know, on the federal end, we never did the small business stuff. We looked at it, but golly, it looked so confusing and I'm sure you've been through it. It's like you almost have to have a liaison to hold your hand through it. So, I would say some sort of assistance on that, because it is ... It's so vast out there. We never really touched it." [#12]
- The male co-owner of a woman-owned professional services company stated, "It's ridiculous amount of crap you have to do on a constant basis that has very little to do with actually doing your job. But if you want to do work with KYTC every single year, you have to fill out the same [expletive] information, that I don't know why there can't just be a portal where you submit any updates or new information. You have to submit the [expletive] same form every single [expletive] year. All these qualifications you have to do, I believe, every two years to stay certified, and it's a lot of work just to get there to begin with. So, it'd be really... Of course, leave it up to the state not to make it easier for the business world. It'd be really nice if it was just a lot more simplified so we can spend more time doing our job." [#30]
- The Black American co-owner of a professional services company stated, "There is one standard for Black businesses and there is another standard for everybody else. Which is why I don't generally agree with certification because certification actually puts a tax on Black business that somebody else may not be spending. I'm like, 'Why can't you just let everybody just opt in, and then put severe penalties on the back of perjury, or lying, or all these different sort of things because, come on, everybody should just have to do it the same way.' I'm speaking directly to our supplier diversity cohort of people is that they have a job, but they don't necessarily have the burden of understanding what the business owner is having to encounter from a P&L and balance sheet perspective. So, they sometimes create processes that serve their purposes, but don't necessarily serve the purposes of the business owner. So, I'm like, 'Why don't you just like... Why not use like the PTAC fund to give them a person who completes all the documentation?' You got all of this PTAC money over there, but you mean you still expect the business owner to go... this misnomer that like, 'Oh, the business owner has to know how to file their own taxes and do all this other stuff.' And I'm like, 'No, you don't.'" [#34]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "A lot of barriers for us is just keeping up with all the certifications. It gets to be cumbersome, and they're all, each certification's on its own deadline and everyone has their own separate applications. So that becomes annoying when you, we just received a couple

emails saying, 'hey, are you on this contract or are you on this schedule?' And it just gets kind of frustrating having to upkeep all these different certifications. It'd be nice if you could sort of streamline it. If there was sort of a, and I know that this is hopeful thinking, but if there was sort of a catchall certification or at least if the different types of certifications were on the same schedule, as far as renewals were required, that nice." [#37]

- The Subcontinent Asian American woman owner of a professional services company stated, "Maybe the right kind of documentation, where to get the documentation, and how to, in present, the documentation itself." [#7]
- The Black American woman owner of a professional services firm stated, "Or maybe even a Zoom training would help. Just some kind of opportunities that can kind of help you along through the process. It's overwhelming. But I mean if there was a workshop day. Okay, we're all going to work on it together. Set aside a time. Yeah. Yeah. We're going to set aside this day to start working on your thing instead of sending you the paperwork, sending you home and you don't know what to do with it. But if everybody was there. Or even if you did it on Zoom and your documentation is at home, then you can go get your documents that you need in order to fill it out. But to go through the process together, to help people." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "No, it's not. You've got to do the certification. Listen, if people don't work for something, they're never going to appreciate it. Now, when I did the certification, I was like, 'I got a high school diploma. That's it. I'm trying to figure all this out.' But I knew that I had to do it and I couldn't be lazy about it. I couldn't cry about it. I got to do the certification." [#9]

5. Comments on other certification types. Interviewees shared several comments about other certification programs [#12, #13, #14, #15, #18, #2, #20, #3, #37, #5, #FG1, #11, #15, #3, #8]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "We also had the ODOT, Ohio Department of Transportation. And TDOT as well, Tennessee." [#12]
- The Black American owner of a DBE-certified construction company stated, "[I am a] DBE, was an 8(a) contractor. I graduated out of the 8(a) program, and I do mostly federal work. That's how I became a DBE and 8(a). I had to write a narrative about racism to get in the program, and that's something that happens every day, still." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "We're on the Tri-State MBE and DBE certifications." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "We are in DBE and MBE. KYTC." [#15]
- A representative of a majority-owned professional services firm stated, "Yes, we've done work with them before." [#18]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "I have my MBE, my DBE, my WBE, and there's several other that go along with those, like WOSBE, SBE." [#2]

- The co-owner of an SBE-certified professional services company stated, "We're registered as a small business, I don't know that that has been advantageous for us." [#20]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "We're certified woman owned, we're HUBZone. And we are certified by KYTC, Kentucky Transportation Cabinet as a DBE. [My former business partner] also did not want to become certified, even though it was a woman-owned business. She just had a philosophy that she was not for that. And we had been asked by one client to become certified and I didn't see any reason not to. So, I immediately upon rebooting, I immediately became certified and started looking into the opportunities that some of the organizations such as the Transportation Cabinet, and LFUCG, and others were offering to small businesses to help them grow. It was challenging, because I was running the business, doing the work, and trying to take advantage of the opportunities, the learning opportunities, and the relationship building. And that can be very hard when you're small. But eventually, it started to pay off." [#3]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "Both MBE and DBE." [#37]
- The owner of a WBE-certified construction company stated, "I had to have help. There was a job I wanted to do, and they wanted me to be certified for it, and it was for the University of Kentucky. … they wanted me to get certified to fulfill some requirements. So, I had been a woman-owned business since the beginning, so it required several hundred pages of work, but we did it. I didn't personally do it, one of the ladies in my office did it. I participated in the process, but I did not personally do it. I'm assuming that there's nothing we could do to mess that up. In other words, it doesn't expire. But I haven't checked on it for a few years, myself." [#5]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I have NABO, and then I have the local Louisville one. And then, I do have the Kentucky certification. I've had positive experiences with the large certifying organizations." [#FG1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "Especially KYTC has a strenuous prequalification [for certification]. Other than it being challenging, I don't know if there was any specific barrier that was special for us versus others. They do have a challenging process, though. Their prequalification or qualification as a WBE was ... I think we went through the Finance Cabinet first because that was a clearer path, and they provided more assistance and guidance in terms of what they expected and needed for paperwork and things. And it's kind of like once you get one certification, that makes it easier to achieve some of the other certifications. I think we had to go through both of them at least a couple of times to get the paperwork and everything. And it was a lengthy process. It takes a lot of time. And back when [the former MBE Liaison] was with the city and suggested we seek WBE and seeing first, WBENC first, that was a much more sort of streamlined process. And it was like a three-month process versus taking a year to get rejected through the various cabinets. But eventually we kind of got through and got some help." [#11]

- The Black American owner of an MBE- and DBE-certified construction company stated, "KYTC. It's very easy." [#15]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "You have to process the papers. And once you've done it once, then you just have to update that and send it in. So, I've kind of tracked myself. It takes three to four hours a year to do the certification and probably takes more now because we have multiple certifications. But I don't think it's that big a process." [#3]
- The Black American woman owner of a professional services firm stated, "Well, actually, I signed up today with the Small Business Administration. They were going to have some kind of workshop going on. I just signed up. I can't remember the name of it, but it was like a four-day workshop. So, I just signed up with them. It's supposed to start May the first, I believe. Some people do need the guidance to go through that. I walk countless people through some processes just to get them. And then they don't keep up with what they need to, some people don't and then, you know." [#8]

D. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work**.** Section D presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Experiences getting work in the public and private sectors;
4. Experiences doing work in the public and private sectors;
5. Differences between public and private sector work; and
6. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work [#11, #12, #15, #20, #29, #31]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Most of our work is public sector work. We do have a few private sector projects, and I'll say I've seen a little bit more private sector work here in Lexington just to be specific, kind of redevelopment type work. So, we're working on a couple of projects in sites that have been previously developed that are more urban. So, we've seen kind of some of that happening in Lexington in the past few years, which is good, but also sometimes has some pitfalls." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Since we've started out, our trend has been more public. Now, I don't know if that's a trend overall but for us, we are heavier on the private early on, but as we gain more and more government contracts, it swung back, because you've got to be real careful on the private end with getting good clients. There's some people out there you don't want to work with. Some developers, you just don't. So, we've learned of a few along the way, but I think it

seems to be weighting more towards public overall, and I think it'll continue. Especially if this stimulus goes through, it'll definitely be a lot more public, big time." [#12]

- The Black American owner of an MBE- and DBE-certified construction company stated, "We tend to work public work." [#15]
- The co-owner of an SBE-certified professional services company stated, "For us, I think, that is a trend. I think, it's trying to make sure that we've got a diversity. I don't know how long interest rates stay low. I don't know how long the money is inexpensive for people to borrow and I think that's really what makes private development work well. Obviously, you had 2008, once everybody got over that hump and the banks, got everything squared away, we started business in '11. It's been the time to borrow and build from a private development side. So, I think, our trend now is to make sure that we are diversified and that we've got a big enough public portfolio to be able to more consistently land that public work." [#20]
- The Black American owner of a construction company stated, "I just go work [where the] money's at right now, and do what I can do, because it's just me. I'm taking care of my daughter, so it doesn't matter me who I get my money from long as it's legal money." [#29]
- A representative of a majority-owned construction company stated, "That can vary greatly by year. A lot of it's got to do with... we rely pretty heavily on the state. And so, if the state is letting a lot of work in our area... of course it's going to be heavy government or public work at that point. But only that there's not a lot of state work being led or county work or things like that we'll probably go heavier private then." [#31]

2. Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

One business owner explained that their firm only engaged in private sector work [#8]. Their comment is as follows:

- The Black American woman owner of a professional services firm stated, "I have not [worked in the public sector]. But I did hear that there was opportunities to do so, I just don't know how to find those yet." [#8]

One business manager explained that their firms only engaged in public sector work. [#18]. Their comment is as follows:

- A representative of a majority-owned professional services firm stated, "We mostly work with public. We do very little private, and it seems like there's an abundance of opportunity in public. I don't really know so much about private just because we don't do that type of work." [#18]

For fourteen firms, the largest proportion of their work was in the private sector [#1, #14, #19, #2, #20, #21, #22, #25, #28, #3, #33, #34, #36, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Majority of our jobs right now are private; right now probably 10 percent of my work is public." [#1]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Probably 65 percent." [#14]
- The Middle Eastern American owner of a majority-owned construction company stated, "It's more residential." [#19]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "I would say a good 80 percent of our business is outside of this area and would be in the private [sector]." [#2]
- The co-owner of an SBE-certified professional services company stated, "I would say, it's probably 60 percent private, 40 percent public ... today. Like I said, early on, we were heavily private but now, I would say, at least more than 50 percent is private still but..." [#20]
- The Black American owner of a professional services company stated, "Private. Just private so far, yes. I haven't expanded to public yet. I'm trying, that's why I'm getting my certification." [#21]
- A representative of a majority-owned professional services firm stated, "For the last four, five years, we've been really busy with a lot of private customers and haven't had to do much in the way of seeking out projects. Last year, probably at least 90 percent private." [#22]
- A representative of a majority-owned construction company stated, "Seventy private, 30 public." [#25]
- A representative of a majority-owned professional services company stated, "Mostly private." [#28]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I would say it is 30 percent public and 70 percent private." [#3]
- The woman owner of a professional services company stated, "It's local business owners." [#33]
- The Black American co-owner of a professional services company stated, "Ninety-nine and 1. We don't really do much business with the government yet." [#34]
- The Black American woman owner of a goods and services company stated, "I hadn't thought about doing anything as far as government contract at all." [#36]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I've focused building my business on the private sector, not necessarily the public sector, just because it was just faster entry into market capture, and things of that nature. That's been my focus. I'm learning. I just got a minority business certification, so hopefully that helps in public opportunities." [#FG1]

For 11 firms, the largest proportion of their work was in the public sector [#11, #12, #13, #15, #16, #24, #31, #37, #4, #6, #FG2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Most of our work is public sector work. It can vary some. There are certainly years when there is, depending on leadership, there's less funding and if your project's available either at the state or the local level, at which point we'd probably seek out more private development work, but in general, I would say that 80 to 90 percent public is probably pretty constant." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I would say 80 percent public, 20 percent private, if I were to guess." [#12]
- The Black American owner of a DBE-certified construction company stated, "A majority of my work is federal, I would say probably right now for me, it's probably 20 percent from the private sector and 80 percent from I guess the federal sector." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Public sector, it's usually about 80 percent." [#15]
- A representative of a majority-owned professional services firm stated, "Probably 75 percent of it." [#16]
- The owner of a majority-owned professional services company stated, "Right now we're doing mostly public work. A lot of state work, and some private nonprofits, using public funds obviously when they operate. But that's just the way it has trended for us. We're comfortable doing what we do." [#24]
- A representative of a majority-owned construction company stated, "Probably 60 public and 40 private." [#31]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "Seventy percent government, 30 percent private." [#37]
- The owner of a majority-owned construction company stated, "I'm mostly all public contracting." [#4]
- A representative of a majority-owned construction company stated, "Predominant amount of public work, federal government is pretty rare here. We've also done we do a lot of interstate paving, but it's actually through the highway department (Kentucky Highway Department). We've also done work to do to improve Bluegrass Airport. [We] do maintenance work to repave the runway, those are all projects that we've been involved with in recent years." [#6]
- A representative from a focus group consisting of construction companies stated, "Ninety percent of our work is in the municipal water and wastewater area." [#FG2]

Four firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy [#25, #26, #29, #FG1]. Their comments are as follows:

- A representative of a majority-owned construction company stated, "We deal with a lot of publicly owned, as well as privately owned agencies." [#25]
- The owner of a WBE- and DBE-certified professional services firm stated, "I like to have a real strong mix of 50/50. To me, that's security. People that have all of those eggs in one basket, I think are just asking for trouble." [#26]
- The Black American owner of a construction company stated, "I work with the public a whole lot. I work with private entities a whole lot." [#29]
- The owner of a WBE-certified professional services company stated, "Although most of our work, we do quite a bit of public work, mostly for state government. Some municipal governments. A lot of our work is for the private sector as well. We're probably about 50/50 in terms of what we deliver." [#FG1]

3. Experiences getting work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in the Lexington area [#19, #31, #32, #34, #6, #8]. Their comments are as follows:

- The Middle Eastern American owner of a majority-owned construction company stated, "Now, I did get an invitation from the Fayette County Public School system to bid on a project for them. There was an invitation, yeah. That would be my first bid. They send the information. I'm reading it. I'm going over it." [#19]
- A representative of a majority-owned construction company stated, "As far as public jobs we're on every list out there where we receive notifications when there's upcoming work. And then as far as private work, that's a part of my job as well to bird dog that private work, if you will, and figure out what's going on, if it's something we're interested in bidding and then go from there with it. And then there again, being around as long as what we have, word of mouth, we get a lot of people that call us." [#31]
- The owner of a majority-owned construction firm stated, "I would love to because I heard there's some ... Government is trying to help people like me who start out and struggling. So, I was thinking to get into it maybe build on some contracts from government, but I don't know where to start. I don't know where to look. I don't know." [#32]
- The Black American co-owner of a professional services company stated, "Consumers come directly to us or contractors present contracts that they want us to buy." [#34]
- A representative of a majority-owned construction company stated, "They [local, state, and federal contracts] all follow the procurement laws and, but you know, their processes are advertised differently. They're bidding methods or how you bid may be slightly different. But in the end, it's all getting the point that you're under contract and you're in you follow your scope of work or plans." [#6]
- The Black American woman owner of a professional services firm stated, "I say, get the word out. Because first of all, how would you know? I don't know. I don't know if they're getting to the community to actually let them know there are opportunities out there. If you don't know you are not going to participate." [#8]

Ten business owners expressed that it is easier to get work in the private sector. Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#10, #14, #19, #21, #24, #25, #3, #30, #34, #5]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "I would definitely love to work with businesses, and governments, and things that. Like I was saying before, it's tedious. You know, the process is not easy. When you are a sole proprietor, you're everything. And they do make it hard to where you don't want to follow through with it." [#10]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Probably private. The private sector is pretty good." [#14]
- The Middle Eastern American owner of a majority-owned construction company stated, "Typically, people that did a test and they know they had elevated radon levels, and they're worried about their family's health. Typically, it's real estate transactions but recently it's been homeowners. And the difference is, the real estate transaction, whenever they're buying a house, it comes in, the buyer knows they had radon problems, they want to fix it before they close on the house. Or after they close on the house because you negotiate a price with a seller. And the homeowner's is whenever you already moved in, or your buddy told you about, 'Hey, man, you need to test for your radon.' So, I either test for them or I install a system for them." [#19]
- The Black American owner of a professional services company stated, "It's easier [in the private sector], because they usually go by word of mouth, and you give them your references and kind of go with it that way. But when you're in on the public side, you usually dealing with a general contractor, and he usually uses who he's comfortable with. And most of the general contractors are not DBEs." [#21]
- The owner of a majority-owned professional services company stated, "Private sector work is a lot easier to do, with regard to not having a bureaucracy to deal with. But fortunately, in public sector, if you're engaged with the right individuals who are running along with you, they're easy to work with too, as individuals. There's just that myriad of paperwork you know is coming at you, that you've got to do, to prove that you're being honest and forthright in everything you do." [#24]
- A representative of a majority-owned construction company stated, "Yes [private is easier to get]." [#25]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "A lot of times, people just come to us, and we start working. They call us and we talk about it, we give them a price and we start working, so that makes it a lot easier." [#3]
- The male co-owner of a woman-owned professional services company stated, "The thing is that the private sector, I don't have to send them a small volume [of documents] like I need to with when I bid on a public sector thing, but they also don't care about the quality of my work. They are definitely the lowest number gets the contract. I just send them a number, and they either go yes or no. I do the work, and they pay me." [#30]

- The Black American co-owner of a professional services company stated, "I prefer private over public all day long. It's easier. No red tape." [#34]
- The owner of a WBE-certified construction company stated, "They are neither sealed nor unsealed [when I proposed on this private job]. I don't know the right description for that. I know that I was not the low bid. I know I was awarded the bid because I was the most thorough. In my proposal I was very descriptive on what I intended to do for the money, my proposal was three pages, typewritten, single spaced. Another one of the proposals was less than one page, and the other proposal was 25 percent higher than my bid. Now, I was not the low bid, the person who only gave one page was the low bid. However, the organization felt that I gave a more thorough description and they felt like they would get a better job using my company." [#5]

Six business owners elaborated on the challenges associated with pursuing public sector work [#1, #10, #22, #8, #9, #AV]. Their comments included:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Private, like there was a bid that goes on Friday. There's three of us that's bidding. Three of us bidding, the other two, I know of them, it can be a competitor. If that same job was out open on the public, it'd probably have 10 bidders on it. So, then it gets real competitive, and then you have people just trying to figure out, okay, am I going to take this job? I don't really have anything against the public bids, it's just your market and your competition and where can I be comfortable at, and where can I make money? It is a lot of effort. I mean, typically a public bid requires a bid bond. So now I have to send out to my bond agency and let them know I'm biding this, and it takes a bid bond, which is, I think it's 5 percent or whatever. The paperwork, the paperwork file is like 30 pages or more. I spend all that day filling out the paperwork or waiting on getting subcontract bids from my vendors because there's so many people bidding it. So, they don't want the numbers to get out early. So, what you brought up earlier, shopping the number when on the private end I may get a bid from somebody two or three days early than other times, it's trust. Because they know their piece of paper, their bid is not going to get shopped all the way across three or four other people. The bid form on a private job, a lot of times, if there is a bid form, it's two pages. It's just less work, less of a demand sometimes. A lot of people are easier to work. A lot of times they're easier to work with. The administration on the job goes a whole lot smoother." [#1]
- The Black American woman owner of a goods and services company stated, "Everything. Like I said, there's a lot of information that you have to put down. There's a lot of repetitive questions that are asked but in different ways. And you're afraid. 'Well, should I mark it this way or should I mark it that way? I'm not really sure what they are looking for. So let me just put this check mark here.' When it comes to the financials of things, I'm not a million-dollar company yet. But do they look at your financials and say 'Oh, well, this person is only making this amount of money. Are they capable of taking on this amount of a contract?' Or there's so many different factors. Like I said, I don't even know if I'm answering your question or not. Generally, when I think of contracting, I do, I think of streets, and roads, and bridges, and signs. But I think if they opened it up and let people know, like, 'Hey.' Like I said, I didn't know you could contract food services. I didn't know you could contract this." [#10]

- A representative of a majority-owned professional services firm stated, "A lot of times we don't go after some of the public work because it doesn't seem like there's enough effort to go after it and unlikely that we would get it [over] a bigger firm, and so we don't even try. They're able to do them because they build up the reputation over time, but when you've done a bunch of them, you get the reputation of everyone knows how large you are and they also know that you have to capacity to handle it. Very rarely, but it does happen, one of the small ones will be awarded it because they'll say, 'All right, we'll we're going to try this less expensive firm up here and we'll give them a shot.' But it doesn't happen very often. I think the capacity isn't the thing, it's the reputation." [#22]
- The Black American woman owner of a professional services firm stated, "It was complicated and then I just backed out. I was just like, okay, I don't know what's going on. I don't really have time try to figure this out. I went through a little training, but then I just didn't really see much that was related to my notary work. Some of them are saying that they're doing really well. But mainly what I've heard is not necessarily with the city, it was mainly federal. So, I don't really know. You got to get your sam.gov, and so I'm in the process of doing that right now." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "They should have our contract and stuff at ready. Now, it took all of our bond. Matter of fact, our bond wouldn't even cover it all, they're going to break it down in phases. Right now, we don't have any bonding capacity left. Now, could we go back to the people, the bonding company and get a little bit more? We could try, don't know if it'd work. Not to do anything straight with the city. We could do it with [a large local construction company] because when we did that work with [them] for the city before, we wasn't bonded. They covered us, [that large local construction company]." [#9]
- A representative from a majority-owned construction company stated, "This is all we do, I'm third generation in my industry, and we've managed to stay afloat so far. Last two years in the pandemic have been tough. Fayette County and the State government both have too much paperwork for a small business to do." [#AV15]

Eight business owners and managers described public sector work as easier or saw more opportunities in this sector [#11, #12, #13, #17, #18, #30, #32, #4]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "All my career, the emphasis has been public sector work and that just tends to be what we do. It's a more stable market. It's a more fair market. So, and that's what I have, and we have our experience in. I think the public sector is easier because the clients are more sophisticated about process and of the industry." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Easier to get quality work, yes. You know, the private is very commodity driven. It's very price, shopping, price ... How cheap can you go? We try to stay away from that and be more of a qualification type setting." [#12]
- The Black American owner of a DBE-certified construction company stated, "I think one of the things about me working on the federal side, you don't have as many headaches as you

do on the private side. I think you get paid quicker and on time. Yeah, you don't have those problems of waiting on your money, I think especially for me. I guess that's why I love federal contracting. It's a little bit different." [#13]

- A representative of a majority-owned construction company stated, "The public's pretty easy, right? The private's a little different. Once again, it goes back to those direct questions that we talked about earlier." [#17]
- A representative of a majority-owned professional services firm stated, "We mostly work with public. We do very little private, and it seems like there's an abundance of opportunity in public. I don't really know so much about private just because we don't do that type of work." [#18]
- The male co-owner of a woman-owned professional services company stated, "Well, I could say that begrudgingly, public sector work is easier because as much as no one wants to spend money they don't feel like they need to, at least public sector knows they have to abide by federal regulations, and they don't gripe about it as much. Private sector, holy [expletive], man. They don't want to spend any money at all." [#30]
- The owner of a majority-owned construction firm stated, "I think working for government is better because it's a better pay. It's more organized. They not going to fool you. Like the people sometimes don't want to pay and you sign a contract, and you know, what you're looking forward to. So, it's more secure and you can get a job for a couple months instead of one day and then look for another one. So, it is more secure, more income. And then if you do good up, then they will hire you next time." [#32]
- The owner of a majority-owned construction company stated, "I purposely went to work in the public work arena instead of trying to go out there and fix houses and do bathroom additions or whatever. I just stuck to public work because they open envelopes, you got a bond, they read you low, you got a job. You go out there to market and maybe the guy behind you gives them a slightly higher price, but they like him better because he's got more experience or whatever. And the other thing I was worried about was people that, they don't have the money, or they run out of money and you're in the middle of a job. And with public funds you know the money's there." [#4]

One business owner noted that it is not easier to get work in one sector as compared to the other [#15]. Their comment is as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "It's about the same. They shop your work, they'll shop your price, just as much as in the public sector. Yeah, it's about the same." [#15]

4. Experiences doing work in the public and private sectors. Business owners and managers commented on what it's like to do work with public and private sector clients in the Lexington area [#34]. Their comment is as follows:

- The Black American co-owner of a professional services company stated, "I think this is very true for Louisvillians, especially. If you took race out of the conversation and you looked specifically at all business owners, there's a large swath of this community that

leaves this city to go make their money somewhere else. If that's true for them, then why isn't it also true for the minority entrepreneur? It probably is true there as well." [#34]

Eight business owners discussed their experiences doing work in the private sector [#1, #11, #16, #17, #21, #32, #9, #FG2]. Their comments included:

- The Black American owner of an MBE- and DBE-certified construction company stated, "So a lot of times on the prime side, that's where we're getting into a lot of issues with the public work, because a lot of the public work it's hard to get documents and you sift through the documents. When a lot of our clients then come to us and say, 'Hey, I want to renovate this church and turn it into an office building.' That's really on us. We had direct involvement with finding the architect, teaming up with the architect, laying it out, value engineering the job, getting the numbers. Figuring out how to save money and make money. Public starts [as a] bid, so everybody's bidding the same wall." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "It's harder to kind of get your foot in the door with that type of a designation than it is with public work. The payment is a lot less sure. Developer work is, if you've got somebody that you ... There's certain developers that you know are trustworthy that you work with. And to me, a lot of that work is just word of mouth. So, the private sector work that we have right now is because an architect that we work with brought us on board because they like working with us." [#11]
- A representative of a majority-owned professional services firm stated, "I have found that with the private sector, it's harder to get a... Payment is harder in the private sector than in the public. I don't know why that is, but the accounting departments are just more rigid. They're not as... I don't know why that is, but it's... When it comes to accounting and payment and contracting, it's harder in the private sector." [#16]
- A representative of a majority-owned construction company stated, "When you're dealing with someone privately is, 'Do you have the money to do this?' But we still go on, we still do it sometimes. And then at the end of it go, 'Yep. We knew that was going to happen.' Like, 'Oh, no. They're not going to do that to us. We're better than that.' The private sector is probably a little more, you have a little more freedom. And you have a little more influence in what happens. So, I can take a vision and help with something, right?" [#17]
- The Black American owner of a professional services company stated, "I mean, it's just a little hesitancy at first, but then once they get comfortable with you, it works out pretty good." [#21]
- The owner of a majority-owned construction firm stated, "The people contact me. I go look at job and I say, okay, I calculate how many hours approximately and what do I need for my equipment and material? And I give them a bid, I do estimate, I give them estimate and they either take it or not. And if they take it, I go out and schedule a job and go do the job." [#32]
- The Black American owner of a DBE- and MBE-certified construction company stated, "When we go work for a company a lot of times, even in Kentucky, if we just work for a regular private company, they may say, 'Don't worry about a bond. Our bond will cover you.' Or they'll say, 'Don't worry about it,' because if something goes wrong, they'll just take care of it." [#9]

- A representative from a focus group consisting of construction companies stated, "Lexington is very good to work for a lot of these private organizations, maybe hospitals. They're flexible." [#FG2]

Five business owners discussed their experiences doing work in the public sector [#14, #17, #23, #24, #36]. Their comments included:

- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "What they did is, we built an Applebee's, and we gave a quote to build an Applebee's. Then, he brung us in, and we sat down with him, and he was like, 'Hey.' We were the prime contractor. 'This guy's price is too high. This electrician's price is too low. He can't do the job.' So, we kind of hashed everything out, to make sure that we were still going to make money, and they were going to get a good product. But they were intentional about making sure that we got the job, because it was our first time doing a restaurant. They took us to a different location; they were in the process of being built. So, that they was real intentional about making sure we got the work, and supported us [throughout the] process." [#14]
- A representative of a majority-owned construction company stated, "Because it's a hard set of documents. It's a hard bid. It's, 'Design team's in place. This is what it is. Here's your contract. Get started in 10 days. Get it finished in six months.'" [#17]
- A representative of a WBE- and DBE-certified goods and services company stated, "Because they trust the process that we use when it comes to validating our applicants that we work with. They understand the work that we put into and all the credentialing that we do. And understand that each person has been fully vetted and comes with our stamp of approval. They know what that means. So, they, they trust us. And basically, what I mean by that is they'll go ahead and move forward with someone before, or they even interview them. Because we've learned their culture really well and we know what they're looking for in their applicants. And sometimes it just takes a long time to cultivate and get to that point. So those are always great clients to work with. And then others, they have their ways and that's fine too, where they want to personally bring our applicants in and interview them. And then after they interview one or two, they want to interview one or two more. And then they want to see another one. And by then, I've already put the other person somewhere else because they were too slow to respond." [#23]
- The owner of a majority-owned professional services company stated, "Most of the public work we do is the product of delivery orders, that are annual or bi-annual contracts. Particularly with the state. Where certain user agencies say, 'I'd like to use this firm, because they know us, and they know what we've been.' Under those, of course it's just us. Engineers are hired separately, and any other services required are hired separately. We manage the team, but we don't sub-contract those components of the work. It's a lot cleaner and simpler for us to do it that way." [#24]
- The Black American woman owner of a goods and services company stated, "That was something that I wanted to try to do. I haven't inquired, I haven't asked about it. I don't think I asked the right person. The one that I did ask, she kind of took me around the bush. I

would think about it if I thought the opportunity was there, then yeah, I definitely would try to put my name in the hat for it." [#36]

5. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Eleven business owners and managers highlighted key differences between public and private sector work [#11, #12, #13, #15, #20, #24, #26, #28, #37, #FG1, #FG1]. Their comments included:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Public sector, like I mentioned, that I think we've seen more emphasis from certain public entities on, for us particularly WBE, DBE requirements becoming more stringent or considered more in terms of selecting consultants. So, I think we've seen a bit of that. So, I would say there are very large differences. Again, the public sector work is much better regulated. It is a much fairer, more level playing field. And that's across the board with the larger public entities, like the state and the larger municipalities in the state. You know that you are going to be able to negotiate fees, you're going to get treated fairly, and you're going to get paid in a fairly timely fashion. And while they have certainly favorite people that they work with that's generally based on performance and is fair. In the private industry, it's difficult to kind of, I feel like that's much more sort of networking based and not based so much on, well, for example a WBE certification really doesn't mean anything in the private sector, unless a particular owner has an interest in that, but that doesn't carry any significance." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "We see the public ones larger than the private. Here and there, you get a large private job, but for the most part, the public is where the larger contracts are." [#12]
- The Black American owner of a DBE-certified construction company stated, "I noticed that around Lexington, I noticed on the private sector I kind of look around at some of these companies that you might see they're building hospitals or putting an addition on hospitals or different projects like that around Lexington. I know they're private projects, and you wonder how are the same companies doing all these private projects? You never see any minority participation on them. I've never seen any. The thing about it too is, we're not privy to those bids like that [private contracts]. A lot of times, I'm finding out. I'm like, 'Now, where do you go to bid on that?' And you can't find out where. I think a lot of times in private work ... Usually in private work you're going to have probably I guess more finance ... The people have more finances. So, I don't think it's a matter of them, what the cost of the project. They just want to get the project done as quick as possible. They don't have the stipulations that normally a non-private, like for a government agency or a city agency have. They're totally different. I don't think they have the same stipulations, so it's a little bit more flexible. That's probably, you get paid more money because of it." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I mean, working in the public sector you're usually working with organizations that you can kind of lean on to make sure that we get paid... working in a private sector, or sometimes we're working with companies, or larger companies that are not based in central Kentucky

or even in Kentucky. And so, you run the risk of them skipping town without paying you or something. Now that hasn't happened to me, but it has happened to other people before." [#15]

- The co-owner of an SBE-certified professional services company stated, "That gap is... I think that our public projects definitely have the ability, particularly, on the civic side, to be much larger. The private development has been getting bigger because money's been easy to get, and it's been less expensive. So, with lower interest rates, a lot of our private development projects, say 10 years ago compared to today, they've been much larger, and I think, that's just relative to low interest rates and ease of cheap money." [#20]
- The owner of a majority-owned professional services company stated, "Substantial difference is primarily, private entities are profit motivated, and they understand that you've got to move, in order to accomplish getting the project on the street and delivered and in service. The public entities, of course you've got to work your way through their bureaucracy. Some have more layers than others. It's just a slower process, and occasionally an exasperating process, if you have a team member who is just not fully onboard with running with you. The big thing is the layers of bureaucracy in the public work, which I understand." [#24]
- The owner of a WBE- and DBE-certified professional services firm stated, "And a lot of other people that are private clients of mine, I ask for 50 up front and they don't bat an eye. I'm having to use the cash flow from my private jobs to even chase the government jobs." [#26]
- A representative of a majority-owned professional services company stated, "Public contracts come in bits and pieces, so if you look at the contracts individually, they tend to be smaller but it's usually more specific. It might be to do one thing, whereas a private contract might be the entire project. But the state contracts can be subject to change their orders, too, as the project progresses. They may want, [expletive], more O-rings put in the ground, more wells installed, or more sampling done." [#28]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "There's probably more protection when it comes to getting paid. There's probably more protections on the public side than working for private developers or on private projects." [#37]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "As a general contractor, I think more or less in the private sector, I think maybe cost is less big of a deal. It's more relationships you've built with those companies. In the public arena, it's definitely cost sensitive. You have got to get the prices low, which makes everything competitive, which is good for everybody I think." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Some of my other public sector clients are qualifications only selection, and then my private sector clients they're a combination of factors. The most competitive markets would be those that receive public funding. K through 12 is the most competitive that's out there. And then, I would say the second most competitive would be the federal and the local municipals. And then, at least all the state work that I do is qualifications on my selection. And the university work I do is qualifications only selection." [#FG1]

6. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Four business owners perceived private sector work as more profitable [#1, #13, #23, #24]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I've seen the numbers, it's all public open. So, for example, I think it was Woodland Park that they just had. I decided last minute I think not to bid, but I know other contractors who bid below the numbers because they're open, it's an open record, and there was a contractor that was pretty much lower than everybody. How they got there? I don't know. People typically, whether it's private or public bid, if I lose a bid or if I win a bid, immediately I go back and say, I'll go reevaluate my numbers. Let's say I lost the bid by 10 percent. Typically, I can go back to my numbers and figure out where that 10 percent at, okay? Sometimes at 10 percent, I can rip out my management and be right on and say how they do it, you know? And some companies do it. They just basically say, 'We're going to take this job.' I got to be honest with you, when I'm on a public bid, I pretty much just say, 'Hey, my guys need to be busy, or I like this job. I think it might be a good marketing piece for us,' and I take the job. I'm not taking it as a loss, but my profit margin is not as much." [#1]
- The Black American owner of a DBE-certified construction company stated, "I think a lot of times in private work ... Usually in private work you're going to have probably I guess more finance ... The people have more finances. So, I don't think it's a matter of them, what the cost of the project. They just want to get the project done as quick as possible. They don't have the stipulations that normally a non-private, like for a government agency or a city agency have. They're totally different. I don't think they have the same stipulations, so it's a little bit more flexible. That's probably, you get paid more money because of it." [#13]
- A representative of a WBE- and DBE-certified goods and services company stated, "Anybody that accepts government monies, it's tighter." [#23]
- The owner of a majority-owned professional services company stated, "I think probably, the profit margin in private's a little better. That seems to be a product of not letting your bureaucracy eat up so much of your time, and so much redundant and necessary paperwork if you would. But either one, if everyone's on the same page, you can make a little money on both. Architecture's not a high profit industry by any stretch of the imagination." [#24]

Three business owners and managers perceived public sector work as more profitable [#11, #12, #13]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I would say that public is probably more profitable, even though you have hourly rates that are sort of pre-determined, that aren't necessarily what you could get as an hourly rate in the private sector, because there's a very established process and people are sophisticated about construction and things. I think you can work more efficiently in public sector work." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "The KYTC profitability is stronger than Beattyville profitability. It's public but your larger entities, LFUCG, definitely KYTC, the profitability is more." [#12]

- The Black American owner of a DBE-certified construction company stated, "For me, the federal side is probably more profitable. But on the smaller jobs on the private side is, but the larger jobs on the federal side are, I think. It's kind of weird, but that's how it is for me." [#13]

One business owner did not think profitability differed between sectors [#15]. Their comment is as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "The profitability is about the same [between sectors]." [#15]

E. Doing Business as a Prime Contractor or Subcontractor

Part E summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' decisions to subcontract work;
3. Prime contractors' preferences for working with certain subcontractors;
4. Subcontractors' experiences with and methods for obtaining work from prime contractors; and
5. Subcontractors' preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Nine firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise [#11, #14, #15, #2, #26, #30, #5, #7, #PT2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I would say about maybe 30 percent to 40 percent of our contracts are as prime. And, but the majority is as a subconsultant typically. Some years we may have one or two big projects where we're prime and so that may flip flop a little bit, but ..." [#11]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "In private, we usually work... It's probably 40 percent is the prime." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Usually about 40 percent of what we do is usually top prime contractor." [#15]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We can barely get work as a subcontractor, let alone bid on a prime." [#2]
- The owner of a WBE- and DBE-certified professional services firm stated, "Often, we're the sub for survey on larger projects" [#26]

- The male co-owner of a woman-owned professional services company stated, "Very rarely are there contracts that get put out that solely deal with our services. Most of the time, our services are subcontracted to like engineering. And they'll go, 'Hey, this is a contract to, let's say, build a new road. They're going to widen 64 from Lexington to Louisville.' And the thing is that they'll put the contract out for the engineering, and then it's up to the engineering firms to find firms like mine. And unless we have that close relationship with these engineering firms, not only do we never hear about the contracts, but we may not bid on it because it's up to the discretion of these companies. Whereas if the municipality or the state puts out a bid saying, 'Okay, here's a bid for archeology, here's a bid for geology, here's a bid for wetland studies, and here's a bid for...' and actually separate it into different things, then we would be able to find out about the projects to bid on it." [#30]
- The owner of a WBE-certified construction company stated, "Much of what I do is through general contractors. I mean, I'm going to say 85 percent of what we do is through general contractors." [#5]
- The Subcontinent Asian American woman owner of a professional services company stated, "Most of our businesses are through subcontract." [#7]
- A respondent from a public meeting stated, "I think a big issue in this area that I know I've seen is getting the opportunity to serve as a prime contractor. Definitely we get opportunities to serve as subcontractors." [#PT2]

Eleven firms reported that they usually or always work as prime contractors or prime consultants [#1, #12, #13, #16, #17, #18, #20, #21, #23, #24, #4]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "The majority of the time, right now just the growth and how we're formatted ourselves, we self-performing more on the design builds. Just because of the efficiency of how our team is set up and to operate. Basically, it's like a boss working under a boss. That's not going to go well. We have a way of doing things and getting it done. You working with somebody, they have a system and unless you have a relationship we get that clash. Now we're working inefficiently. Even our team members, our guys out in the field, like this is ... They don't like that environment. If your guys don't like the environment, they're not like managing the business and all, they just don't come work. They say, 'You can put me on another job, or I quit.'" [#1]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I would say we prime at least 60 percent of our work. 60 to 75 ... I'd say 70 percent." [#12]
- The Black American owner of a DBE-certified construction company stated, "Probably more as a prime contractor than a sub, but I've been picking up more sub stuff. I like being a prime better because you can control the project better." [#13]
- A representative of a majority-owned professional services firm stated, "We primarily work as a prime. We occasionally do sub to other firms, but it's not common. It's probably 90 percent of us is prime." [#16]

- A representative of a majority-owned construction company stated, "We're just a prime." [#17]
- A representative of a majority-owned professional services firm stated, "I would say, maybe 80 percent prime, 20 percent sub." [#18]
- The co-owner of an SBE-certified professional services company stated, "I would say, 90 plus percent of our work, we're the prime contract and we hire subcontractors but it's not atypical for us to do design build work as a subcontractor to a construction company." [#20]
- The Black American owner of a professional services company stated, "I did some subcontract work with painting and stuff like that, yes. With the scale of the small jobs I'm doing right now is prime." [#21]
- A representative of a WBE- and DBE-certified goods and services company stated, "Prime most of the time. We have done the two tiers where we've partnered with somebody, but that usually doesn't work out real well." [#23]
- The owner of a majority-owned professional services company stated, "They hire us as a primary consultant, and we do put together the teams there. Our sub-consultants as needed, based upon the nature of the job." [#24]
- The owner of a majority-owned construction company stated, "So they hire a construction manager. He goes in there and bids out the packages and we get one of the packages. They read the bids aloud. I'm low. I get the job, just like as if I was a prime, only I'm under him. So, a lot of the bigger work, I'm a sub technically, but it's not the same because they're still reading the bids aloud and giving it to the low bidder, and we have to bond it and everything else. So, it's really not the same as technically I'm a sub, but it's not the same as what we're talking about." [#4]

One firm that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project [#37]. Their comment is as follows:

- The Black American owner of an MBE- and DBE-certified professional services company stated, "[We do] a mix of both. Both of them have their benefits. So, when we're subs, it allows us to work on projects much larger than we would ever be capable of leading. So, we're fortunate to be able to work on just mega projects around Lexington and the Southeast region. But then also it's nice to be in the prime, even on smaller projects where you can put, truly put your stamp on it, puts your beliefs on the projects and show clients that what you're capable of and you're not kind of overshadowed by being on a huge multi team, firm or multi firm, team, whatever you want to call it." [#37]

One firm explained that they do not carry out project-based work as subcontractors or prime contractors [#34]. Their comments are as follows:

- The Black American co-owner of a professional services company stated, "We're just funding." [#34]

2. Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

Seven firms that serve as prime contractors explained why they do or do not hire subcontractors [#18, #20, #24, #27, #28, #30, #33]. Their comments are as follows:

- A representative of a majority-owned professional services firm stated, "A variety of different ways. A lot of times, it's people we've worked with before that we know do excellent work. That's what we like to see. And then, sometimes there are some MBE or WBE requirements. And so, a lot of times those are folks that we have worked with before, so we like to continue working with them. And then other times, the list that's provided by the city is really helpful in us being able to find folks. And that's nice because then we get to work with those people and continue to work with them in the future." [#18]
- The co-owner of an SBE-certified professional services company stated, "That's, probably, the most typical way would be a subcontractor, is through a design build process." [#20]
- The owner of a majority-owned professional services company stated, "Most of our public projects, we don't sub-contract. We're assigned sub-consultants who have separate contracts with the public entity. Our private work, and all of our nonprofits, yes, we are responsible for the full team. We do sub-contract on those." [#24]
- A representative of a woman-owned professional services firm stated, "We don't sub out anything, just because if we would have to, we probably won't bid on trying to get it." [#27]
- A representative of a majority-owned professional services company stated, "We don't do stuff like air permitting or anything like that because we don't have the expertise. We would... if we were to land a job like that, we would sub it out. We used to do our own drilling but finding appropriate people that were qualified to do that work became harder and harder, and insurance issues, and other things that we got out of that part of the business and subbed that work out." [#28]
- The male co-owner of a woman-owned professional services company stated, "And things like GPR, ground-penetrating radar, is something that we could utilize more, but that's also such a rare piece of equipment that the amount of projects, it might be once a year or once every couple of years I'd even need it. So, in a case like that, we just hire someone to do that stuff for us." [#30]
- The woman owner of a professional services company stated, "When I need to utilize things I don't do like social media and things like that, then I just refer another business to my client for those things. I have contacts that will treat my customers right, and that's who I refer." [#33]

Seventeen firms that the study team interviewed discussed their work with certified subcontractors and explained why they hire certified subs [#11, #12, #13, #14, #15, #16, #17, #24, #25, #28, #30, #31, #37, #6, AVMPS, #FG2, #WT1]. Their comments included:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Typically, just the same as other firms. People are either good at what they do or they're not. I would say, in our industry, there are not necessarily a lot of DBEs and WBEs out there. We have, for the most part, that's been positive. There have been a couple that we've worked with that probably would not seek to work with again, but I think that's true of any firm." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Yep, based on expertise and relationship. It depends on what's out there, what's advertised, so yeah, most definitely. And the LFUCG, KYTC is very clear in the DBE goals, and you strategize on that a lot of times a DBE goal may have been 9 percent but a particular prime consultant, I'm putting my hat back on again, but if there was a project heavy in drainage or heavy in something else, we were really good at, they would promote that and it'd be 20 percent instead, and they would promote it as such. I know who to call when I need it, relationship-wise." [#12]
- The Black American owner of a DBE-certified construction company stated, "Just by I guess doing the ... When I took that training course, the minority training course, I just would pull guys from there. And then I would pull them from different DBE lists, for the state DBE lists, and just by word of mouth." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Most of the time we use a DBE for HVAC, sometimes concrete we'll sub out to a DBE. But most of the time, it's there's not too many certified plumbers that's DBE. … Oh, it's been a good experience, as long as you set the expectations. I think it's a good experience. It's just the capacity and the funding. Usually, when we [are] working with some guys, when they finish, they want to be paid that Friday. It's not net-30 or anything like that. So, we usually try to accommodate them once they're finished with the work, to go ahead and get them their funds." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "More often than not actually. So, like especially a lot of work we do. I mean, that would be our primary solicitation, just because we notice that the circumstances and a lot of them, they wouldn't have the opportunity to work on some of the projects unless we provided it for them. We, have developed relationships with them and a lot of times, we've done, well, we're trying to get other major contractors to do their... We've helped them along the way and showed them how to bid the job or how to be able to work their employees out, in order to be able to perform the job in a timely manner." [#15]
- A representative of a majority-owned professional services firm stated, "As I said earlier, we've got some longstanding relationships, business relationships, with a lot of companies. So, that's our first source. In addition to that, I routinely will contact the minority liaison at each municipality and get a list. Look through that list and see if somebody is new on it and then go from there." [#16]
- A representative of a majority-owned construction company stated, "[A local WBE], we use them. I mean, they're one of our preferred. There's a couple of cleaning companies we use that's MBEs. We actually partnered up with another GC, he was an MBE, we did a church with him." [#17]

- The owner of a majority-owned professional services company stated, "I don't have any MBEs right now. We have in the past. Usually, it's someone I have had the opportunity to watch, as far as seeing how they performed, and how they conducted business. Just like anybody else. I didn't go, well, and I'll be honest, in some cases yes, I knew we were pressured to acquire MBE sub-contractor services or consultants. But as far as evaluating the MBEs, there was no difference. You look at what their reputation is, and how well they've performed. Were I to put a negative slant on it, the only thing that really concerned me, and makes me ... Well, I knew it was coming, but I had to absorb it anyhow. The majority of the MBEs, in the contracting entity, if they know you're under requirements, or under pressure to acquire the services of that MBE firm, or one, the natural inclination is to boost their pricing. Because they know they can ask it and get it. That's no different than what we're looking at right now, post-COVID, with every commodity we're trying to buy. 'If we can get more from you, we're going to get it.' Now that's really the only negative experience I've had with the MBE subs, is I think in some cases they knew they had me, and they were going to charge me more than they should." [#24]
- A representative of a majority-owned construction company stated, "I think it's actually, in my experience, I think it's easier most times. The way they do business. Meaning, they come in, they want a part or a piece, they know what the price is upfront, and they put it on a purchase order, or they use their credit card. I mean, you can't get any simpler than that." [#25]
- A representative of a majority-owned professional services company stated, "We have used woman-owned businesses. I'm not sure about minority-owned specifically. We didn't necessarily look for that specifically. It's just what they were. We return to them frequently." [#28]
- The male co-owner of a woman-owned professional services company stated, "As much as that should be a greater factor, especially on public sector contracts, I don't think people really pay attention to that as much. It would be great if they did a better job at requiring primes to actually seek out MBEs and WBEs, and it would be great if there was easier access for them to know who to reach out to." [#30]
- A representative of a majority-owned construction company stated, "Most public jobs have a DBE participation goal and we do everything in our power to hit those goals and exceed those goals. For the most part it's subs that we've already done a business with, and we know what they do and what they specialize in and what they can and cannot do. There again, some of that just comes from an experience level. But if there's something that comes up that we don't have a relationship or contract with a DBE, I'm sure we'll look at any list out there that supplied to try to find somebody." [#31]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "Anytime we get the opportunity to, us being a minority, if we can employ other minority on firms, we know the challenges and struggles and especially when you get looked over and you know you're capable of doing work. We definitely try to hire other minority firms. More or so word of mouth, of course, like KYTC has their DBE list, things like that, but we build up a solid network to where we can just call somebody, and we know a friend of a friend who can refer us to somebody." [#37]

- A representative of a majority-owned construction company stated, "I feel like we've got a good track record of that. I think it's not just something that we say it's something we that we do. As far, as DBE subcontractors, you know, we work with folks to try and give them an opportunity to start doing or formed a new company and give them space to be able to lay down their equipment and store their equipment and their materials while they're working on one of our projects on our property because it's hard to find lease property or afford lease property in Lexington, you know, to be able to do paving. Trying to, you know, meet the goal of having a more diverse workforce, but also have a more or more opportunities for the DBE contractors to do work for us. We've had some woman-owned companies that we've dealt not in Lexington, this is this is across the state. They basically told us that they weren't going to meet our schedules. They would show up and their workforce was deficient or untrained. They also they also showed up with equipment that was faulty. We're talking about standing up on interstate 75 night after night and they couldn't get their equipment right. And they seem like they get to operate on different set of rules. And we've had a lot of negative experiences. I'm getting way out sideways, the negative experiences that that it seems like they can cry that they are a DBE, and they don't have to get the work done on time. You know, they don't have to follow the same standards that I do. And they put our people in harm's way, you know, night after night, when they weren't able to perform. So, when you talked about relationships earlier, it's very hard to have some relationship with somebody that's putting you in that situation when you're out on the interstate working. So, that's why I think I'm all for the DBE Program. I'm all for inclusiveness and being able to have good workers that are that are well trained, but I don't believe that they need to be held to a lower standard. I believe that they ought to be able to show up and be able to do the work and perform and that's what made me have so much of a good feeling when I run into somebody that's giving their best effort and they're doing what they should be doing." [#6]
- A representative from a majority-owned professional services company stated, "We're trying to include and use more minority businesses as subcontractors." [#AV42]
- A representative from a focus group consisting of construction companies stated, "I know that we probably had the largest diverse or DBE subcontract in Lexington history with our electrician on a job at one of the ... One of the wastewater treatment plants here was around $7 million, somewhere around there. We've actually got another contract with the same electrician in Louisville right now that's right at $7 million. We do a lot of work with minority contractors, and a lot more in the past than we do now." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I would think it applies to both. Sure, in the municipal, whatever government side, there are requirements sometimes, most of the time, that would benefit a DBE. But they're also out there in the private side too, especially with larger private companies. If somebody wants us to build a brewery in Georgetown, Kentucky, they're not real concerned about minority participation. But if I'm building a Walmart somewhere, I guess they would be. I haven't built any Walmarts, I've built a brewery, but not a Walmart." [#FG2]
- A representative of a majority-owned construction company stated, "We do so much in house that we have a hard time finding diverse subcontractors that do the type of work we need when putting together a proposal. Most of the subs we use aren't minorities, but our

two landscaping subs are WBEs. Because of the size of jobs we do, we self-perform the small stuff and for the larger contracts we can't find subs that can perform work worth more than $100,000. The subs just don't have the financial aspect to do it. To help find subs we don't really require bonding from them unless it's a mega contract." [#WT1]

3. Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors [#1, #11, #12, #13, #14, #16, #17, #18, #24, #33, #FG2]. Prime contractors shared the methods used to find subcontractors and the factors considered when selecting a subcontractor. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "There was a couple of minority firms here that I have a relationship with, they're also in the commercial industry. They figured out who on the non-minority side to team up and partner with and built up a relationship. It's really the comfort level. It just so happened, for example say concrete, we can build up and say we do concrete. Typically, any concrete contractor, if you do bad work, you're going to get a bad reputation quick. It doesn't matter what your skin color is, or your sexuality, or your gender, whatever it is. It doesn't matter. So, once they realize you do good concrete work, guess what? Typically, you have a team up relationship. They're always going to go to you first. The bid, when it comes down to the bid, but when they see the low bid and they don't know a lot of times people, they're just appearing. Do you take the risk on a low bid? There's a lot of public work that are taking on the risks that I do know in the backend." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "That's based largely on the project type and what the specific parameters of the project are and our relationships with different subconsultants and who we think will be a good fit. For example, we have an MAP engineer that we work with a lot on park projects, and they understand that type of work and architects that are sort of better attuned for certain projects versus others." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "By their area of expertise. Yeah. And it depends on the scope of the project, and relationships." [#12]
- The Black American owner of a DBE-certified construction company stated, "Usually if I'm working on a federal project, I call three electricians, three mechanical, three of whatever and get competitive bids that way. And what I do, I do a certain amount of the work in house myself, but usually on mechanical and electrical I usually sub that stuff out." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "We sub out plumbing, HVAC, and we sub out that." [#14]
- A representative of a majority-owned professional services firm stated, "When we get RFPs from Lexington, Louisville, or wherever, we're looking for... And they're engineering RFPs. So, we're looking for firms that can provide surveying, engineering technical services,

specifically in the water, wastewater industry. So, all of those factors tend to make the list. Typically, we have long longstanding relationships with firms that go way back. I just recently added a new one to that list and it was because of the type of service they provided. So, two things, the type of service and recommendations that I've received from other people over the years. when we're hiring a sub, we're using it to fulfill a need that we can't provide locally." [#16]

- A representative of a majority-owned construction company stated, "We have a couple of self-performing crews. We'll do some of our own concrete work, and we'll do some of our finish work. But other than that, it's pretty much exclusively sub-contracted out." [#17]
- A representative of a majority-owned professional services firm stated, "A variety of different ways. A lot of times, it's people we've worked with before that we know do excellent work. That's what we like to see. And then, sometimes there are some MBE or WBE requirements. And so, a lot of times those are folks that we have worked with before, so we like to continue working with them. And then other times, the list that's provided by the city is really helpful in us being able to find folks. And that's nice because then we get to work with those people and continue to work with them in the future. Like I said, a lot of times, just folks we've worked with are minority- or woman-owned, so we keep a record of that just so we know, because sometimes there are those requirements, and we want to make sure that we're meeting them. And if it's for a consultant that we don't use that type of consultant very often, then a lot of times we'll go to the list that the city provides for us." [#18]
- The owner of a majority-owned professional services company stated, "A lot of it is having individuals that we're comfortable working with, and we can trust, to make the kinds of decisions we think are the correct ones. It's a little bit of a different industry. Again, I've been in it long enough, that I have long term relationships with people who think and operate much the same as I do. As such, we have to struggle sometimes with some of our newer, younger members, because they're learning. If I hire somebody here, I take them to raise. I understand that. But I don't need to be raising somebody else's brood there. That's a long way of saying, when we can, we work with people with whom we have history, and are comfortable." [#24]
- The woman owner of a professional services company stated, "Business that I've worked with in the past, and I know they're trustworthy, I know they're honest, and do a good job, and all of that." [#33]
- A representative from a focus group consisting of construction companies stated, "For the most part, I'll just say overall, our subcontractors, our material suppliers are very ... A lot of times there's only one opportunity, only one company can supply a $2 million pump. That's just the way it is. But there are all kinds of other things that happen. A wastewater treatment plant has buildings, small building, big buildings, all kinds of different things that they can work with and get involved with. That's some of the things we've done in the past basically to make that success." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I think showing that you are a real business, I can remember actually the subcontractor I talked about earlier, the largest subcontract that the city of Lexington has ever seen, $7 million

electrical contractor. I can remember back 20 years ago when we asked him to supply us his audit and financial statements, which he supplied to us. I did analysis on him and realized that he was a real business. He had worked for a non-DBE, the president of the company, and he had learned how to be a businessperson. He had learned how to be an electrical contractor. That was a big help. If I'm in a meeting and somebody wants to give me their card or wants to do this, or wants to do that, I'm wanting to know your real business. Who else have you worked for? Show me those things." [#FG2]

- A representative from a focus group consisting of construction companies stated, "Making it look good. Look, if somebody sends me 10 pieces of paper that aren't even bound, we spend time making things look pretty, and it's not that tough to do in today's age with computers and stuff." [#FG2]

Primes discussed the tools they use to identify subcontractors [#11, #13, #14, #15, #16, #17, #18, #20, #24, #25, #28, #31, #37, #6, #AV, #WT1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "It depends on the project, and I'll say, honestly, if I'm pursuing an LFUCG project, and I know I need XYZ types of consultants, I will ask [the MBE Liaison] to send me the current list of the WBE, DBE, veteran consultants. And I know most of the folks around town, but this is a small industry on the design side, but that's a good resource for us to look through and just make sure we're thinking of everybody. So outside of that, it's kind of the typical relationships and work experience and knowing who's a good fit for what. But I'll say other places don't necessarily have that information quite as readily available or are not as responsive with it. So, LFUCG does a good job with that." [#11]
- The Black American owner of a DBE-certified construction company stated, "Usually, it's just kind of funny, just over the years you build up. When I first started out, you did projects as under my Mentor-Protégé. It's kind of like you learn from them the subs that they use, and then throughout the years you start seeing signs out of other contractors. You start calling them up and seeing if they're interested in bidding a job. That's basically what I did. And too, I used to get a lot, a lot of calls from people that want to work with me. Because like I said, at one time I was a pretty big federal contractor. The federal stuff was really hot, and then the private sector was really cold." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "It's usually based on relationships that we've had in over the years. We've been using the same group of guys for a while." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Usually we, just over the years we've made connections or network with other contractors that are subcontractors. And then, we get called. So, like, it depends on the job, we would be listed as a prime, so subcontractors would be able to, for that and subscribe for the job." [#15]
- A representative of a majority-owned professional services firm stated, "It does seem like over the last few years that, and maybe this is just a local thing, but some of the people that we have used, and this is just a normal business cycle, some have gone out of business. And I can think of a surveying firm or two that, that we use all the time. So, they've gone out

business, but there was nobody really to replace that niche market. it's recommendations and other people." [#16]

- A representative of a majority-owned construction company stated, "You can go to [online] and get a list of who's pulled the plans. You can get, literally, you can Google people, and it comes back to that experience thing. You know? You keep using the same subs over and over again. You go to the board rooms and look. I mean, it's just all kinds of different avenues that you can take." [#17]
- A representative of a majority-owned professional services firm stated, "Like I said, a lot of times, just folks we've worked with are minority- or woman-owned, so we keep a record of that just so we know, because sometimes there are those requirements, and we want to make sure that we're meeting them. And if it's for a consultant that we don't use that type of consultant very often, then a lot of times we'll go to the list that the city provides for us." [#18]
- The co-owner of an SBE-certified professional services company stated, "That's a good question. I think, most of the time it is either by word of mouth or through, particularly with LFUCG … they've got a list and [staff] can go through that list and we can figure out who's going to be the best fit for us on a particular project." [#20]
- The owner of a majority-owned professional services company stated, "I've been in it long enough, that I have long term relationships with people who think and operate much the same as I do. As such, we have to struggle sometimes with some of our newer, younger members, because they're learning." [#24]
- A representative of a majority-owned construction company stated, "Google, but a lot of times I've got a lot of knowledge on my staff, and they know where to go. They've been in the industry for quite some time. And even talking to the people that come in our service techs that we sell to, when they come in, we'll ask them, 'Hey, where can I get this made?' Or something like that. And they more than likely can let us know either. But Google is probably the best search tool out there. [We] already has the relationship with a service called ARI for the trucks. We just go through that service and they find a local vendor for us to go to." [#25]
- A representative of a majority-owned professional services company stated, "It's more word of mouth." [#28]
- A representative of a majority-owned construction company stated, "It just depends. There's different companies out there that specialize in different things, and there again with our experience level over the years we've learned who to go to. If we're bidding a road job and it has a bridge on it that's something that we don't do, we know who to contact for a bridge contractor or a pipe contractor or anything like that, if it's something that we don't do." [#31]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "It's been built over relationship, over years, it's just building relationships. So, let's say we need a landscape architect. Well, we've kind of got our preferred landscape architect that we enjoy working with. Every now and then we might just do a straight up Google search just to do a, sort of a cold call, but that's few far in between, but over time when you

start to chase the same projects, you kind of know who you enjoy working with and what kind of subs you. More or so word of mouth, of course, like KYTC has their DBE list, things like that, but we build up a solid network to where we can just call somebody, and we know a friend of a friend who can refer us to somebody." [#37]

- A representative of a majority-owned construction company stated, "One thing that you look for when you're trying to determine who is qualified to do work is there's a pre-qualified list with the Highway Department, they have some pretty test requirements as far as they'll build with the company and make sure that they are truly a DBE or a woman-owned business. They'll prequalify them and only certain types of work that they're capable of doing based on their experiences and their resumes. And so that that's one place to go. You know, if somebody is not on that list, that doesn't necessarily preclude them from doing work for LFUCG, but it is a starting point. LFUCG, they don't you know, they'll turn up that list and say, Hey, we've got this, these folks but they also have folks that [they] will recommend or say that we've got other folks that may be you know, capable of doing the work that that you all do are fortunate that work. You know, it's somewhat limited as far as being able to do that, you know, there's just certain trades that there aren't DBEs for the work. And there's times that will maybe find a DBE or woman owned company and they don't want to quote, they got other markets they work in. So, it's been a little bit difficult to be able to find good DBE contractors that are qualified and are interested in working in Lexington. They have to be able to provide and be pre-qualified to meet a certain capacity or whether that's a certain volume or certain you know, they can provide the equipment, they provide the resources to be able to do the work. So, so that's really the best way for us to know if we were hiring is capable, once before we go into a contractual subcontractor relationship with him." [#6]
- A representative from a woman-owned professional services company stated, "It is really difficult for industries like mine who are prime consultants. It would be beneficial for companies like mine to match up with sub consultants and foster a better relationship between the two." [#AV210]
- A representative of a majority-owned construction company stated, "LFUCG's list is full of businesses that are either out of business or their contact information is not up to date. LFUCG has lists by type of work." [#WT1]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors [#11, #12, #13, #31, #FG2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I would say just in general, we don't find in this area that private sector work emphasizes WBE, DBE, nearly what the public sector does." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "The only thing on the private is that price may come into play whereas typically on the public, it's the qualification type. It's weighted more to price on the private end." [#12]
- The Black American owner of a DBE-certified construction company stated, "Sometimes you have to ... I do this, too. Sometimes you have to go with the lowest bid on the job if you want to be profitable. You've got to feel comfortable that the company can do the work. I

think that's a big thing, too. You've got to feel the company can do the work. I was never really worried about them bonding up until a certain amount because I would just cover it myself a lot of times. Especially for minorities, I'm trying to help them out and kind of mentor them." [#13]

- A representative of a majority-owned construction company stated, "For the most part, private work does not ever participate in DBE participation. For the most part that would be the owner of the project's decision, whether to put something like that in. And right off I can't ever remember that happening." [#31]
- A representative from a focus group consisting of construction companies stated, "I would think it applies to both. Sure, in the municipal, whatever government side, there are requirements sometimes, most of the time, that would benefit a DBE. But they're also out there in the private side too, especially with larger private companies. If somebody wants us to build a brewery in Georgetown, Kentucky, they're not real concerned about minority participation. But if I'm building a Walmart somewhere, I guess they would be. I haven't built any Walmarts, I've built a brewery, but not a Walmart." [#FG2]
- A representative from a focus group consisting of construction companies stated, "You're seeing a lot more procurement on the private side, the Ford Motor Company, Oval, the battery plant that was announced, it has minority participation on it." [#FG2]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. Preferred subs usually have a long-standing relationship with the prime and are responsive to the needs of the project [#17, #18, #20, #24, #28, #6, #FG1, #FG2]. Their comments are as follows:

- A representative of a majority-owned construction company stated, "We absolutely do. We have our go-to subs that we can use to... You know? People that we've used over the years, and say, 'Hey, man, I really, really need a price on this in 24 hours. Can you do it?' We've got to keep those relationships with the subcontractors because that's who makes us who we are." [#17]
- A representative of a majority-owned professional services firm stated, "Yeah, we have subs that we tend to work with a lot. It doesn't mean that's exclusive. It's, again, folks that we know provide good quality to our owners and we know we work well with. That's something that... We like to build those relationships, because again, we can help them, and they can help us, and we like that." [#18]
- The co-owner of an SBE-certified professional services company stated, "Part of it, I think, is who we're used to working with and what might give us an advantage given the type of project and the portfolio of work that, that company that we're partnering with would bring to the table. I would say, the majority of our work is just who we've worked with in the past that, we can show that consistency of the team members, as far as the ability to deliver a project on time and within budget. A lot of the consultants that we use are repeat consultants, like I said. If you've got a good experience working with somebody, you stick with them. I can't say that I've had a bad experience necessarily because most of the people, again, are people that are repeat consultants that we've worked with and that we've developed a relationship with and trust. I think, that's our big thing, is just working with

people that we know and can trust and deliver and exceed client expectations. So, I think, we've had very good partnerships." [#20]

- The owner of a majority-owned professional services company stated, "Most important is, I'm not even going to consider somebody unless I know what kind of reputation and experience they have. Period. I don't care, MBE, WBE, or any other kind of firm. The second thing is that we've got to be a good match on a particular project. Sometimes we are, sometimes we're not. That's nothing, other than experience, and direction that the firm is taking. I guess the way I best address that, is that we're looking for quality, period. People I can be comfortable with, that I know are going to do the right job, and I don't have to make excuses for, or nurse, or cover. That's not limited to any ethnic group, or any gender. That's just people who do or do not have the right experience." [#24]
- A representative of a majority-owned professional services company stated, "We have some strong relationships with certain companies, but occasionally we do have to seek others to get competitive costs." [#28]
- A representative of a majority-owned construction company stated, "We've had good and bad experiences. I think it's all about finding the right person that's genuine and they are in it to really do good work, you know, our values and our company is to do quality work and being productive and being safe. You know, we have a stringent drug policy. You know, when I think about a DBE company, they have to be able to follow the same consistency of values. You know, one of the issues that we have a DBE company is we witness some are doing drugs at lunchtime. You know, so, so our experiences tell us that some people aren't as committed to doing things, you know, in a drug free environment, or doing really high-quality work. Also, then we found, we found folks that are absolutely as committed as we are. So don't judge a book by its cover is my advice, find out what the person's values are, and that what do you know truly committed to is the way they're going to do things and make sure that they don't just say that but they live up to those to what they say their values are. And that transcends all different races, cultures, and languages. Sometimes a person that tells you they're going to do something that they just don't do it. That's what leads to the bad experiences and then you find the next person they live up to what they say will do, you know. Your contract is supposed to be the bond that makes people live up to what they're going to do. You know, they're going to provide a service, they're going to sell you a part or whatever and contract says the terms all that but you know, that's what we do is important, we get them under a contract, but that still doesn't mean that people don't have struggles and they don't need a little bit of assistance at times, you know, and we've tried to be the contractor that does that, you know, that gives them the benefit of the doubt. And then, you know, once or twice you can you can understand that when, when that's every day and they're not they're not doing what they say and they eventually don't live up to the terms of their contract; a whole lot of our projects are very time sensitive. You have to bid to have it done by a certain date. If you miss a good day in the summer, when the weather's good. Your chances of doing that diminish quickly. So, dependability is incredibly important value. What we do, you have to be there, have the workforce there and be ready to go on time. And unfortunately, sometimes, on our schedule, they are not there." [#6]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I know for myself, past performance is huge when you're meeting a

GC. They can verify that, 'Hey, you did X, you performed it well, you finish up the project.' And I think if you establish your past performance, any GC is going to take you seriously if they can verify, and that will get you at least to the table. And then beyond that, you've got to have competitive prices." [#FG1]

- A representative from a focus group consisting of construction companies stated, "Keeping a written record of who you work for and that foreman or that estimator, if you can give a list, a simple list like that can really help get you a job. But if you're just starting out, go to these seminars, DOT, transportation puts them on, your various other small business administration is a good place, just any type of ... Even though it might look like it's simple and consequential, it is. If you can put that, just write it down, and then later on maybe type it in, and be able to hand it to a prime contractor, that helps. That gives a comfort too, to the prime contractor. It's something versus nothing." [#FG2]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Three subcontractors mentioned the helpful role LFUCG's programs play in finding work [#3, #13, #18, #FG1]. Their comments are as follows:

- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "They [LFUCG] don't send it out, I request it. And it's actually public information because those people have signed, they're on the list kind of to get the information. And so, we have sent emails to the potential prime saying, 'Hey, we'd like to be considered to work on this.' And then also LFUCG has shared our name with primes who request that, and that's how we got the initial contract as a subcontractor." [#3]
- The Black American owner of a DBE-certified construction company stated, "A lot of times I'll get calls from ... I'm just one of those guys who's in a position a lot of times when people kind of push for minorities, I will get a call to come and look at a job. I've just been lucky because I've been doing this for about 26 years and known. I was a known in the industry, I guess, as a minority contractor, especially on the federal side. And another thing is too, I'm on these registers as a minority contractor and that helps. When they have to go looking, they can look down, 'Oh, here's a contractor here. Oh, here's what he can do. Here's what he did before,' so that makes a difference." [#13]
- A representative of a majority-owned professional services firm stated, "A variety of different ways. A lot of times, it's people we've worked with before that we know do excellent work. That's what we like to see. And then, sometimes there are some MBE or WBE requirements. And so, a lot of times those are folks that we have worked with before, so we like to continue working with them. And then other times, the list that's provided by the city is really helpful in us being able to find folks. And that's nice because then we get to work with those people and continue to work with them in the future. Any time that we can, yes." [#18]
- The Black American male owner of an MBE-certified goods and services company stated, "I was invited from a Minority Business Expo to submit for an RFP." [#FG1]

Five subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because of they are known in the industry [#11, #12, #14, #29, #FG1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "We've seen that actually on Fayette County Public School work where the architect is selected and then sometimes shops their consultants after the fact. That's happened once or twice that we've kind of seen and we've ended up, I think getting the projects in a couple of those cases, probably because of the WBE designation that we have. And, of course, we like to think that we're very good at our jobs, too. But that being a differentiator has helped we have had a few folks seek us out because they've seen us on the WBE list." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "It all depends on the scope of work and definitely, definitely teaming, because we don't have all the expertise. So definitely, if there's a component that a DBE is strong in, like with [our firm], we were very, very strong in drainage. So, a lot of consultants use us for drainage, and surveying. We had the surveying capabilities." [#12]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I think, like now, all these firms, they email me, and call me about doing work, you know? But they're just trying to get, to say that they're looking to hire some minorities. What happens is, I'll go, and go meet them, and look at the job. It might... Say, for instance, it's redoing a pump station. We got an electric division, and we do drywall and painting. He'll say, 'Hey, come look at this pump station.' I'll say, 'Okay.' I'll go look at it, and the only thing he wants me to do is demo the drywall off the walls in the pump station. He's going to do the electric. He's going to put the drywall back. Then, he says, 'And send me your certificate.' I'm like, 'Well, I don't want to come over just to demo the drywall.' You see what I'm saying? Usually, we work for a couple of other DBEs, or like guys that see us down at the... See us working somewhere, they'll grab a card, and say, 'Hey, we've got some lights need hanging.'" [#14]
- The Black American owner of a construction company stated, "Sometimes I do, but they don't tell me that's what they're calling me for. So, they don't treat it as a minority deal." [#29]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I do know for a fact that with the city, being woman-owned helped for my first job. I think it was an RFP that I respond to for design work. But with most agencies or anything like that, it's been either introductions, or I'm not afraid to call somebody up and say, 'I'd like to come meet with you.' That's been much harder, obviously, here recently. The absolute best way has been word of mouth referrals." [#FG1]

Twelve interviewees said that they get much of their work through prior relationships with or past work performed for primes. They emphasized the important role building positive professional relationships plays in securing work [#11, #12, #13, #21, #27, #31, #33, #37, #5, #6, #FG1, #FG2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "It is the relationship either with the architect who is usually the prime or the entity. So, as an

example, if it's UK and we've done a lot of work at UK, it's that relationship either with the client or the architect." [#11]

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "It's back to the relationship thing. Partnering conferences, the Kentuckians for Better Transportation, KBT, just being involved in ... I would strongly encourage folks, DBE, to be involved in ACEC and KSPE and Water Professionals. I just got back from a conference in Tennessee, Water Professionals conference. Huge turnout down there, but to have exposure at those venues are big, and then you can follow up on your own after that. It's relationships. I keep coming back to that word, but it's people knowing you, having a history of knowledge of your work, and then the key is, once you get the work, is to deliver it because if you mess up, you're going to lose that opportunity in the future." [#12]
- The Black American owner of a DBE-certified construction company stated, "I think with me, a lot of times I get calls. I get a lot of calls for companies just asking me if I'm interested in bidding this job or ask me if I'm interested in taking a look at a job. I get a lot of calls on that, that way." [#13]
- The Black American owner of a professional services company stated, "Word of mouth. I've been in out here construction for a long time and everybody kind of knows everybody. Well, my [other] job. When I worked in the construction industry as a project manager, I met a lot of the people." [#21]
- A representative of a woman-owned professional services firm stated, "It's very unique in that term. We've all worked with each other for so long." [#27]
- A representative of a majority-owned construction company stated, "People that have used us in the past, they know that we come in and we do the job correctly and there's no issue. We definitely have people that use us exclusively to do paving." [#31]
- The woman owner of a professional services company stated, "I find that whenever I get a referral, I walk in the door and within five minutes I've got the client. When I try to do cold calling instead of meetings, it's just a nightmare." [#33]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "It's just relationships we've built, and they've enjoyed working, prime contractors have been, enjoyed working with us. And so, I think it's times where they want to put us on the team where it might not necessarily make sense for our skillset, but they've been willing to say, hey, we'll at least train you on this skillset, just because we enjoy working you and the partnership. And so that, I think it's a win-win for everybody." [#37]
- The owner of a WBE-certified construction company stated, "I've acquired clients, and clients that I have worked with the entire time, and that has caused growth because those clients, as I did work with a general contractor, if some of the people from that general contractor went to another firm, often they would call and say, 'Would you mind giving us a bid on this?' Or 'Would you do this?' And as the contact basis has grown, so has the business." [#5]
- A representative of a majority-owned construction company stated, "I would assume it's a small world so if you don't do well on one job, the word gets out and that it's kind of hard to

get an opportunity after that. But you know, there are people who would say they don't get the initial opportunity." [#6]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "I do know for a fact that with the city, being woman-owned helped for my first job. I think it was an RFP that I respond to for design work. But with most agencies or anything like that, it's been either introductions, or I'm not afraid to call somebody up and say, 'I'd like to come meet with you.' That's been much harder, obviously, here recently. The absolute best way has been word of mouth referrals." [#FG1]
- A representative of a Black American-owned WBE- and MBE-certified construction company companies stated, "Since this construction and the failure rate is so high for any new business, especially construction, once again, it's that relationship. If you push that relationship, no matter how simple or small it might be, that is by far the best bet, because mistakes happen. You have to get to the job site. You've got mechanical issues there, a vehicle, if you're small. But if you get to know the contractor, certain things can be understood of say an accident [such as] people getting caught in accidents and not being able to get to the job site for a couple of hours." [#FG2]

Seven business owners reported that they actively research upcoming projects and market to prime contractors. Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services [#11, #12, #15, #30, #32, #37, #FG1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "We do, if the project suits." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "By marketing, reaching out." [#12]
- The Black American owner of an MBE- and DBE-certified construction company stated, "We try to, we go to pre-bid meetings. We talk to them about it, we try to give them capability statement to tell them what we can do and try to develop some partnerships." [#15]
- The male co-owner of a woman-owned professional services company stated, "[Say for example a locally owned construction company] is doing the construction on a project. If the archeology and environmental stuff got roped into the entire contract, then we would've had to gotten ahold of [that] construction company and then hope that [they] will hire us as opposed to dealing directly with the city. So that's where most of our marketing comes from, is going to these conferences and making the connections, following up, and just beating on these doors until someone hires us. And then hopefully, we do a good enough job that they say, 'Hey, we have more work coming down the pike.' Initially, we liked the just get an opportunity to provide a bid, but our eventual goal is to get to the point where we can have that relationship that if, for example, [a prime] had a contract and they used us enough times, then you guys would pretty much know what I would be charging you guys to do a certain amount a thing. That's the ideal relationship that we're going for." [#30]

- The owner of a majority-owned construction firm stated, "I ask one company, but they don't need my help I guess. They can support all the projects they have." [#32]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "At those big networking events, we try to put ourselves in front of the big prime consultants and so we just market our services to them." [#37]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I do know for a fact that with the city, being woman-owned helped for my first job. I think it was an RFP that I respond to for design work. But with most agencies or anything like that, it's been either introductions, or I'm not afraid to call somebody up and say, 'I'd like to come meet with you.' That's been much harder, obviously, here recently. The absolute best way has been word of mouth referrals." [#FG1]

5. Subcontractors' preferences to work with certain prime contractors. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Nine business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly [#11, #13, #14, #15, #23, #26, #3, #6, #9]. Examples of their comments included:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Sure. I mean, that doesn't necessarily mean that you won't work for others, but there are certainly some primes that are fair when it comes to fees and more organized for a variety of reasons. There's only one that I can think of and that is because they tend to marginalize us. They will use us as a name or percentage or what have you, and then give you a little tiny bit of the work when you could have done performed very well on more of it." [#11]
- The Black American owner of a DBE-certified construction company stated, "A lot of times you do want to work with some of these bigger prime contractors because these guys can get the work. They can get the big jobs the last two or three years, four or five years, whatever. They can get these bigger jobs, and they do need people all the time. Because these are the guys that are doing these 20-million-dollar jobs, and they have access to I guess jobs down the road that's coming, also. So, you want to do a good job so you can try to pick up work down the road with them, to continue the jobs coming in. There's several primes I wouldn't want to work with, because first of all if you're a small minority company you don't want to go into a job that you are not going to make a profit off of. You don't want to go on a job, and especially if you're a small company and they know you're a small company, and they choose you to do a job to work with them, and then the job is not going to make any money. And then once something goes south, you lose, you go broke. I know several companies, small minority companies, that happened to. You're in the game to make a profit, and they don't need to hire you from the beginning if they don't think you can do the job." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "They're pretty much, once you get a rapport with the prime, it's just like... I think all of it is who you know, and who you're comfortable with. Once you break the ice, and you start working with them, then it's really not an issue." [#14]

- The Black American owner of an MBE- and DBE-certified construction company stated, "The other ones they don't care, you need to put that, into being reported, the other primes and that I can name off or that I've dealt with, they don't really care about working with minority contractors and trying to establish relationships with them. They have not put themselves in a position." [#15]
- A representative of a WBE- and DBE-certified goods and services company stated, "Sometimes it just comes down to personality. Do you get along well with the person that makes the key decisions at the client that you're working with? Are they difficult to work for? Do they have unrealistic expectations from workers? Sometimes it just depends on the people that you're working with if they're relatable." [#23]
- The owner of a WBE- and DBE-certified professional services firm stated, "The only reason I'm able to do well on the statewide aviation contracts is because my prime is an advocate for me as a DBE and as a person. And they say, 'This one's going to take four months. This one's going to take eight months. Make sure you put enough money in there for your cost of your line of credit, because this one will take four months, and this one will take eight months.' And they will tell me. The engineers won't give me the time of day, but the contractors that are building these giant projects think that we are the cat's meow. We have decided to stay focused on those clients that treat us well. And a big part of treating us well is even, is net 30. If you can't net 30, I don't really want to do business with you." [#26]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "There's got to be a contractor and then subcontractor. And as long as you know who's in charge, then it can work. I mean, I'm happy to be a subcontractor as long as we know the roles, or to be the prime and work with other people. But what has happened before, sometimes in the business is people don't have the same philosophies and that can get kind of sticky." [#3]
- A representative of a majority-owned construction company stated, "Our relationship with them was very good. They wanted us to work that fast and get the building up and building the site development and everything around the building by having a fast expedited manner and we liked working with them, but they definitely challenged us we were able to meet their goals." [#6]
- The Black American owner of a DBE- and MBE-certified construction company stated, "[When a large local construction company] says when I proved to them that we was a real minority contractor and we did the work, the president, said, 'Listen, you need to talk about getting bonded now. Listen, you need to talk about getting bonded now and we will help you get bonded. We will use our bonding company to get you bonded and we will go in there and tell them all about you. Coming from a company like this, [a large local construction company], when we speak to the bonding company about you, it's going to carry a lot of weight. We will do that'. I didn't bring it to him, he brought it to me. The city could have the same power if they choose to. They can say that 'We will do jobs only up to 75,000 or 100,000.' They could if they wanted. [The large local construction company] offered to do it but I ended up not even needing [them]. [They] didn't even know I was bonded until way later on. I did it on my own because... Here's why I did it on my own, [that large local construction company] has been real good to us, they let us use their yard. These people have been good to us. The city ain't been so good to us and I'll get to that in a minute.

[This large local construction company] has extended their hand to us in several different ways and to now we have formed a really good relationship. But let me tell you a little bit about that. I was up there until the city and them telling the state, they're telling [them], 'You need to use a minority contractor on these goals.' Well, this is important. I mean, this is longevity right here. This is important because everybody says what they want to do, but when it costs a little bit more money, then they don't want to do it. [This large local construction company] is... Let me tell you something. [They] have been helpful. I want to go even farther. First and foremost, I give it to God, but had [the large local construction company] not been who they are, me and you would not be having this conversation today. I would not be able to help the people that I have helped had it not been for [them]." [#9]

Subcontractors discussed the effect working in the public or private sector has on their decision or ability to work with certain primes [#11, #14, #15]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think private sectors are all kind of relationships and networking and in that." [#11]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "A couple of them [primes that use us on public work] do [use us on private work], yes." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "A lot of the private work is not, they don't have the opportunities to do that. Like the pre-bid meetings or networking like that, they just send you information. So, there's not a lot of opportunities to communicate with them, unless, I mean, just by signing up for the bid rooms and putting your qualifications in there, that's the way you can contribute. I mean, that's the way they find out who you are it's only one prime that we in 15 years that we work with consistently like that [both in public and private sectors]." [#15]

F. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

1. General experiences working with public agencies in Kentucky;
2. Barriers and challenges to working with public agencies in Kentucky;
3. Best and worst practices of public agencies in the Kentucky area; and
4. LFUCG's bidding and contracting processes.

1. General experiences working with public agencies in Kentucky. Interviewees spoke about their experiences with public agencies in Kentucky and the Lexington area.

Twenty-one business owners had experience working with or attempting to get work with public agencies in the Lexington area and in other places [#1, #10, #11, #13, #14, #16, #17, #2, #20, #23, #26, #32, #33, #5, #7, #9, #AV, #25, #27, #28, #FG1]. Their comments included:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Typically that's a very hard competition of bidders. It was decent. I probably got beat on the bid. I was probably very competitive. Say if there was five bidders, I was competitive with two of them, and one of them was probably below us." [#1]
- The Black American woman owner of a goods and services company stated, "I don't know who to talk to." [#10]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "The notification process I think is pretty good in my experience. We always get notified through IonWave. As long as you're signed up, you get everything that comes across." [#11]
- The Black American owner of a DBE-certified construction company stated, "I just think that they need to get a ... And they are getting better about this ... They need to get their list of minority contractors, and they need to send them out emails when the jobs are being bidded, or walk-throughs and RFPs and stuff. I think they do do that, and they're kind of getting better at doing it over the last few years." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Yes. [The people at LFUCG] do a great job, and let you know about the projects." [#14]
- A representative of a majority-owned professional services firm stated, "It's gotten much better over the last five to 10 years. I routinely get on their website to look for things. I'm very impressed with how easy I can find things, not just current RFPs, but old ones. Just doing that today. Okay? I've worked with the city a lot, as you know, and I think their processes are pretty good. I get email notifications when things come out. I'm never surprised by something. I usually get it in plenty of time. They're timeline for responding is typically reasonable. So, no, I can't... I think it's pretty good actually." [#16]
- A representative of a majority-owned construction company stated, "It's very straightforward, very streamlined, very you know what to expect from one job to the other." [#17]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "There's one company, one or two companies that get everything. They get everything. It becomes pointless in trying to compete around here, and that's why all of our work is in Louisville." [#2]
- The co-owner of an SBE-certified professional services company stated, "I've been to the minority [meetings], I've been to those. I don't know whether they call them conferences or whatever, but I've been to those. I've reached out, at least, to do re-roofs and things like that. I think, we're on the list to do some smaller projects. We did the [project]- like I said, we did the [project] with LFUCG but they seem to work with folks that they've got a history with I think that there should be an attempt for them to really look for new talent. I think, it's been tough for us. I think, the proposal process, it's not from lack of trying. We've done a lot of RFP responses. Like I said, the best feedback that we've got is to just try to get on some smaller projects [and] contracts, re-roofs, window replacements, things like that. So, that's where we are right now but it's been tough for us to break that barrier, I think." [#20]

- A representative of a WBE- and DBE-certified goods and services company stated, "I get the bids all the time and trying to fill some of those positions. Sometimes we get out bid, but it's been a lot of infrastructure right now. So, we haven't had a lot to be able to get into." [#23]
- The owner of a WBE- and DBE-certified professional services firm stated, "Lexington hasn't hardly put anything out during the pandemic. And they had a variety of contracts for the stormwater and for transportation where they prequalified and set up a whole bunch of different firms, and then they would pry-shop you really bad, see who could get down to the point where they were going to buy the job. And since Lexington hasn't put any projects out in a long time, I don't know really what's going on with that. Again, it's the primary A&E departments that are the problems, in my opinion. Parks and Rec called us and they're like, 'Hey, can you do this survey?' And it's the second time they've called us to do a survey. And we're doing surveys for them, and I make them happy, and we get paid in a timely manner. Those other two are so bloated that they make the process more cumbersome than it needs to be, especially in the payment arena. It's too many people, so it's too many touches. Both of those departments [within the City] have so many people that came from large entities, that they don't think that any small business can actually produce a project. They think that small firms can only be subs." [#26]
- The owner of a majority-owned construction firm stated, "I think I can bid on the job right now. I just don't know where to go, what website? Where do I go to bid on a job? Where do I find that job? Only thing I knew is I can go Craigslist, Facebook, and post that I can do work." [#32]
- The woman owner of a professional services company stated, "I heard that they do bidding on stuff, but I've never... I would love to try that. It's just that I've never had any information on how to do that or anything. I know that one printing company I used to work at, they were minority, he was an African American guy, and he was able to get certain jobs or bid certain jobs for that reason. That's all I know about it." [#33]
- The owner of a WBE-certified construction company stated, "I don't know how I would do business for LFUCG. I've never been invited to a bid or been part of any process." [#5]
- The Subcontinent Asian American woman owner of a professional services company stated, "That will be really helpful to grow, to bring some business back to Lexington." [#7]
- The Black American owner of a DBE- and MBE-certified construction company stated, "But she says, [Interviewee], why don't you do, why don't you guys start just bidding straight with the city? Why don't you guys start doing that?' And I was like, 'Yeah, we'll bid some with the city.' I said, 'That'd be great.' And she says, 'Yes, because I think that would be really good. 'We really just got a couple big projects we're going to get on. We're hoping that they don't get pushed back. We're keeping guys working. It's just been pretty tough. I mean, we've been on the go a lot, but I want to start business straight with the city.'" [#9]
- A representative from a majority-owned professional services company stated, "I tried and submitted work to Lexington but stopped submitting due to not being a minority. Not worth our time submitting to projects." [#AV37]

- The Black American owner of an MBE- and DBE-certified construction company stated, "On public side it's pretty much all the same, format a paperwork, putting it in. I bid work with the state, bid work with LFUCG, bid work for the public school." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "So, in terms of public agencies kind of statewide, we do a lot of work for the Finance Cabinet, and I think, in several of the universities and colleges around the state, I think those oftentimes are very relationship based. And so, you need to get that foot in the door somehow. And sometimes that's through as a WBE on somebody's team. And sometimes that's through master agreement at work or seeking them out and meeting with them. A lot of times, it's just, I'll use the Finance Cabinet as an example. They work with certain firms all the time because that's who they're comfortable with, who understand their processes and perform well for them, and I think that we fall in that category. There are other entities that are harder to get a relationship established with. I always think of this in terms of Louisville, and we've started to make some inroads in the last few years, but whether it's Jefferson County Public Schools, which we finally have a project with them or U of L or even Metro, that's kind of a difficult market to crack, even though it's a public sector and we have an office there. That one has been a little bit more challenging. I think maybe a lot of that is just the typical barriers of they just don't know you yet. We don't do a lot of work with the Transportation Cabinet. And if we do, it's typically as a subconsultant. I find them to be a little bit more of a different animal in the way they do everything. So, I think that's just lack of familiarity maybe." [#11]
- The co-owner of an SBE-certified professional services company stated, "It's hard when there's price components and you're so close with your fee or your bid that you put out there. You're so close with whoever won it. A lower fee doesn't always mean it's better work. In some cases, can end up meaning more work if who you're working with isn't... If they drop the ball in one way or another. So, being able to get in and talk about how we can provide that superior service and how we will work on that relationship and be dedicated to that project, I think, is a step above the just written proposals." [#20]
- A representative of a WBE- and DBE-certified goods and services company stated, "We have gotten bids from the Small Business Administration. It was kind of messed up there for a while. I think there was a lot of changes in their inner workings of their office, but now we've started getting their bids and stuff again. They're getting more information now." [#23]
- A representative of a majority-owned construction company stated, "When they come, they just come in the store and buy the parts, or they make call and purchase for." [#25]
- The owner of a WBE- and DBE-certified professional services firm stated, "Carrollton Utilities is just fine, Springfield Utilities is just fine, other private sector people are fine, but yeah. Other folks, other utilities treat people just fine. It's because Lexington and some of these other places have gotten so big and they've just been doing what everybody's always been doing, they've ended up with a very broken system. Because if you always do things the way that it's always been done, you are probably not using your brain." [#26]
- A representative of a woman-owned professional services firm stated, "Another problem we have is a lot of times, when you go out in their ILEC area, Incumbent Local Exchange

Carrier, is Jackson county. That's fine and dandy, either they or Jackson Energy owns the polls. They've got a great working relationship. When you get outside of that, see, they're been building CLEC, Competitive Local Exchange Carriers areas. When you get into that, then you have Kentucky utility poll line. You may have some other, AEP pole line, and then you've got Windstream or AT&T. AT&T is very prohibitive about allowing others on their calls. They make it very difficult and expensive." [#27]

- A representative of a majority-owned professional services company stated, "It's a combination. Sometimes they know our reputation. We have called, said we're interested and then bid on it. There's a couple of them that we've got that are no-bid contracts." [#28]
- The Subcontinent Asian American woman owner of a professional services company stated, "Yes. Frankfort in the state of Kentucky. … I have worked with the SBA during the process of recent PPP loans. It's the kind of businesses that are conducted in those states are more versatile, and at the same time, accessibility to some of these. I have been registered in Washington State and the print material that has been made accessible through the websites itself is much more than what we have here. There is one common place that provides you all the information across the state." [#7]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "We worked with University of Kentucky, Fayette County public schools, University of Louisville, and some different things. We never worked with the city, but we worked with a lot of the other big, larger brands in the area." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I have done business with Fayette County on numerous occasions with contracting food services for various entities. The Red Mile Daycare Center, and some other stuff. And then, we do some other of the smaller municipalities, which are one-time events, Chamber of Commerce events, and so on and so forth." [#FG1]

Sixteen business owners described their experiences working with or attempting to get work with LFUCG specifically [#2, #4, #6, #7, #11, #12, #15, #18, #20, #24, #26, #28, #29, #FG1, #FG2, #PT2]. Their comments are as follows:

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We got connected to an opportunity through LFUCG, for [a] bid. And they followed us up, LFUCG Diversity Staff called us up and said, 'Look, we have someone, we know you have trucks, we heard someone, someone approached us about wanting to find a company, minority-based company to partner with, and bid on this together.' We connected and we went after that. To make a long story short, we won that bid based on... I don't know what it was based on, but part of the incentives was this company had been trying for 20 years to get this bid and couldn't get it, and they won it with our help. … but we were raising concerns because LFUCG paired us up, and paired us with the expectation of supporting us, for this to move from minority and non-minorities, and so I expect... The expectation was that they (LFUCG) should be helping us, support, and not allowing this prime to do what they were doing to us. LFUCG threw their hands up, and they were like, 'We don't have nothing to do with it. Good luck. Have a great day.' What they did do, some of the people who were passionate could clearly see what was happening, because the company clearly,

severely underbid and saw us as a way for them to win, and when they won, to utilize our sex and color as a means to go back and renegotiate the bill LFUCG, they weren't having it. They were like, 'Look, you bid that.' Once they saw that they couldn't utilize us to get that, they began taking money from us, squeezing us off so that they could bring on this other company. LFUCG, the resources that were really passionate about diversity, they would stay on that prime and pay us. But they [the prime] paid us what they wanted, not what they owed us. And they currently owe us over a million dollars. … based on how LFUCG has handled a lot of minorities through the primes, it's like a parent-child relationship. It's like if I was your child, and somebody came to visit or somebody came to the house, and we was like, 'Okay, baby. Go with them. Mommy got to get something now, baby. You go with them.' And that child ends up being molested, hurt, or something like that. That child is going to lose its trust in who you choose to want to send them off, and I'm saying that's with the minority population in Lexington, the way LFUCG has handled, even though contractually, they're like, 'Okay, that's the prime, we're hands off.' But we've encouraged these relationships, And we're mistreated. It's going to be really hard for us to build our trust in you because of how long you handled us this way." [#2]

- The owner of a majority-owned construction company stated, "The way the pendulum is swinging now is a lot of the public agencies hand pick a construction manager, no bid, they just hand pick them. And then that construction manager subs out the work, but generally on a public job, they still have to bid it out and they still open the bids and read them aloud. And if you're low, you get the job automatically. So, they hire a construction manager. He goes in there and bids out the packages and we get one of the packages. They read the bids aloud. I'm low. I get the job, just like as if I was a prime, only I'm under him. So, a lot of the bigger work, I'm a sub technically, but it's not the same because they're still reading the bids aloud and giving it to the low bidder, and we have to bond it and everything else … I like the construction manager jobs and we've made a lot of money doing it. They generally can't self-perform. That's one of the rules. If you're dealing with public money, the construction manager has to sub everything out. They can't be given a job and then turn around and do it themselves. That's not in the public's interest. So, they hire the construction manager just to be a manager and then they make the guy sub out everything. That is not always the way happening nowadays. I've always done well with construction manager except the city of Lexington, or Fayette County Urban County Government has... I don't know how else to say it. They have decided along the way to ignore the public law about self-performing and they've allowed a construction manager to be handpicked without bids and then turn around and self-perform. That is a violation of the law. And they ducked out of it by saying they never adopted that law. Well, the law says you don't have to adopt the Model Procurement Act, [it] does not have to be adopted in the form that it was written in the law. But then if you don't adopt it, you got to adopt some other rule that says the same thing. Or you have to have a set of policies that essentially do the same thing. And they just hide behind the fact that they never really technically adopted the policy and then they did it again [on a large project]. They advertised for bids, proposals, from construction managers. At the meeting they showed on the overhead projector, this is the contract we're going to use. And the title of it was, 'Agreement between owner and construction manager, where basis of payment is cost plus a fee,' that is, the traditional construction manager. They took proposals for construction manager. And then after two months of haggling

around, they issued a contract for general contracting, which is not what they advertise for. They never advertised that job as a general contractor job, but they gave him a general contract, which meant he could pick whoever he wanted to do the work. He handpicked all his subs, and he didn't have to meet any kind of go... He didn't have to bid anything. He just did whatever the [expletive] he wanted to do. And it was illegal for two reasons. One, he decided to self-perform huge parts of it. So, he's got his people down there making tons of money, never having bid the job. So that whole [project] was never bid, it was just handed to a guy based on a proposal with a guaranteed not to exceed price, which was not that uncommon. And they just turned the guaranteed not to exceed price into his bid price, and then just wrote him a contract completely different than what they advertised for. I wrote a letter to the person they had running the project. He never replied. I wrote to the Attorney General ... And he never replied, and after a year of hounding to try to get something done and they're busy doing the job, and they wouldn't reply. They said they didn't owe me an answer because I'm not a legislator. They just pretty much stiff arm me. So, I got [a council member] to write the letter himself because he was on the council and he said, 'I want to know this myself. I'm a legislator. I deserve to know.' So, they, at that point, the city called [the council member] and suggested that maybe that they approached it and tried to get this worked out and they didn't do anything. … so, it's all just who knows who and none of it was bid publicly. None of it, none of that job was bid publicly. … the convention center, Lexington convention business... That is a subsidiary. I mean down there at the courthouse, they did the same thing and they said, 'Oh,' the city said, 'Oh well, that's not really us. That's the courthouse corporation.' Yeah. But if you look at the courthouse corporation, all the board members are city employees and it's their money. So, the only reason they put it in the courthouse corporation was so they could sell tax credits and the city government can't do that. So, they created a corporation, but then they hide behind it to do something essentially illegal. … this isn't right. They don't want to hear it." [#4]

- A representative of a majority-owned construction company stated, "I think Fayette County, for the most part, does a good a good job and contracting and doing a good job, creating a level playing field In the most part, it's very good. I just think that they don't quite get the nature of you're going to have a DBE, how they can go about given the contractors that are doing the work the opportunity to meet that goal." [#6]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think [LFUCG's] pretty clear in their mission and anytime that I have pursued a project and needed the current list of WBE, DBE businesses, I can email [the MBE Liaison] and I see it within the hour. So, they've always been, in my experience, really responsive when I had any questions or anything to that effect. I think maybe once we get past COVID, I've mentioned those kind of outreach events that LFUCG and Fayette County Public Schools, too, host. I've enjoyed going to those and meeting folks. Outside of that, I would say the city really, in my personal experience, does a good job of illustrating the resources that are out there and being responsive and everything. So, I mean, it was honestly the city that really helped us with the certification process in general and kind of said, 'We recommend you go to WBENC first.' One thing that LFUCG does with their projects, they have their subcontractor monitoring, and you have to check in and tell them, 'Yes, I've been paid, and it was in a timely fashion,' or what have you. I think they do a better job of tracking that really than anybody else that we work for. LFUCG that I would say about that because they do a

really good job of sort of pushing out projects and information and letting the community that's that signed up know about things probably better than most of the other entities that we work for." [#11]

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think they do a good job of ... I get emails all the time of opportunities. I know COVID has impacted some of those things with what used to have some mixers or get togethers or like a job fair, and COVID has certainly impacted the personal part of that. But I think given the circumstances, they've done a good job." [#12]
- The Black American owner of an MBE- and DBE-certified construction company stated, "They have a commitment, but there's no, pressure or accountability given to the larger contractors to achieve the goals that they have set forth." [#15]
- A representative of a majority-owned professional services firm stated, "They're really good about supplying us with great instructions and resources that we can use to find sub consultants and they're... I don't know, they're very easy to work with. Like I said, they usually have very good, clear instructions, very thorough. And then, I think that they respond back to us fairly quickly, which we appreciate." [#18]
- The co-owner of an SBE-certified professional services company stated, "... recently, with them. I think that after debriefing with them, and [staff]'s been working on some RFPs with LFUCG, has led them to tell us that we need to be pursuing the re-roofs and smaller contract work with them and hopeful, work our way up into larger projects with them. So, we're chasing two, three of those just, right now. … it's not like we've done a ton of work with them, but I think, with any public project, the biggest part of the contract that you can get head on, I think, is during construction. I think that the, the process of working through initial contracts, working through the initial phases of the development of a project, are usually pretty straightforward. I do think, sometimes, not just with LFUCG but with DECA and other state entities, that the expectation is a little too much on construction administration. I think, It's a little too much I think that most of the time we're prepared to show up monthly do it, but you get into bimonthly or weekly expectation of showing up or attending conferences. Sometimes, you can get over extended and obviously, you want to deal with the client once, but you can really get hurt, I think, sometimes, in that. So, anything, I guess, that I would say, as far as contractually, would be able to put expectations up front as far as what the construction administration responsibility is. Set those expectations very clearly and if it is bimonthly meetings, they need to be able to pay for those services and not expect that to be 20 percent of a 6 percent fee that's fixed. They would be able to pay additional for that." [#20]
- The owner of a majority-owned professional services company stated, "There seems to be a preferential attitude on the part of a lot of municipalities, particularly Lexington for a period there, where in order to try to level the playing field, if you would, we felt that we were being looked upon with a certain level of bias because we weren't MBE or WBE. That may be just because we weren't awarded any work. We've never had a Lexington job, by the way, the city of Lexington. Never had a job awarded from Lexington. We go back all the way to the point, where we understood why. Because we weren't willing to play the game and dance the dance. Watched politics dominate how work was awarded. Through the periods where there was that effort to try to, again, gain more parity and make it more equal for all

people to participate. But in all that span of time, we've never done a city of Lexington job. The obstacles and the barriers there, I'm only supposing. Because after getting turned down two or three times, and not having any communications, or any idea why we weren't even considered, it was like, 'I'm moving on. It's a waste of my time.' So that's where we went. Other than that, there was, I really don't see major barriers." [#24]

- The owner of a WBE- and DBE-certified professional services firm stated, "When you're doing work directly for Lexington, for the General Services Department, they treat you fairly and they pay you in 30 days with a check. Plus, sometimes it's two weeks. They treat you very fairly if you're in general services. But if you are a sub to something in the Engineering Department or the Environmental Services, yeah, 90 days if you're lucky. And you can't count on it. The Planning and Zoning Department doesn't have a licensed surveyor, just like most places in the state. And so, they try to tell surveyors that you need to adjust the plat, and that's just not how it works. And that, to the point that, for me, I have to go to the State Board of Registration for Surveyors and say, 'Look, they're trying to get me to do this again.' Because I'm supposed to have a note that says, 'This plat complies with KAR 180.' And they're like, 'Well, it's Lexington. They're just screwed up, so you can change your note to say, 'This plat does not comply with 180, but we provided a separate drawing to our client that does meet that.'" [#26]
- A representative of a majority-owned professional services company stated, "Years ago, we use to [work with LFUCG]. They just either didn't have the work, or they moved on to different consultants." [#28]
- The Black American owner of a construction company stated, "They contacted me, and I was working for [another company] at Lexington, Kentucky, that does a lot of work for them. I was working for them. But then I went, I got on my own again. Then they contacted me, because they knew I knew how to do it." [#29]
- The owner of a WBE-certified professional services company stated, "Typically in Lexington, I think Lexington procurement is predominantly driven by two factors, past performance with them, and then they're also highly price sensitive buyers." [#FG1]
- A representative of a majority-owned construction company stated, "I don't think there's any barriers in Lexington. It's all straightforward. Yeah. I don't know of the existing barriers in Lexington. Lexington's always made an attempt to help DBE subcontractors, DBE businesses. I don't know what barriers [other] then what any other city would encounter. We can talk to people in Lexington. I can pick up the phone and call a procurement officer and talk to him, call him by his first name, he calls me by my first name, we know each other. 'What's your problem? Just tell us what it is,' and they're very open, which is a good thing… The engineering department in Louisville doesn't even communicate with the diverse works program in their organization. Lexington is very connected. Procurement, engineering, they all work together, and that is the way all organizations prosper, by working together. That's why we're having this thing today, because you want to know what's going on. You want to know, let's talk to each other." [#FG2]
- A representative of a Black American-owned WBE- and MBE-certified construction company stated, "When I was at pre-bid and my audio was not working, and the engineer saw my name go through, he's said, 'Yeah, I'm familiar with them.' I'd never met the guy, but

he's familiar with my name going through and he mentioned it, and something that small. Yeah, I really appreciate Lexington and their demeanor towards minority participation in public works projects. I really appreciate it." [#FG2]

- The Black American woman owner of a professional services firm stated, "Because we weren't matched up with the prime in LFUCG we were really expecting more support. But instead, the prime obtained more weight, would go back, say false things about us to the point that LFUCG leadership, or some of them that were on those projects began to defame us, say very negative things, though the data did not support it. We delivered and did just as well as the larger company, if not better. So, these are the types of things, not getting the support from LFUCG, and they may have had legitimate legal issues prior to placing the effort on helping minorities, but that was a big concern, and it still to this day as impacted our company and impacts our company." [#PT2]

Twelve business owners described their experiences getting paid by public agencies in Kentucky [#11, #12, #13, #20, #23, #26, #27, #30, #37, #7, #8, #FG1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "The public sector work is much better regulated. It is a much fairer, more level playing field. And that's across the board with the larger public entities, like the state and the larger municipalities in the state. You know that you are going to be able to negotiate fees, you're going to get treated fairly, and you're going to get paid in a fairly timely fashion. And while they have certainly favorite people that they work with that's generally based on performance and is fair." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "The big thing is to have the owner or the client, KYTC or LFUCG pay timely, and they do. I mean, KYTC pays quickly. Some of these smaller towns, like Beattyville ... My gosh, they're really slow on paying, because we have a project with them right now, and obviously the subs are at the mercy of that, because we don't pay out until we get paid. So, having a good client that pays on time, yeah, that's paramount." [#12]
- The Black American owner of a DBE-certified construction company stated, "I think one of the things about me working on the federal side, you don't have as many headaches as you do on the private side. I think you get paid quicker and on time. Yeah, you don't have those problems of waiting on your money, I think especially for me. I guess that's why I love federal contracting. It's a little bit different." [#13]
- The co-owner of an SBE-certified professional services company stated, "Well, yeah. Private development. A lot of the times, if you're working, you're not sure if that day will ever come, that they end up getting financed and pay you in full. We definitely have a few of those where it's related to a project getting financed and you're working... The project that I mentioned a while ago with the zone change, their final financing was contingent on getting them a zone change and if that didn't happen... I had three quarters of our billing paid and I had a quarter of our billing unpaid and had a 100 percent of our civil engineer unpaid and they're the ones that, when planning, are doing all the work." [#20]

- A representative of a WBE- and DBE-certified goods and services company stated, "The government pays pretty good. When it comes time, when it's due." [#23]
- The owner of a WBE- and DBE-certified professional services firm stated, "Payment terms as set by the government agency, and payment terms as set by primes. Both of those are poor. 'The system is broken,' is the answer. In other states, you can get paid in net 7, net 10, net 30. And up here, I'm lucky if I get paid in 90, and it's not a net 90. Net means I can count on it. There are no 'I can count on when my bills will get paid' in Kentucky. It's all, 'Whenever the [expletive] somebody felt like processing my invoice,' and hopefully, 30 days after my prime got paid, I will get my check. But none of that is regulated in Kentucky. And two other parts of it that are completely broken are that if me, as a sub, if I submit an invoice to a prime, there is no legal requirement in the FAR, the Federal Acquisition Regulations guideline, that they must submit my invoice that cycle. They can choose to sit on it until they have $10,000 or a $100,000 to submit an invoice to the client. And the large companies totally know that, but as a surveyor and a traffic count person, we do front-end work. So often, the prime will have spent zero time on it so that since they have zero time, they don't bother submitting with just a sub invoice. If it's going to be 90 days, tell me it's 90 days and I'll make sure that I made my rate accordingly. Which is what I do on the aviation contracts. And that the only reason I'm able to do well on the statewide aviation contracts is because my prime is an advocate for me as a DBE and as a person. And they say, 'This one's going to take four months. This one's going to take eight months. Make sure you put enough money in there for your cost of your line of credit, because this one will take four months, and this one will take eight months.' And they will tell me. And a lot of other people that are private clients of mine, I ask for 50 up front and they don't bat an eye. I'm having to use the cash flow from my private jobs to even chase the government jobs." [#26]
- A representative of a woman-owned professional services firm stated, "I've heard some horror stories. The city of Monticello was wanting to build their own fiber. When you get into that, getting your payment for the work done is often difficult our clients, we send them a bill, they send us a check. It's good. When you get into government, you send them a check, and it may be three to six months before you see, or you send them an invoice and it may be three to six months before you see the money." [#27]
- The male co-owner of a woman-owned professional services company stated, "Public sector, I'm guaranteed to get paid. The caveat is when I can expect that money to come in." [#30]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "There's probably more protection when it comes to getting paid. There's probably more protections on the public side than working for private developers or on private projects. Typically, if it's on the government side or the public side of things, there's some protections for us as employees or contractors to get paid and there's usually some penalties if the government doesn't pay. But on the private side, it's a little bit harder, we've been burned, working with private developers to do plans and we'll give them the plans and then eventually, they just kind of stop showing up, stop responding to emails and when it comes to paying, but that doesn't always happen. But if I just had to choose, I think it's a little bit safer to work on the public side." [#37]

- The Black American woman owner of a professional services firm stated, "I think it would be probably the same way. I think it would definitely be the same way. So, you got to have some kind of cash backing behind you. So that would be a barrier as well to contract with the city, especially if you need money to get yourself going. So, I don't know if there are any grants or anything like that available to be able to help with that." [#8]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "My public sector clients are the most reliable. Typically, my private sector clients have their corporate terms, net 45, net 60. I just had one ask for a net 120." [#FG1]

Two business owners described their experiences getting paid by LFUCG specifically [#3, #6]. Their comments are as follows:

- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "The prime for the city of Lexington had organizational issues, it didn't really directly relate to the city, but that was very difficult. And again, they were having internal problems and then they had changes in the person over the contract who I was working with, and the relationship deteriorated with the city which made it very difficult for us, because we were providing services. And eventually they were going out of business and had not paid us. So, payment was slow and then payment wasn't happening. And the Procurement Office helped us in the process of... I confided through the person who's the coordinator with minority in small businesses, confided in her that this was happening. And so, Procurement was aware and they supported us in our effort to work with the prime to get paid. And as a result of that we were able to get paid even though it was late. And that would have been extremely detrimental to our business if we hadn't because it was substantial money. They communicated with the prime to remind them to pay. And they, in essence, worked out a deal where they would pay us for the prime because they hadn't paid the prime everything yet. And so, it decreased the risk. Yeah, so I guess my answer is yes, they helped us get paid. the reason that I confided, is because [the MBE Liaison], who is in the Procurement Office, had asked me specifically, 'Are you being paid on time? Are they paying you? That's an important thing.' So, she brought it up, otherwise, I would have been uncomfortable with it. And so, I would say that, yes, they would have a process in place. But even more than that, she encouraged me to keep her informed on that, and she touched base with me. And if she had not done that, I might not have... I would have approached them eventually, but I felt comfortable and confident that she was acting on my behalf because of the outreach that she had." [#3]
- A representative of a majority-owned construction company stated, "In our business, you've got to have cash flow. You got to be able to pay your people on time or they will not come back and work. You got to pay your subcontractors on time. The city has to pay us on time. They don't do a very good job of paying us on time. They'll produce a purchase order and set money aside. It's just the billing process is antiquated. You got to realize a company like ours that has the ability to kind of be a bank for the for the city where you know we have enough extra money in our checking the pay DBE and get their payroll met, you know this week, and then in six months, we may see our payment and the very few people that are like us and have the ability to do that." [#6]

2. Barriers and challenges to working with public agencies in Kentucky. Interviewees spoke about the challenges they face when working with public agencies in Kentucky and the Lexington area.

Twenty-one business owners highlighted the length and large size of projects, allowable profit margins, communication with decision makers, and lead time before projects are announced as challenges, especially for small, disadvantaged firms [#1, #12, #15, #16, #20, #3, #34]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I really think that you shouldn't just assume that big public jobs are always great and say, 'Oh, how come it doesn't have any minorities'. Prime example, I'll give another example, almost would be ahead of you, is the Lexington Civic Center. I was going to bid on that job. I spent a lot of time bidding on it with the first go around, prior to the current contractor getting a job. There was somebody else involved from the CM standpoint. Then I came back and was looking at it, and I had to tell myself that's a three year or four-year job, okay. Some of the packages they are looking at or bidding in a system or teaming up with majority of the work I was going to be dealing with, is on the front end. So, I was noticing that I was going to chase a million dollars' worth the work on, I think, what is that, it's hard to, a couple of a hundred million, whatever, million dollars' worth of work, and I do 80 percent of it within the first year. Well, at the same time, guess what? They hold 10 percent retainer on the job, so I'm subject not to get 10 percent of my 800,000 I bid this first year until the project is completed, or to another year, at least a year and a half down the road, or whatever your general contract can return. Some may come and say, 'Oh, this good. He's fine, honor, and let it go.' But a lot of time, legally, they don't let loose to your 10 percent until the project is closed out, because they haven't got paid their 10 percent, right? So being a smaller company I am, then I've done $800,000 worth of work, I don't want to go and get paid $720,000, and I don't get my other 80,000 until three years after I'm done. That doesn't work on my books. Well, it is spent. It's all contract, but then it's hard for me to hold my subs out two years. Accounting-wise, it doesn't really work or help for a smaller company, because especially if I get a loan, I had a roll on the account they're showing. I'm trying, but forget the terminology, they're showing that money's on hold. Anything over 90 days in accounting-wise, when my bank is pretty much wiped out, as if they've [done] work they not going to get paid for, although it's in the contract. As far as you renewing your credit line or whatever, they can't use it as revenue coming in, although it's on paper, although this contract is there. It's just how they work. So that's why it's so key to get paid when you submit to bill to get paid within 30 days. Because if not, really now what you're going to be living off of borrowed money. So now you're paying interest off of borrowed money on that anytime. I'm losing money at the end of the day, and then I have a lot of credit against that 80,000 for three years if I was an individual and say, 'Hey, is there any way possible?' And they say, 'Okay, we're free to go to LFUCG, say if they are the owner of this project, right, then why am my getting special treatment over the non-DBE." [#1]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "You know, the only drawback to that on the Finance Cabinet end are their rates need updated. I don't think they've changed their rates since the 1980s or something and that needs to be fixed because we're not paying our engineers what they made in 1988. I

mean, literally, the salaries from when I got out of school as an engineer in '96 at Palmer to the engineers we're hiring here today, they're making twice as much, and those rates are the same. So, it makes it difficult because the per diem, it's not lump sum, it's hourly. But that may not be the platform for me to say that." [#12]

- The Black American owner of an MBE- and DBE-certified construction company stated, "Most of the time, I mean, it's been okay. You don't work with public work, I mean, with public agencies in Kentucky, but again, most of the public agencies in Kentucky, they say they have a commitment to work with minority contractors or to they have a minority spend. So, when, at the end of the day, there's no teeth to that and there's no proof in the pudding, like there's none. Mainly because they don't have any requirements placed on the prime contractor as relates to minority goal and incentives." [#15]
- A representative of a majority-owned professional services firm stated, "Any problems that we've had is because it's been maybe our first time with that client, so we've got to figure out how they operate, but once we do that, it's not bad." [#16]
- The co-owner of an SBE-certified professional services company stated, "DECA has been very difficult for us to land. LFUCG, I think, DECA, KCTCS. We've had a little difficulty, I think, cracking the... just getting our foot in the door." [#20]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "One of the things that I have heard is if you get a master contract, with the University of Kentucky, or with the state or with the city, that it will help you that other people can use it. They can attach new projects to it. I haven't had a lot of luck with that, so far. The university contract, it's called a price contract. So, any organization that has to comply with the state contracting rules can use our existing contract to work with us without having to send it out to bid. But when I tell people that, they don't know how to do that." [#3]
- The Black American co-owner of a professional services company stated, "I think there's always this question of impropriety that is always looming like, 'Oh, I can't give you the contract directly because it has to go to bid,' and that's not true. If the federal government can do it, I don't see why y'all can't do it." [#34]

3. Best and worst agency practices in the Kentucky area. Interviewees shared a number of comments regarding the best and worst practices they have encountered with public agencies [#11, #12, #18, #26, #3, #9, #FG1, #4, #7, #FG1, #FG2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "LFUCG does a really good job of that. They consistently have the WBE, DBE representative at pre-bid meetings and pre-proposal meetings, and they do a good job of disseminating bid opportunities and you really just have to kind of sign up and ask when things are there. So, I think they do a really good job of administering that program. I have less experience with metro, but we have submitted on some things, and I think they do a pretty good job of it as well. It's interesting. I think the city examples are probably better at it than the state." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I tell you, Indiana DOT. Their portal, I think, is magnificent. As far as your pre-qualifications and your resume and your updates, it's all in this portal. You log in and I think that's a great example. It's efficient. INDOT does a great job of that. Lexington-Fayette Urban

County Government and the Kentucky Transportation Cabinet, they've been good. They've been great. Yeah, they've been really good. Your larger entities have been great. I will tell you that SD1, they've got some things going on up there that make it a little more difficult, but overall, the entities have been good." [#12]

- A representative of a majority-owned professional services firm stated, "I'm sure there're things that have varied, but I would say probably the best thing that I like to look for when I'm working is just really good, clear instructions on those RFPs." [#18]
- The owner of a WBE- and DBE-certified professional services firm stated, "City of Atlanta and GDOT both have slightly different programs, both of which far exceed what we have up here. I'm going to get them probably mixed up. One of them pays contractors in seven to 10 days net EFT, electronic check, which means they're not actually checking it. It's whatever the contractor puts in the system, they're going to get paid, and then they will audit whether or not that was correct. They don't pay the engineers quite that fast down there, but it's usually between 30 and 90, but you can count on it, which is a totally different thing than what we have up here. What we have up here is, for some reason, the people in charge of the project are also the people who are trying to do the bookkeeping for a project. And never, never, ever, ever has a project manager been the bookkeeper in any real-life situation." [#26]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "The city of Lexington has had events where you could meet the contractors, the people... Not the contractors, but I guess the company's looking for help. And there have been fewer of those. And I don't know if it's because of... I would say because of COVID. But they do other opportunities. So, the city of Lexington's procurement department is very helpful." [#3]
- The Black American owner of a DBE- and MBE-certified construction company stated, "Okay. This is what they could do. Indiana, over here in Indiana, if I sub from any of them over here on the highway work, I don't got to be bonded as a subcontractor. Don't got to be bonded. Yes, yes. I think that Nashville does it too. Because they're calling me to come down there and do some work as a minority. MSD, they were having people putting these companies in their wife's name and stuff. MSD stopped it too, they changed their whole thing around. Buddy, I tell you right now, if you want to do some work in MSD, you ain't going to get signed a little good faith stuff. We do work for MSD now." [#9]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I enjoy working with the city. You just get to know the clients. They each have a lot more bureaucracy in terms of decision making. At the council, I know they just improved the change order process. It used to be every change order had to be read by council three times, and that was quite onerous to the progress of the project." [#FG1]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "SD1, just because the whole political arena up there. It's been tough and some of the smaller municipalities have been a little more ... just because of ... they're not as sophisticated in their ... just in the way they're set up and the way they go about business." [#12]
- A representative of a majority-owned professional services firm stated, "Sometimes, again, if it's just really unclear directions, sometimes things might be in a couple different places,

so we have to just... We always want to make sure we read it really carefully and pick up because sometimes where they say what the evaluation criteria are, there might be some little nuggets in there that we want to make sure we put into our RFP." [#18]

- The owner of a WBE- and DBE-certified professional services firm stated, "One of the fundamental things that's changed in the past few years is that when Jim Gray ran for mayor, he said he was going to start bidding engineers and architects, and he did that. And now, across the state, they now bid engineers and architects, and that's radically different than other states. For example, in Mississippi, it's against the law if you ever, ever, ever bid an engineer or an architect. But Lexington pivoted in the direction of the previous mayor because he ran a business and he had to bid for all of his work as a contractor. And so, he has set that direction and that path for Lexington, and then all the other cities in the state have said, 'Well, if Lexington can get away with it, we're going to do it.' So, it has become a race to cheap fees in this state. And for that reason, I am growing my business largely outside of Kentucky because I can get better fees and be treated better as a DBE as well." [#26]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Actually, this university is even harder, because they're a part of the state system. And we have to have a form. We have a form, we have our invoice, and then we have to show work product. So, there's three parts that goes into an invoice and sometimes our invoices are less than $100. And it takes 30 minutes to an hour to put together the invoice because there's so many parts to it. So that's what the state, I don't have to do that for the city. But we do show our time in detail for the city. So, there's more paperwork going in to win the work and there's more paperwork and documentation to get paid for the work." [#3]
- The owner of a majority-owned construction company stated, "I've had a few complaints. I thought that sometimes people, other contractors, bid a job, they beat us, but they're not required to do all the what's in the contract. We bid... If they, say, to do XYZ, that's what we put in the bid. Then somebody else gets it and they beat us, but then they don't do all of it because they had some understanding worked out, perhaps they weren't going to do the whole thing. I don't know. But yeah, I can't control all of it. I'd spend all my time trying to police other people. I just assume that they're going to bid straight. So, we just don't bid to them anymore if they're going to do it that way. We just don't participate in their offerings anymore because we just don't trust that they're going to do it right. We had a minority participation goal met on a Housing Authority job here in town and our competitor didn't and they got the job, but they didn't meet the intent of the job. That's very frustrating. We sometimes add money to the job to get minority contractors. Berea College said they wanted 20 percent minority contractors. So, we went and worked hard on getting a package put together and we submitted it and then the other guy doesn't even meet the goal and said, 'I can't meet the goal.' So, they just give him the job anyway. He was lower, but he didn't meet the requirements and we added money to our bid to make sure we could assemble a team, and then they didn't have to do that. I mean, it's a disincentive when you know you're going to get beat. So, here's the situation on that one. It's the same guy that's doing the doing [another large project]. He was the contractor and he told us that we had to have 20 percent minority, but he didn't put it in his own bid and then he beat us and self-performed. I think he just lied about it and be honest with you. I mean, he just did that to me. I complained to the Vice President of Berea and they said, 'Ehhh, it wasn't really a

requirement, but our board passed a resolution that we should do that, but we never really have implemented it. And yeah, I'm sorry you didn't get the job, but no, he's not doing it either.' And then he already had a job, so, well, so we just won't ever bid to Berea again. That's the kind of thing you run up against I also had a bad experience with the Health Department. They wanted that building washed. And they wanted participation and I run a 100 percent vaccinated company and I had a minority contractor ready to work with me and go in there and meet our goal. And then the next guy, he gets the job, and he didn't bring a single minority contractor on the job. Didn't even talk to him, just that's the way it is. And they still gave it to him. The reason is they want to save the money. A lot of public agencies when they're faced with enforcing the rule or not enforce a rule, they want to save the money. They just tell you that it's a goal. But when it comes down to it, they're not dedicated to doing it. When they built the BCTC on Newtown Pike, I went to the pre-bid and the lady from the state said, 'Now you'll have to fill out this minority participation form and just fill it out and put that in with your bid.' So, I raised my hand. I said, 'I have a question. Do you expect to meet that goal?' And she said, 'No, we don't expect to meet it. We never do. You just have to fill out the form.' And I said, 'So let me get this straight. You're not doing anything different than the last time. Right?' She goes, 'Well, that's correct.' And I said, 'Okay, so you didn't meet it before. You said you never do, but you're doing it the same way for this one.' And she said, 'Yes.' I said, 'Well, okay then.' They're just half-assing it. They don't really expect to meet the goal. They're just saying, they're going through the words, and it's disappointing because I had to... There were MBEs in the room and to have somebody from the state admit that 'We don't expect to even meet it. We never do, just but you got to fill out the form.' You want to say, 'Don't even come in here with the...' They tried that once. The school board tried it, it didn't work, but they had the three-envelope system. First envelope, you opened it up and you say your percentage, and if you don't have 10 percent, they don't even open the other two. So, they did that. And I thought, well, this is progress. That's what they do in other towns. You open the first envelope. They just set all three envelopes aside. So, what do they do? They get into bid opening. And they open all the envelopes at once and they take the contents of the three envelopes, and they put them together and then they just read the bids. So, what's the point of going through that? They either missed something or whatever, but if they wanted to do the three-envelope system where the first envelope is open by itself, and if it doesn't say the right thing, you don't open the other envelope. You don't read their price because they didn't meet the bid requirements. But if you're just going to sit there with a letter opener and open all the envelopes and then just take the contents of the three envelopes and put them together and staple them together and then read the bid, what's the point? You're just wasting envelopes. So, they need to finally quit doing that." [#4]

- The Subcontinent Asian American woman owner of a professional services company stated, "I have had situations where we're not favorable with University of Kentucky. Providing resources. Again, it boils down to providing resources. We have made attempts to provide resources to University of Kentucky, and more than likely, we have not seen any favorable results in spite of these skill sets. In this market, lack of resources itself speaks volumes. When we are ready to provide the resources, we have not seen any favorable inner results." [#7]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "I think the hardest thing about working with the city itself is just they use a very collaborative decision-making process. There really aren't individuals empowered to make decisions, and so they're, particularly in construction projects, they commission, or they start a lot of projects that they actually don't have funded. They get shelved, or you do an exploratory phase, and that's not going to work. And so, there's a lot of start and stop. And working with them, I think I've been on four or five of those types of projects." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Using consultants to make decision making, or to explore options. It'd be nice if they just said, 'We're just exploring the option. This is an engagement for a phase A, and then we're going to present that budget council, and we're going to decide whether we can do it or not.' It'd be really nice if they had the money earmarked for the job before they went out and solicited opportunities. For me, one of the frustrating things that's been when it's a lot of layers to go through. Whereas us working with the private sector, I can reach out to one or two individuals in order for me to get a response to have something change or rectify, I have to go first [to the] point of contact, and they have to go [to another person], then they have to go to accounting. Accounting has to get them back, and they have to come back to [me]. And here we are now five days out, and of course whatever bill, or whatever change we got to [do]. Of course, by the time I get the answer back, we've already resolved [the issue]. I have to make an adjustment call, and hope that it doesn't come back to bite you. It has come back to bite me in several [times] where was a last-minute decision. And so, in food service, we have three deadlines, it's called breakfast, lunch, and dinner. I can't wait to not feed children. I have to do whatever's necessary. And if I don't meet the requirements of the contract, then I don't. I don't know how to handle that part, because they were fed nutritiously, but [outside the] part of contract. I don't know if there's some sort of just common-sense negotiation, or a point of contact that can make a decision within a timely fashion." [#FG1]
- A representative from a focus group consisting of construction companies stated, "We did a lot of work with Louisville MSD in the past, and they have some very stiff requirements as far as minority- and female-owned businesses as far as participation." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Louisville MSD is very tough to deal with and they always have been. So that's their reputation. But you get differences there. Transportation people are very good. Of course, they have the bigger budget and the seminars and stuff that you come to and get to talk with them. Once again, it's started that relationship and work on it. It can be your make or break. It can be your make or break." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Louisville's really hard to deal with." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Right now, if a subcontractor, their minority requirements have changed. If you are a whatever, if your reason that you are a DBE, your race is not a certain race, all of a sudden you can't work with Louisville anymore, because that's not part of what they think they need." [#FG2]

- A representative from a focus group consisting of construction companies stated, "It has shocked me some of the things that they've done. They've actually upped the percentage from, it was 15 for the MBE to 18, and it's putting a lot more pressure on the prime contractors. Because Louisville MSD takes a view that if you even speak to a prime contractor, they want you independent. Well, that might sound good on the books or sitting at a desk reading it like that for a business class, but once again, how do you build those relationships practically?" [#FG2]
- A representative from a focus group consisting of construction companies stated, "Louisville also suffered some well-publicized situations where minority subcontractors were really a sham. They had a big material supplier that was local, and it was a total sham. That caused a lot of their problems. They're just not easy to deal with." [#FG2]
- A representative from a focus group consisting of construction companies stated, "They're not as flexible." [#FG2]
- A representative from a focus group consisting of construction companies stated, "The one subcontractor that I was speaking about that we had several times electrical contractor, his reason or his ethnicity is Cuban. Now, he can't work as an MBE in Louisville anymore." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I did see, it says African American, and I thought, 'Wait a minute.' It shocked me. But trying to corner MSD to get them to explain it, they're very difficult to deal with there. You don't want to step on toes, but when I saw that, I thought, 'Now wait a minute. It says African American 18 percent.'" [#FG2]
- A representative from a focus group consisting of construction companies stated, "You have to shake your head. Like I said, I would like them to explain it, but they end up getting upset. So, what's going on?" [#FG2]
- A representative from a focus group consisting of construction companies stated, "What is the problem? What are these barriers that Louisville has, is you can't question them. You can't talk to people." [#FG2]
- A representative from a focus group consisting of construction companies stated, "They sort of see themselves as a private business, MSD does. They don't see themselves as a government agency." [#FG2]
- A representative from a focus group consisting of construction companies stated, "It's just their attitude towards this has always not been right. I wish they would talk to the prime contractors more and find out what's going on out in the construction world. Because that's who's working in it, is the prime contractors. They don't have a good relationship with their prime contractors. That's it." [#FG2]
- A representative from a focus group consisting of construction companies stated, "It's the mentality of say the Louisville MSD, and they've been at that for so long you would think they would change directions. They don't even really consult their engineering department when it comes to building minority enterprises, and they should, but they just view it as they're the judge, jury, and executioner, and you agree with us or hit the road, and that's not a good environment." [#FG2]

4. LFUCG's bidding and contracting processes. Interviewees shared a number of comments about LFUCG's contracting and bidding processes.

Fourteen business owners shared recommendations as to how LFUCG or other public agencies could improve their contract notification or bid process [#10, #11, #14, #2, #20, #21, #23, #26, #28, #29, #32, #34, #4, #AV]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "I think one advice would be is to know what are the needs of each department and make those needs available to contractors and to the public. Because I've never, like I said, I'm not in that world, so maybe I'm wrong, but put it out there as far as, 'This is the needs.' Besides the bids. And maybe being more creative as far as like, 'Okay. You've got commissioners for each department.' And maybe in the family services department, there's a particular need. They see, like I said, with adoption agencies or whatever, what are the parents saying? What are the group homes saying? What are the schools saying with their kids? They need help with their hair. 'Okay, let's be creative. Are there stylists? Are there product companies we can work with that can offer certain things?' I would say think out of the box would be one. if the majority of the business' contracts are going to larger firms that are maybe all white and are the ones being passed over, is it because they don't have the staffing? 'Well, could we do something that would be, make it easier for those that have less than 100 employees or less than whatever, to where they can get in?'" [#10]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think it's just in continuing to reinforce the importance of including DBEs, WBEs and they have in the veteran component to it now, too. And just stressing to people that are submitting on their projects, whether they're on the consulting side or the construction side, stressing that they do look at that, that that is important to them. And I think that's the strongest way they can do that. I think they do a pretty good job of it now. I mean, [the MBE Liaison's] always at all the pre-construction meetings, pre-bid meetings and all that kind of stuff, and they do a great job of representing that in their paperwork. But I think that's the strongest, most leverage that they have over our industry." [#11]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I think they're all about the same. It's all based on the lowest price. I think what would help if they would be more intentional about hiring a minority. I think the bid process, they need to create a section where if they're not going to make the primes accountable for hiring... Say you got a goal of 10 percent. So, if you don't punish them, or make them accountable for that 10 percent, then, I mean, it's just a goal. You can say, 'Oh, I tried, I did this.' But, if you had $100,000 job, and you supposed to do 10 percent with DBEs, if you took 1,000, or 10,000 of that money, and put it in a fund, that since they didn't use a DBE, they going to make it happen. They ain't going to give that 10 away if it's not... And it's etched in stone, a part of the contract, then we're not doing anything." [#14]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "And that's why RFIs, the city really putting something, another suggestion is soliciting for RFIs or hiring consultant companies that can run RFIs on a continuous basis to find all these minority companies that we can really see how many minority companies with the skill sets we really have in this area, or the surrounding area." [#2]

- The co-owner of an SBE-certified professional services company stated, "Interviews? Yeah. I think, it is one of those things that I believe made a difference for us with [County] public schools, was being able to get in front of them and talk to them and to be able to impress them in person because I think that, within a few minutes of having a conversation with somebody, you can either completely pan them off or give them a sense of confidence and giving you a go at one of their projects. So, I think, even, like [staff] said, if you just get into an interview then, I think, you get a chance. Honestly, I think, I would go back to the construction administration component. I think that for the most part, public work is pretty straightforward. I like public work because it follows phase A, B, C, 1, 2, 3. You know what you're getting into except for the construction side. I think that the expectation on the side of construction administration, and I come from... My father worked in construction administration for over 30 years, and I know that, that's the last taste of a project. That's the last thing the owner's going to see. The whole dance with the contractor and the finished product and close out is all very important and I think that a lot of times, the expectation is not necessarily clear upfront from what the owner might expect during construction administration, as far as the time commitment from the A and E team. Again, if it's extraordinary, I think that people need to be compensated for that or you decide and plan on particular milestone pre-installation meetings or things that are going to be particular to making sure that something's going to be installed or done correctly. Maybe, that's when you have more meetings or additional meetings but not something that just continues to eat up time without you knowing that upfront. That's been my only takeaway from some public projects, is that, there can be extraordinary expectations during construction. Again, if everybody knows they're going into it, that's fine and if there's compensation for that, that's fine but I don't think it's fair for anybody to lose money during construction." [#20]
- The Black American owner of a professional services company stated, "Public work is fine. It's just acquiring the job. I think as far as being a minority, they need to be more intentional about wanting to use minorities. I mean, you can say you want 10 percent, but if it's not mandatory, then it's never going to happen. So, I mean, if you're intentional about hiring minorities, you can make it work. But if you're not intentional, if you're just saying it, then it's never going to happen." [#21]
- A representative of a WBE- and DBE-certified goods and services company stated, "Just make a little bit more clear on what they're doing as far as the specifics in the job description or in the bid description. Sometimes it's hard to find the details. The federal government's the worst about that. You all haven't been like that as much, but it's getting better. Different people as they've gotten used to these jobs, we've seen changes." [#23]
- The owner of a WBE- and DBE-certified professional services firm stated, "FAR, the Federal Acquisition Regulations, needs to be updated to have two things. It needs to say, number one, that all subcontractors being used for DBE purposes shall have their invoice submitted in the next pay cycle, period, regardless of whether or not the prime has time that they are invoicing for. That's number one. Number two is that invoices for DBE payment less than $10,000 should be paid in net 30. Otherwise, we are being used to finance the likes of a multinational incorporation. Lexington and KYTC are both not going to change their current mindset until the FAR is changed, the Federal Acquisition Regulations guideline. … The burden was on me because the payment terms were that bad. The other way that this can get fixed is that regulations can get passed either at the city level or at the state level that

say, 'We are going to supersede the FAR regulations and have even more strict regulations than what the state set, or the feds have set, as the minimum.' And that's what the city of Atlanta has done, and that's one of the reasons why I prefer to do work in the city of Atlanta. City of Atlanta and GDOT both have slightly different programs, both of which far exceed what we have up here. I'm going to get them probably mixed up. One of them pays contractors in seven to 10 days net EFT, electronic check, which means they're not actually checking it. It's whatever the contractor puts in the system, they're going to get paid, and then they will audit whether or not that was correct." [#26]

- A representative of a majority-owned professional services company stated, "I would think, and they may have this. I would think that a platform, like a website or something like that where we can talk to, and we do posting of the bidding process. Make it, I guess, easier to find. Easier to find, and to have a description, the general scope of work, the requirements for the job. I don't think it would necessarily be the responsibility of LFUCG to go out and find small businesses, but it would help small businesses if they were able to find the information. For instance, if there were contracts that you all were looking for to be fulfilled, to allow a company to be able to go onto the website or something like that and look through the job postings and read the descriptions to see if it's something they could do. And then from that point, it would be for a company to decide whether they would want to pursue that." [#28]
- The Black American owner of a construction company stated, "Just be fairer on everything, you know what I'm saying? Be fair across the board. It don't matter if you're a minority or whatever, just be fair across the board, you know?" [#29]
- The owner of a majority-owned construction firm stated, "The email/text message is easy because if I'm on a job it's hard to run equipment and talk on the phone, but I always can see a message and write back or see email and write back unless there is something important, we have to like do meeting like with you right now. But the phone call, it depends if I have time, I do phone call. If not, text message is always good, emails is always good." [#32]
- The Black American co-owner of a professional services company stated, "We made a proposal. So, typically because what we're doing is novel, we then make... and actually, I think this is a pretty good point for your survey, is that there needs to be a stronger mechanism for making proposals to cities for what they should be doing. Right? Because it's not always that there's a specific line item, or skew, or a bid, or an RFP for the thing. Right? So, what we end up having to do is sometimes hire lobbyists to go in how you go in and tell them, because a lot of times I've seen they don't know exactly specifically what they need, but since you're the ones with all the brains behind it, you can tell them what they need." [#34]
- The owner of a majority-owned construction company stated, "I think the forms the city uses is redundant and excessive and there's even things in there you're supposed to be checking that aren't even checklist items, like you're supposed to be telling them what you did and there's a big paragraph with a box next to it to check. And it says, 'The contractor will be required to show this and this...' It's just a statement. It's not like something you would check. I just think it needs to be reworked. And I've told the city that this... It's very difficult, but you're just asking the wrong questions and it's not being enforced, kind of like

that woman that came up here from Frankfort and said that here's what you got to do. Fill out this paper. And no, we don't expect you to meet the goal. Just telling them, right out, 'Oh, we don't...' It's almost like saying, yawning and saying, 'They make me do this. So I'm just going to do it. But don't worry about it. I'm not going to enforce it on you.' That's not the way to get results, to me." [#4]

- A representative from a majority-owned construction company stated, "I would like to see a good fair bidding policy and everyone that bid on the contract open in the bid. Most times low bidder gets it. They often have private opens, so if you want to go to the open you should be able to go. If it says, 'shall be' it has." [#AV232]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of Lexington-Fayette's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Past marketplace conditions; and
3. Keys to business success.

1. Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic.

Four interviewees described the effects of COVID-19 on the marketplace and their firms as negative, describing a decline in sales, slower payment, difficulty obtaining supplies, and general anxiety about future ventures [#7, #AV, #FG1]. Their comments are as follows:

- The Subcontinent Asian American woman owner of a professional services company stated, "Actually, we lost couple of subcontracts or contracts. We lost the T-Mobile contract, for example, because of multiple situations, because of the way immigration is the first effect, right? Immigration. Delays in processing. Sometimes, it mostly required in-person at early stages when people were still about to access things and we were not able to provide in-person resources." [#7]
- A representative from a majority-owned professional services company stated, "I started two weeks before the pandemic, so quite a struggle." [#AV39]
- A representative from a woman-owned construction company stated, "We have struggled during the pandemic - have received a contract lately." [#AV213]
- The Black American male owner of an MBE-certified goods and services company stated, "COVID has been devastated for me in the food service industry, so I am on a hiatus right now. And I do not know if I will continue in business at this moment." [#FG1]

Twelve interviewees shared that COVID-19 negatively affected their firm, but things have started to improve [#13, #14, #15, #19, #21, #3, #33, #AV]. Their comments are as follows:

- The Black American owner of a DBE-certified construction company stated, "As a matter of fact, when COVID started I was working with a company, because well of course the construction companies was one of those areas where you could continue working. But on some of the jobs I had, I think some of the people might have got COVID and we kind of backed off. I kind of pulled the guys off the job for just safety reasons. But it did affect me, but after everything kind of settled down we went back in, but we played it really safe. It did stop us from moving forward on other jobs, because people stopped bidding the smaller stuff and to me, they went more with private people that they knew, especially around Lexington. I think it'll pick back up." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I think it's going to pick back up, once everything opens back up." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "We were down, $150,000 in revenue, because of COVID, from previous year in work. I think it'll pick back up." [#15]
- The Middle Eastern American owner of a majority-owned construction company stated, "Oh, for worse because it affected the real estate industry. Because there was low inventory, people were trying to put their hands on the houses and it's a sales market. So, the normal procedure of, 'Okay. Let's do a radon test and see.' It wasn't done through the real estate transaction, it was done after people moved in, so that affected it in a negative way. But after six months we start seeing it's picking up a little bit. Homeowners are doing the test or now they have the finance to do it. So, it's really tricky." [#19]
- The Black American owner of a professional services company stated, "I wasn't able to go out and view work, look at jobs. There wasn't too many people able to move around and go look at work, be at work, that type of thing." [#21]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "We lost some work as a result of it. We had just won a piece of work with a nonprofit organization that was right in our sweet zone, it was a good contract, and it was the start of even more, and COVID hit, and it just went away. The project went away, because they had to close, it was a fitness center club, kind of. It was a YMCA, and they had to completely pivot. And it was a big hit for them financially, so they couldn't... Well, they didn't need to do what we were doing. We were writing blogs for them, writing articles, and they didn't need that anymore and they didn't have the funding, so it went away. With the city of Lexington, our work got put on hold. But the funds rolled over, so we were able to do the work eventually, it was just, we had to wait several months for it to happen." [#3]
- The woman owner of a professional services company stated, "It was shut down. My clients closed, and so, obviously they did not need to do any marketing and advertising because they were not open for business. And two... Actually, three of my clients' businesses never opened back up, so I've been trying to get new clients and make up for those losses. I had two clients that returned back to business quickly, and then I had two others that started back a year into everything once they were able to open again. They waited a year and then recently have been blessed with two new clients. But now that the economy is in this type of fluctuation, my clients are afraid to spend advertising dollars because they're concerned

that customers, that the general public are holding onto their money, and not seeking out extra money for dining or things like that." [#33]

- A representative from a majority-owned construction company stated, "This is all we do, I'm third generation in my industry, and we've managed to stay afloat so far. Last two years in the pandemic have been tough. Fayette County and the State government both have too much paperwork for a small business to do." [#AV15]
- A representative from a majority-owned professional services company stated, "It's been fairly busy. The pandemic slowed things, but it is picking up. Labor shortage tough to get materials in a timely way." [#AV35]
- A representative from a woman-owned professional services company stated, "Established in 1964, 41yrs doing very well the pandemic took a toll but starting to pick up." [#AV200]
- A representative from a majority-owned goods and services company stated, "I think the market's coming back, but my business is one that comes to the client." [#AV275]
- A representative from a majority-owned construction company stated, "It's getting better after COVID." [#AV279]

Eight interviewees noted that COVID-19 has had little to no effect on their business [#12, #16, #18, #28, #30, #37, #8, #FG2]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Probably if anything on the construction end. We do construction inspection for LFUCG, and they halted some projects with COVID, so that was impacted, but from a design standpoint, no. It really didn't impact us much." [#12]
- A representative of a majority-owned professional services firm stated, "We were affected by it, like everyone was. Primarily, that was having people work remotely. And what we discovered is that it worked very well. We did not have a downturn in our business, so we didn't have to put people on furlough or layoffs or anything like that. So, we held steady pretty well." [#16]
- A representative of a majority-owned professional services firm stated, "We have not really noticed. I mean, there're some things that we had to change the way we were doing. For instance, some people worked from home for a little while, so it was probably more on that end of just internally changing things here rather than the number or types of projects we were proposing on." [#18]
- A representative of a majority-owned professional services company stated, "I don't know that it really affected us that much because of the size of our company. Because we're small. It's easy for us to comply with the requirements of the CDC. The only thing that we really had to change was some of the personal hygiene stuff. I don't know that we're going to see a much of a difference in things once it totally goes away." [#28]
- The male co-owner of a woman-owned professional services company stated, "We really weren't affected by COVID-19. Our industry is very heavily dependent upon construction. So, the only thing that really hurts us is when there's no construction happening. So as long

as they're still building housing developments and military bases, or putting up barracks and they're building roads, then we still have work." [#30]

- The Black American owner of an MBE- and DBE-certified professional services company stated, "We've been fortunate that COVID hadn't put a huge damper on our business. We've been fortunate to be able to keep everybody employed. We haven't had to lay anybody off, projects, because we had projects in the hopper before COVID we were able to sort of lean on those during 2020." [#37]
- The Black American woman owner of a professional services firm stated, "A little bit. I ask them questions before I go. Have you had COVID, have you traveled outside the country in the last 14 days? I try to screen them before I go. And then I also mask up. I was still able to do it. Some people I would only meet them outside, like right in the height of it. I was not going in their houses. But most of those people have you either been, they answered the questions, whether they have it or not. I did have a couple of people that did contract COVID, and I refused to go. So, it was my choice." [#8]
- A representative from a focus group consisting of construction companies stated, "COVID obviously was a big deal and all that too. Frankly, I'll just say this, COVID did not affect us whatsoever." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Sure, we had people that had COVID, and we had to shut down a job site, blah, blah, blah, but really didn't hurt us. But we tried to prepare all ... We did spend a lot of money preparing for those situations, but I always say, we locked our front doors and put signs up in some of our office, but basically, job sites really didn't suffer." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I was quite surprised that I guess the job sites are out in the open and the precautions were taken, but COVID really has not ... Except for the decrease in the applications you get for jobs. Since this environment has caused people to ... Like the females need to stay at home to take care of the kids, because the kids are not in school. It makes a difference. But the construction industry has been booming and it really hasn't been affected. That really shocks me. But who knew this? I would've thought we'd been affected like every other industry, but no, it has not. We're grateful for that. We're very grateful." [#FG2]

Seven interviewees noted that COVID-19 benefited their business through new ventures, increased work, or the ability to learn new skills [#36, #5, #AV]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "There was some pros and cons to COVID. Of course, the con was that I had to shut down all together and I was just beginning. But the pro was that it birthed new things for me, such as doing, I had to stay afloat, and so I was advised by that same business mentor to try something new out of my comfort zone, which was doing Facebook live sales. And I began doing those. It was later in the year that I began doing those. But when I started, it was such a success. So many people would rather be able to shop virtually or online." [#36]
- The owner of a WBE-certified construction company stated, "I had the best year I've ever had last year, and the part of the process was I had a lot of jobs in the queue, or in line, to be done, and we were able to work through and we enabled our people to have their

temperature taken, to have any number of tests, to work safe, work distance, work in pods, maintain a limited number of people. And if they had a lot of discomfort, then we put them working by their self in locations, because last year was the time to be flexible, if there ever was one." [#5]

- A representative from a majority-owned construction company stated, "Business has been brisk and probably driven by the pandemic the last two years. We would love to be able to provide for services having issues finding work force to provide those services." [#AV12]
- A representative from a majority-owned professional services company stated, "Workload is pretty good right now. Considering COVID and all that stuff." [#AV34]
- A representative from a woman-owned goods and services company stated, "I don't know the Lexington area, but the economy, we thought we would slow down some, but we've kept busy. We don't do a lot of heavy marketing, but we get a lot of repeat business." [#AV209]
- A representative from a woman-owned goods and services company stated, "Past couple of years haven't been the best but we have stayed busy even with the pandemic - Lexington has a lot of work available - good people to work with." [#AV222]
- A representative from a majority-owned goods and services company stated, "We're very blessed to be working in Lexington. Even with the pandemic we were able, through the PPP program, to not have to lay off anybody. Our business was down in 2020 but not more than 25 percent. I expected it could be down twice that easy." [#AV299]

2. Past marketplace conditions. Interviewees offered thoughts on the pre-pandemic marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the Kentucky marketplace that they have observed over time.

Twenty-one interviewees described the pre-pandemic marketplace as increasingly competitive [#1, #15, #16, #18, #3, #30, #32, #33, #AV]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I think from the unknown of the market, I seen this back in 2009 and 2010, with that '08 boom and I was in Cincinnati, we would go to pre-bids, and we started seeing people from a higher market, if you want to call it, come down to a mid-market. We've seen people from the lower market come up to the mid-market, or vice versa. And it was basically because everybody's looking for work." [#1]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I think the compression of the marketplace, among the larger contractors. So, there's only so many large contractors and I think, different in the past few years, because the limited amount of larger construction manager, contractors has put owners and people that do construction projects in a situation where they feel like, they have to do what they say and the way they say it, which is, which is in effect is not good for a small contractor. And especially not good for African American on contractors in the city." [#15]

- A representative of a majority-owned professional services firm stated, "The pressures that we are seeing in the industry is there's a lot of competition and, compared to 20 years ago, it's more price competitive." [#16]
- A representative of a majority-owned professional services firm stated, "I think we are very competitive right now and I think it's the depth of knowledge. We've worked with municipalities since the beginning of the founding of the firm. And so, we have a lot of knowledge of how to work with municipalities and they've really dug deep into the types of projects that we really do well on, and those are those that you'd find in municipalities, so fire stations, police stations, aquatics, recreation, libraries, courthouses, all those kinds of things. And so, I think that maybe one of the secrets to our success is just finding what we do and then doing it really well." [#18]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I mean, it's not multitude, but there is strong competition." [#3]
- The male co-owner of a woman-owned professional services company stated, "Our industry is very cutthroat, because there's not a lot of us, and there's also not a lot of work out there relatively. And so most companies, they're very competitive going after projects." [#30]
- The owner of a majority-owned construction firm stated, "It's very hard to get in because there's already so many businesses, big businesses they've been around, and already other big companies know them, and they more contact those people. And not me because I'm nobody yet." [#32]
- The woman owner of a professional services company stated, "I really just think that it's my business in particular, that there are tons of competitors out there. I don't know about since COVID. I've heard a few have shut down, but sort of like having a church on every corner, you've heard that old saying." [#33]
- A representative from a majority-owned construction company stated, "I think we are going to constant in the next year. Don't see expansion in the near future." [#AV5]
- A representative from a majority-owned professional services company stated, "It is a highly competitive market." [#AV40]
- A representative from a majority-owned professional services company stated, "Very competitive." [#AV55]
- A representative from a majority-owned professional services company stated, "Incredibly competitive." [#AV57]
- A representative from a majority-owned professional services company stated, "I think, for our type of business, competition is really tough, the Lexington market is probably adequately served with broadband." [#AV58]
- A representative from a majority-owned professional services company stated, "It's extremely competitive in our business, mainly because of number of firms that do what we do. I think this is due to graduates from the University of Kentucky becoming engineers and architects, and then either starting their own business or becoming engineers." [#AV61]
- A representative from a woman-owned professional services company stated, "It's a fairly saturated market with environmental consultants. There are quite a few companies that

perform similar services to what I do. Not all are woman-owned, but similar services for sure." [#AV79]

- A representative from a majority-owned construction company stated, "It's definitely a competitive workplace." [#AV230]
- A representative from a majority-owned professional services company stated, "Competitive." [#AV283]
- A representative from a majority-owned construction company stated, "I know that our taxes are higher, and I know that makes us less competitive going to Lexington, it seems harder to be competitive in Lexington or Fayette than in other counties, because of the red tape, I suppose." [#AV287]
- A representative from a majority-owned goods and services company stated, "COVID has affected all of us, but generally it's still a fairly competitive industry right now." [#AV311]
- A representative from a majority-owned construction company stated, "There is lot of competition." [#AV329]
- A representative from a majority-owned goods and services company stated, "Competitive market. It slowed down due to the supply chain issues." [#AV310]

Forty-seven interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses [#33, #6, #AV]. Their comments are as follows:

- The woman owner of a professional services company stated, "Before COVID I was doing better in my business than I had ever done in 20 something years. 2020 was going to be my most successful year yet." [#33]
- A representative of a majority-owned construction company stated, "I don't feel like the market has changed drastically as far as you know, getting work. It's been somewhat consistent and steady." [#6]
- A representative from a majority-owned construction company stated, "I don't think I could honestly be any busier this year, it's been an outstanding year." [#AV7]
- A representative from a majority-owned construction company stated, "Great place to build a company. Massive amounts of growth that are possible." [#AV11]
- A representative from a majority-owned construction company stated, "Plenty of work, economy is strong. Just a lack of people." [#AV16]
- A representative from a majority-owned goods and services company stated, "Right now the market is very good." [#AV20]
- A representative from a majority-owned goods and services company stated, "Our business has been pretty solid for the last several years." [#AV24]
- A representative from a majority-owned goods and services company stated, "We have a location in Frankfort and Lexington is a really good market, so we will possibly be moving our Frankfort location to Lexington." [#AV27]

- A representative from a majority-owned professional services company stated, "We find it to be competitive, but it's a good area for us, with a lot of opportunities for growth, and we appreciate that." [#AV28]
- A representative from a majority-owned professional services company stated, "Booming right now." [#AV30]
- A representative from a majority-owned professional services company stated, "There is a lot of construction going on so I have as much or more work than I can handle." [#AV36]
- A representative from a majority-owned professional services company stated, "My phone rings constantly, and I get calls from as far as 75 miles away. The surveying business is unbelievable for surveyors." [#AV51]
- A representative from a majority-owned professional services company stated, "If you are willing to work hard and do well for the customer it is a great time." [#AV52]
- A representative from a majority-owned professional services company stated, "I don't spend any money on marketing, and I have to turn jobs often because I'm so busy. The market in Lexington is very hot right now, so we stay busy." [#AV68]
- A representative from a woman-owned goods and services company stated, "I absolutely love the Lexington area. We have excellent industry. I think Lexington is one of the greatest places in the world." [#AV77]
- A representative from a woman-owned professional services company stated, "I would like to share that Lexington is an ideal market so many positive things going on with our city and location is in a day's drive of 2/3 of the population. People [are] getting out of Chicago & other large cities are looking for places like Lexington." [#AV202]
- A representative from a woman-owned construction company stated, "It's definitely expanding." [#AV211]
- A representative from a majority-owned construction company stated, "Currently a pretty good market." [#AV228]
- A representative from a majority-owned professional services company stated, "Great market for entrepreneurs. Nice area for starting a business." [#AV238]
- A representative from a majority-owned goods and services company stated, "Lexington is in a good market for us." [#AV241]
- A representative from a majority-owned goods and services company stated, "It is a good atmosphere." [#AV242]
- A representative from a majority-owned construction company stated, "Currently we are extremely busy been here since 1952. Business climate here is improving." [#AV244]
- A representative from a majority-owned construction company stated, "Right now it is pretty open market with plenty of people wanting you - if you will show up and do the job you can get the work." [#AV246]
- A representative from a majority-owned goods and services company stated, "We've had good response in the marketplace." [#AV247]

- A representative from a majority-owned goods and services company stated, "It's been a year or two since I called over there. Since COVID hit I slowed down travel, but before that it was a good market area. We did business with schools, and they seemed healthy." [#AV257]
- A representative from a majority-owned construction company stated, "I think this town is big enough for all of us asphalt contractors. We have been in business about 40 years." [#AV260]
- A representative from a majority-owned professional services company stated, "We are interested in expanding our business in the Lexington market because we see Lexington as a valuable market." [#AV264]
- A representative from a majority-owned professional services company stated, "I have worked in the Lexington media almost 40 years always been a good thriving market." [#AV266]
- A representative from a majority-owned goods and services company stated, "Lexington area is very viable for new businesses." [#AV272]
- A representative from a majority-owned construction company stated, "Outlook is positive despite supply chain issues - finding help a more server problem than in year pass - lot of help could be done in Frankfort particular paperwork for those who work from county or county or municipality." [#AV280]
- A representative from a majority-owned goods and services company stated, "Market is good plenty of work." [#AV289]
- A representative from a majority-owned construction company stated, "It's a good market, I'm getting ready to retire." [#AV295]
- A representative from a majority-owned construction company stated, "It is an excellent time to be or starting a new business. New economic boom." [#AV296]
- A representative from a majority-owned construction company stated, "It's been very busy." [#AV298]
- A representative from a majority-owned construction company stated, "We are optimistic about this year." [#AV302]
- A representative from a Black American-owned goods and services company stated, "The Lexington area has been a great place to work, and we've really enjoyed working." [#AV303]
- A representative from a majority-owned goods and services company stated, "Opportunity, things are good now." [#AV305]
- A representative from a majority-owned construction company stated, "Very good market right good opportunities." [#AV306]
- A representative from a majority-owned construction company stated, "It's been stable for us, and last year and this year were as good as or better than the year before. It is very difficult to get employees though." [#AV308]

- A representative from a majority-owned construction company stated, "It has been a decent amount of business to look at recently. 2022 looks promising." [#AV309]
- A representative from a majority-owned construction company stated, "Been busy the last few years, the market has been good in the area." [#AV312]
- A representative from a majority-owned professional services company stated, "It's a good marketplace, I've been here 40 years." [#AV314]
- A representative from a majority-owned construction company stated, "Most of all of my work has been [in] Lexington-Fayette County; it is a top place to work." [#AV316]
- A representative from a majority-owned construction company stated, "As starting a business I feel it's a pretty good market. I know when I started it was pretty easy. Lexington Fayette County Government helped out a lot." [#AV326]
- A representative from a Hispanic American-owned construction company stated, "General economy in Lexington seems good - market issues would be more general." [#AV318]
- A representative from a majority-owned goods and services company stated, "Operating under very favorable conditions & open to doing business with anyone wanting MRO." [#AV316]
- A representative from a majority-owned professional services company stated, "We think there is a lot of opportunity in the Bluegrass [Region]." [#AV330]

Eight interviewees observed that pre-pandemic marketplace conditions were in decline [#AV]. Their comments are as follows:

- A representative from a majority-owned construction company stated, "It is very tough right now." [#AV14]
- A representative from a majority-owned goods and services company stated, "I think my industry is underserved in Lexington and Kentucky in general." [#AV25]
- A representative from a majority-owned professional services company stated, "At this point I think it's questionable I would not start a business now, particularly in Lexington." [#AV48]
- A representative from a majority-owned professional services company stated, "We have been struggling because business are cutting back & that has affected us." [#AV49]
- A representative from a woman-owned construction company stated, "I think starting a new business, this is not necessarily the best time. But there's always need for trade businesses." [#AV71]
- A representative from a woman-owned professional services company stated, "In our current climate very hard to start a new business. I work with startup business in advertising & start up goals." [#AV207]
- A representative from a majority-owned construction company stated, "There is quite a bit of uncertainty in the marketplace given the current state of events, the political structure of the City of Lexington and the United States in general. There is grave concern about the availability and cost of construction related material." [#AV276]

- A representative from a majority-owned goods and services company stated, "There is very little opportunity." [#AV292]

3. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Lexington-Fayette marketplace, in their respective industries, and in general [#1, #11, #12, #14, #15, #17, #24, #26, #29, #34, #36, #6, #8, #AV]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I'll say relationships. I've jumped out, hit the ground running. I try to be involved in the community. Try to be involved with different boards and business organizations like Commerce Lexington and a couple other entities. And just word of mouth, and quality, and efficiency, and safety that we've proven on our past projects. Just like other contractors, especially on the private jobs, it's word of mouth and relationships if you get your next project." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think first and foremost, it's experience and being good and being responsive to clients. I think that's the key thing. In some of that stuff, the experience takes time, so it's important to kind of build your company over time and bring new people in and give them that level of experience, but really maintaining client relationships, whether that's with other professionals that you work with that may select you to be on their teams or whether that's with owner entities. And those are kind of the key things for us in this business." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think first and foremost, relationships, but then you have to have the capabilities of your expertise to deliver, whether it be surveying or design or you do a lot of planning. Basically, to be a resource and to be a reliable resource, and when that happens, you get repeat work and then it grows from that." [#12]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I think we're competitive, if we're just given the chance. If we [were] given the chance, I think we can be real competitive. A lot of times it's just the other people giving you a shot. So, once you get the shot, you get in with them, and everything seems to work out okay. Just given a chance." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Access to capital and access to projects. And some of the other stuff will work itself out like employees and things like that, you'll be able to get those then to access and capital and access the project." [#15]
- A representative of a majority-owned construction company stated, "Gritty, determined, not taking 'No' for an answer. In this business, you almost have to be a little abrasive. You can't be afraid to have the hard conversations. And you also can't be afraid to be just truthful and upfront and honest with people. We say, 'In your face,' but it's really about being transparent." [#17]
- The owner of a majority-owned professional services company stated, "Being in the business as long as I've been in business, I see changing trends all the time. I see emphasis on types of work change. You've got to adapt to that." [#24]

- The owner of a WBE- and DBE-certified professional services firm stated, "Well, I mean, so the way that I've built my business is that we're 100 percent remote, and everybody made fun of me before the pandemic for that. And then, eventually, everybody has realized, 'Hey, you can actually do this remote.' And that works well for not only women who want to be parents, but it works for my other lead surveyor, who's taking care of his elderly parents, my office manager's husband is going through cancer treatment. I mean, the flexibility that we have is just a different way of doing things, and it's fundamentally not a micromanagement system, and that's a big difference between most A&E firms. Most A&E firms micromanage the heck out of everybody, and the people who enjoy being bullies rise to the top and the people who want to build consensus don't have a place at the leadership table. And that's the difference that I think that we are able to build with my program and model and whatnot. And we've been able to find some niches that have been a good fit for that." [#26]
- The Black American owner of a construction company stated, "You got to be competitive by not trying to overcharge what you're trying to do. Because if you get up there just a little bit, two or three cents higher far as my trucking parts. If you get it two or three cents higher, and you've got to have that to run your truck... because you can figure, after you've run your truck for a couple weeks, you can already figure on how much fuel it's going to cost you and stuff like that. You know what I'm saying? If you raise your price? Then you're not going to get a whole lot of freight to haul." [#29]
- The Black American co-owner of a professional services company stated, "I said this on Twitter and people disagreed with me, like 'There's a point in your company where you basically go through these series of firings where you basically fire yourself over and over again,' because you bring somebody else in to do it. I now have a VP of ops and finance. I don't do ops and finance anymore. That's his area, and he figures it out. I mean, sometimes I come in, and chime in, and offer some influence for everybody, but it's really not my area anymore. It's his, and so that's how we scale is by consistently firing ourselves over and over again. What it can sometimes feel like, for me anyway, is that sometimes I don't have anything to do in the company. Right? I think there's a world in which, especially if you're doing something new, I think you need to be strategic about who you're going after. I think I'd be ruthless about it, and frankly, in a previous company, we were this way. We would look and say, 'What is this city?' We'd look at a lot of cities, as an example, from a government spending perspective, and we would force rank them. We'd look at states in the same way. We'd look at agencies, and we'd say, 'Who does the best in terms of their spend?' And we'd choose based on that. as opposed to creating a product, then trying to wedge yourself into a department or into a city government that isn't actively pursuing it. Right? It's like, they're just not your target customer, and so you take the same thesis that you would from the private sector." [#34]
- The Black American woman owner of a goods and services company stated, "Well, as far as being competitive, I think I offer a more personal touch. When you come in the store, I'm for you, I'm helping you. I believe that once you come in, even if you don't purchase anything, when you leave out, you're going to feel better, or you're going to feel really good about yourself, or you're going to feel really good about even just visiting the store. So that's something that I offer, and I don't really see anyone else offering that." [#36]

- A representative of a majority-owned construction company stated, "They should do it in a way that's honest. And you show up with your skilled labor and they're trained, and you manage them well. And you make sure that you that they get there they have the equipment and the resources, and they perform well. You know, take pride in the fact that your company has ability to get the work done and be efficient." [#6]
- The Black American woman owner of a professional services firm stated, "It's okay. I mean, I just got to be vigilant and prepared to accept them. Because if I don't accept them, somebody else will. So, I got to be ready and prepared at all times to get those opportunities. Because there's other people that are out there as well that are trying to do it. But the ones that I don't have to compete with, they send directly to me and say, 'Can you take this?'" [#8]
- A representative from a majority-owned construction company stated, "The market has been good lately, but things are going to have to change because it isn't sustainable. Keeping a good reputation at this point is what you have to do to move forward in upcoming market." [#AV294]

H. Potential Barriers to Business Success

Business owners and managers discussed a variety of barriers to business development. Section H presents their comments and highlights the most frequently mentioned barriers and challenges first:

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Factors public agencies consider to award contracts;
5. Personnel and labor;
6. Working with unions and being a union or non-union employer;
7. Obtaining inventory, equipment, or other materials and supplies;
8. Prequalification requirements;
9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by primes or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;

18. Size of contracts;
19. Bookkeeping, estimating, and other technical skills; and
20. Size of firm
21. Other comments about marketplace barriers and discrimination.

1. Obtaining financing. Twenty-one interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses [#1, #2, #3, #4, #5, #8, #9, #10, #12, #13, #15, #21, #26, #29, #32, #34, #37, #FG1, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Finance is always a piece. Luckily, I just did what I was supposed to. I did whatever my bankers asked me to do. Initially starting out, it started off slow, but I had a banker that [had] seen the potential in our company, and trusted us, and gave us a pathway, then said, 'Please just follow these steps.' And I did it. I didn't try to break the mold. … I would say the biggest one is always finances. There's a lot of front money. I know speaking to not just minority companies, but people I know that want to be in the commercial business, or in construction business, there's always a financial hold. And some people don't believe in putting [up] a lot of front money or understand why putting $3,000 invested in this marketing tool, or this DBE registration, or whatever it may be, or joining Commerce Lexington without seeing the direct result within that six months. You got a lot of business owners avoid doing it. And some turn out to be successful, and some turn out that they don't. … I know some people do have good credit. Some people have been able to have good money. I do feel like there is less of a restriction, or less of a concern with non-minorities going and walking into a bank and asking for a loan versus the minorities. It's pretty evident. You see it all the time. You see one guy start a business. Two months later, he's out of business, and six months later he got a new business, but with three more trucks. Something of that nature." [#1]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Money for minorities is always a problem, especially in this area… because it is about relationships and most of the minorities don't have a lot of non-minority friends to have relationships with the bank, so if you don't have no black bankers around here, you probably won't get what you need." [#2]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Initially, I couldn't get credit for the business, I had to put personal finance, I had to do it on my personal credit. So, I guess in a way I would say yes, but that didn't keep me from doing it. It just made it a little bit harder. But once I was established, now I have good credit and a line of credit that's substantial." [#3]
- The owner of a majority-owned construction company stated, "We were able to get equipment because we were able to finance equipment. We used to finance everything. Now we just pay cash and save the interest cost. But in the beginning, we would buy things on time, and get loans from the bank. That was important. That's one of the impediments to the DBE community is probably some blatant kind of, or… I'd say in a little indelicate to say

it, but there's got to be some acceptance of the fact that there is some racism in the lending. And I don't quite know how to put my finger on it except to say that everybody denies it, but you know what, I sit across the table from somebody. They're looking at a white guy, and … It's very hard to explain, but I just think there's probably some difficulty there. And part of that relates to generational wealth too. … everyone that knew my father was a businessperson, nothing to do with construction... I got a college education, I'm sitting there and if they asked me something like, 'Does your father...' Because the name of the company, is not my name. Well, I did that on purpose because I was only in my twenties. … 'Well, what'd your father do? Did you inherit this from your...?' 'No, I didn't inherit from my father. He works for another company.' … I tell them that, right, no, I started this business. I just named it after him, kind of like in homage to him. It also inspires some confidence that, oh, there's somebody smarter than him back at the office, that kind of thing. … When I got into that scrape with my partner, I had to buy him out. I got financing, in part, by selling a warehouse that I had purchased to my father. And he was able to write me a check for it. And then I used that to buy out my partner partly. And then I also went to the bank and the bank was very cooperative. And then I paid, I bought the thing back from my dad after I got back on my feet, got more money, earned more money from jobs. But not everybody can do that. Not everybody, 'Hey,' pick up the phone, 'Hey dad, how about $100,000?' That kind of thing. So that was a big advantage, and it was a generation... There's a lot of discussion now about generational wealth. And it is a fact of life that if you have not had that advantage because you're successful but you're the first one in your family to be successful, it does weigh on you, as far as your ability to get things done." [#4]

- The owner of a WBE-certified construction company stated, "I didn't attempt to get loans at the beginning, I just started on a cash basis. Didn't pay myself for two years, just built some equity in my business and continued to pay my bills. After I'd had my business for a number of years, I had a little more cash equity behind it, and I had bought property. Once I bought property I could use a home equity line of credit against the property, I bought my business. And that's substantially been the line of credit I've used to help run my business for a lot of years. Now, last year during the COVID, for no apparent reason, my bank called my line of credit, which I have a good credit score, but they called my line of credit. I paid it off, and it made me mad, so I just went back to the basics of putting X amount in the bank and living off my own means. I had a disgruntled employee leave, and she did go to my bank and say, 'I want to make sure I'm not on the account'. And surprisingly enough, about five days later, they called my line of credit. I had been with that bank for 25 years, so that's the only assumption I was able to make." [#5]
- The Black American woman owner of a professional services firm stated, "Not lately. I have gone to community ventures. But for me, in order for me to grow, I need capital. So, it's kind of hard to get some capital in order to move forward a little bit. … my finances are suffering because I'm waiting on payment. I got money out there that I'm waiting to receive, it's just I still have daily living to take place and waiting on my money. So that's hard. But if I had a little bit of cushion, like a reserve, like a line of credit or something that I could borrow against." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "I went to the bank, to see if I could get a loan. Nope. Not one would give me. Well, I went to a bank that I had been banking with for years. They act like they don't want to give me a loan.

I said, 'I think my credit score is 780. 770 or 780. Why won't you give me a loan with that? That's a good credit score.' 'Well, you just don't have that many years in business.' I said, 'Well, I got a good credit score, I'm working every day. I need a line of credit.' 'Well, can you put your house up?' 'No.' 'Well, can you get somebody to co-sign it for you?' 'If I wanted to use a co-signer, I would have brought him in here with me.' I said, 'I don't understand. I mean, don't my credit score speak something about this?' 'Well, let us run your credit and everything.' I said, 'I don't need you to run my credit. I'm telling you what it is. Now, if my credit ain't what I'm telling you, and you want to deny me because I'm lying to you, then that's fine. But I don't need you pulling my credit and then my credit score's taking a dip just because you want to pull my credit. Now, if you tell me, 'If your credit score comes back what you say that it is, we're going to help you.' Then run my credit. Because I know I have nothing to hide or lie about.' Well, that wasn't the case. So, I said, 'Okay, you know what? That's fine. Don't even worry about it.' So, I just kept working." [#9]

- The Black American woman owner of a goods and services company stated, "I needed to have a space for myself. But as I started to expand, I was looking for money for finances. You basically sign your life away. So, 'Well, we need to see your taxes.' 'Okay, cool. I'll show you my taxes.' 'Well, how much are you wanting?' It was a nominal fee, looking back. $10,000 is not really a lot of money. Well, after you show them everything, 'Well, unfortunately, because you don't have a lot of collateral, we can't really give you what you're looking for.' And so, jumping through so many hoops, so it was really hard for funding at first. But then I'm starting to understand the game and being properly, well not certified, but setting up my business in a structure to where you can get certain types of funding, so having an LLC, that makes a difference. … COVID was a blessing and a curse. A blessing in the sense that it made you pivot and think outside of the box. So, because of that, I was able to get quite a bit of funding because of that, was able to get grants, was able to get SBA loans, and PPP loans, and things. So honestly, if it weren't for COVID, I don't know if I have would've gotten anything because I hadn't gotten anything before. I think the money's always been there, to be honest. But I think they were just more willing to give it out. And like I said, I've never, as much as I've struggled with just trying to get financing, and I did everything that I was supposed to and still being denied. I even went to SBA sanctioned banks, like, 'Oh, they should help you.' 'We can't. It's our underwriters. Or they're whatever.' So, with COVID yeah, it was no problem." [#10]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "It was initially, because back when we were getting rolling, we were coming fresh off the recession of '08 and banks were very, very hesitant for a line of credit. So, getting a line of credit, getting a lending institution to believe in your that was tough. Early on, and, you know, what drove the success of that was relationship with the bank. So, I think the lending is something key for ... If someone wants to start up a DBE, having that relationship with a bank and having that bank understand what the nature of your business is would be key, because that was a hurdle early on, is to get the line of credit." [#12]
- The Black American owner of a DBE-certified construction company stated, "Three years ago, I was going to get out of construction. Now building back up, I need probably more I guess lines of credit with the banks. That's a big thing, lines of credit so that you can fund the jobs if needs be. I'm talking about bigger jobs, not small ones. Bigger jobs, you need a lot of credit to fund the bigger jobs until you get paid." [#13]

- The Black American owner of an MBE- and DBE-certified construction company stated, "Access to capital, it's like I said, access to projects and access to capital. You have to be able to [bid to] work on larger projects in order to make enough money to where you have enough profits in order to grow your company. And because the way, things are with, there are only few large companies. And from my perspective, they don't have an interest in trying to work with a smaller contractor to help them build capacity." [#15]
- The Black American owner of a professional services company stated, "Just some funding. Just getting the proper funding you need. That's a barrier. I think it's just being a new business as far as you got to get your lines of credit and that everybody wants the personal guarantees, which is not a problem, but you get kind of spread thin if you got multiple jobs going." [#21]
- The owner of a WBE- and DBE-certified professional services firm stated, "It took forever to finally get real lines of credit. Once I was finally able to get my line of credit, it was, a night-and-day difference for me. That was very frustrating, that I was not able to get a line of credit, a true line of credit, from Fifth Third who helps host the MBE Expo in Lexington, who know me when I walk into the branch office. And I show them business booked, but it still took more than seven years of being in business to finally get an actual line of credit. And the frustrating part is, it was so that I can basically pay the bills for the jobs that I've already done for the government, but I don't know when I'm going to get paid. That was the whole reason [I need] the financing, was because the payment terms are absolute [expletive]. That's why I had to get a line of credit. So, I was financing Lexington work, Fayette County Public Schools work, KYTC work." [#26]
- The Black American owner of a construction company stated, "The financing part, yes. That a pretty good little barrier because people was scared to loan out any money, you know?" [#29]
- The owner of a majority-owned construction firm stated, "It's getting finance. Like I looked around to get some grants from maybe like government support or something, but I couldn't find anything, and I have barriers because I need more equipment so I can be more beneficial and I cannot buy it because I don't have finances yet." [#32]
- The Black American co-owner of a professional services company stated, "Inflation is always a concern, right? We're a venture-backed startup, and so we're going to take more dilution for more money, right? Over time, and so you'll see us raising more money sooner than later, and it means frankly that we'll own less of the company over time until we get out of this sort of inflationary environment." [#34]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "It was difficult in the beginning when we first started the firm, but over time as you we built relationships with our banks for the most part, it hasn't been a huge issue for us as far as obtaining financing." [#37]
- The Black American male owner of an MBE-certified goods and services company stated, "That is a hurdle in my situation for growing. That's something that's had a tough time in working through." [#FG1]

- The Black American male owner of an MBE-certified construction company stated, “I would say definitely not having access to capital in construction would definitely be a hurdle to growth. You can't get a line of credit. I know when I first started, couldn't get a line of credit. But as you build your business up, and people have faith in you, and eventually all that turns. But it can be an uphill battle trying to get there, in my perspective.” [#FG1]
- The Black American male owner of an MBE-certified goods and services company stated, “For my situation, I was able to land a line of credit. After I had a contract, not necessarily starting a contract, but after the bank was able to see that I had a contract with a respectable client, they were able to help me with capital and funding in that space. That was my experience." [#FG1]

2. Bonding. Public agencies in Kentucky typically require firms working as prime contractors on construction projects to provide bid, payment, or performance bonds. Securing bonding was difficult for some businesses and nine interviewees discussed their perspectives on bonding [#1, #13, #14, #15, #28, #4, #5, #9, #WT1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "The bonding process, I didn't have to go through growth. I think I started out ... I want to say my bonding started out at $500,000. After my first job, I grew to a million. That was within a year. I got bumped up to $2 million. I feel for a company my size, I would like to get to around $5 million on the bonding I feel is comfortable. I don't want to limit myself. I get in trouble every time I say it in front of my wife, but just on the jobs and the market that I like to see, and l would like to stay in. I don't think I'll ever have to exceed that amount as far as five million. Majority of our jobs right now are private, which 70 percent of the time they don't require a bond. Maybe if they get bigger, but just haven't had it. I don't think last year or over the last 12 months, besides the last job I just spoke of, I don't even think we applied for a bond, just on the amount of work that we was doing on the private end the bonding is tied to your personal financial statement again. I want to say it's three years of documentation of your business. They're going to ask for at least I think three years if you got one or two it'll work. And just the size of a job that you're doing.” [#1]
- The Black American owner of a DBE-certified construction company stated, "That's how I ended up being successful, is that right off the bat I saved my money in the bank, and I finished contracts. The bonding companies saw that I had money in the bank, and I was finishing contracts, and they helped me build my bonding capacity, which was great. Because I got up to 25 million probably in a couple years. That's how fast I grew. For me to be more competitive I think the relationships with the insurance companies for bonding also, better relationships on bonding. Because a lot of times if you haven't bonded in a while, what happens is that you end up having to pay a higher rate to get a bond; that hurts the minorities is the bonding. A lot of times on these jobs the bonding's just so high, there's no way you can bond these jobs with these other companies. There's no way. I missed like a million-dollar job one time because I couldn't bond it. I should have worked this other company to bond it, and I didn't want to ... At the time I didn't get it. I didn't want to lose that percentage, you know a certain percentage of the monies, and that's just the way it works out. You're going to have to give up some of that percentage if you can't bond and you need the help.” [#13]

- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Well, mainly, a lot of the jobs, we could bid on bigger jobs, but it's the bonding capacity, getting the jobs bonded. If we do one job, and bond the other job, so it kind of puts a limit on the jobs we can take on at a certain time. We have issues with bonding. The bonding requirements. And, a lot of the jobs, like the Fayette County School jobs, and the big jobs for LFUCG, they require bonding, and yeah." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "So bonding requirements, the LFUCG to me has to require the larger company, not as a goal, but as a requirement to work with minority-owned companies, I don't say minority-owned company, I'm not talking about woman-owned businesses or veteran-owned business, I'm talking about minority-owned companies, in particular African American-owned company, because the larger contractor, the banking work available to the Black contractor would help build capacity through profits. And the way you obtain larger bonding capacity is to make money on jobs that you do. And you can't do that if you're always doing labor work, or if you're always doing just where you require manpower." [#15]
- A representative of a majority-owned professional services company stated, "On some specific projects that focus particularly with the state require [some] bonding per project, and that's more performance and payment bonds." [#28]
- The owner of a majority-owned construction company stated, "There is something called a release of indemnity, which means that a bonding company has you by the scruff of the neck, because if you fail, they can come after your personal net worth. They can take come take your house and anything else that they need to, and when you get big enough, then you can start telling them what they can do. And I was able to get them to release my personal indemnity. So now all they can do is claim against the company. So, if the company fails, they can come back to the company of course. That's the name of the game, but they can't come after me. So that isolates my assets on the personal side from being of some calamity, if something ever were to happen." [#4]
- The owner of a WBE-certified construction company stated, "I have had problems getting bonded at first, but as I built equity in my business and personal wealth, I substantially have kept a very conservative profile and have always... I have cash bonded some jobs just to be able to do them." [#5]
- The Black American owner of a DBE- and MBE-certified construction company stated, "We are, another thing we got bonded about six months ago or eight months, maybe a year ago. And now I get calls from the bonding company. 'Hey, we're going to be in, can you be in Louisville? We'd like to talk, discuss some things with you for lunch.' It's a big issue. By the time I got ready to get bonded, 'Can I talk to you about the bond and the line of credit right now? Would that be okay?' About a year and a half later, two years later, something like that, I knew I looked really good. And then, like I said, my credit score was 770, 780. I had financial reports. I showed where I'd already been in business for, I think it was for at three years. I showed where I'd been in business for three years. I showed I could manage money and I showed I could run a business, is what I showed. So, by the time I got ready to walk in, I wanted to be able to walk in that bank and not walk in there with my head between my legs. I wanted to walk in there just like the other people who don't look like us. I want to walk in there just like them. Credit score, good. That stuff's good before I walk in there

because if they tell me something different, I want to know why. Why are you telling me something? I mean, the proof is in the pudding. So, I went to my bank. I get in there; I'm talking to the man. He tell me about putting up my house. I said, 'Let me ask you something, buddy. You talking about putting my house up. Let me ask you something. Is that standard across the board?' Yeah. Anyway, where you go that's the first thing they're going to ask you.' I said, 'I've been banking here for 40 some, almost for 45, 46, 47 years. My grandfather started me an account with this bank when the first week I was born. I never lost nothing. You guys never had to repossess nothing.' I said, 'This don't sit right with me.' And he says, 'Well, we could look at it and try to take a chance.' Stop right there. I don't need you take no chance on me.' I said, 'I'm taking a chance on you.' I said, 'Let me explain why. If my credit score was not good, you were taking a chance on me. If my financial wasn't good, you're taking on me. You're taking a chance on me if I hadn't proven that I could run a business, you're taking a chance on me. The numbers say, I can run a business. The credit scores right there for you to look at.' I said, 'And my financials show that I've been profitable every year that I've been business. I showed a profit. You are not taking a chance on me. I am taking a chance on you.' And he just looked at me. I said, 'But I tell you what I'm going to do. I'm going to go to the bank down the road. If that bank tells me that down the road, I'm going to come back to you. And we're going to see if we can work this out. But if they don't, you ain't got my business.' I went to the bank down the road, walked in there and talked to them. They said, 'Hey, we'll give you two hundred thousand right now. $200,000 for you to do whatever you want to with, the line of credit.' Got it. I went back in that bank, about six months later, they said, 'Hey, you never come back.' I told them; another guy was standing there that worked there. He says, 'Hey, let me talk to you.' I said, 'Yep.' He said, 'Man, why didn't you at least talk to us?' I said, 'There's nothing to talk about. Talk to you about what?' I said, 'Why am I going to talk to you? These people was doing more action while y'all want to talk.' So, he says, 'Yeah.' He goes, 'Look, I think we could work it.' Man, I don't want to work it out. I said, 'Maybe later.' He goes, 'He should never ask you that.' I said, 'Well, he works for you guys. Y'all need straighten that out.' I said, 'I told you, I'm going to take my show on the road.' So, before I wanted to get, now we'll move right into the bond. I wanted to do this. I wanted to be that far ahead before I talked to them about getting bonded as well. So, by the time I went to talk to them about getting bonded, same thing, the same thing that the bank was talking about. I said, 'No.' I said, 'I just told him, I don't want, listen, are you telling me that everybody goes to this?' 'Well, let us look at some things.' We're going to pull your credit score., I don't need you pulling my credit score. What I need from you is, I'm going to tell you what my credit score is. I'm going to tell you everything about me. What I want to know from you is, if I'm telling the truth, where does that put us at? He said, 'What do you mean?' I said, 'Go talk to the manager and say, Hey, if this guy is telling the truth, where's that put him in?' He goes, 'Well, we ain't never did it like that.' I said, 'Well, just go talk to him.' So, he goes in there and talks to me coming back. He says, 'Well if you're telling the truth, we can get you bonded.' Okay. Here's my social security, everything. Now run my credit store. They did it. And they come back. They said, 'Man, we got it approved.' About a couple weeks later and you're bonded. I think they bonded me for $750,000 aggregate, 400 or 450 occurrence is how they bonded me at first. But I just got that raised. They should have our contract and stuff at ready. Now, it took all of our bond. Matter of fact, our bond wouldn't even cover it all, they're going to break it down in phases. Right now, we don't

have any bonding capacity left. Now, could we go back to the people, the bonding company and get a little bit more? We could try, don't know if it'd work." [#9]

- A representative of a majority-owned construction company stated, "To help find subs we don't really require bonding from them unless it's a mega contract." [#WT1]

3. Insurance requirements and obtaining insurance. Ten business owners and managers discussed their perspectives on insurance [#1, #16, #19, #28, #29, #3, #32, #33, #FG1, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "To be honest with you, the insurance is not a really hard process. I will say, I do know of smaller contractors I have tried to assist with, or be it at a sub with me, very talented, very skilled individuals, but they did not want to pay the say four or $500 extra for the insurance. They have insurance, but it's just to bring it up to meet the requirements of the project. That is a little bit of the issue that some potential people have. It's just because if they don't do it regularly, they don't understand why I pay the extra $400, the premium. And I said, 'That's part of business.' And that's a little bit what I did in the very beginning, I was saying there was a lot of upfront money. I don't know. I'm paying a premium insurance policy so I could even bid the job, and I didn't even have a job. I haven't had one yet. When I can sit there and just have a lower insurance policy and go on about my business. That's the real understanding of dealing with the market is if this is what you want to do, you have to go all in, and you have to just play ball, and just wait for it to turn around for you." [#1]
- A representative of a majority-owned professional services firm stated, "We do require our subs to have a certain level of commercial and liability insurance, but that's never caused a sub to be disqualified. We've always been able to work through that." [#16]
- The Middle Eastern American owner of a majority-owned construction company stated, "Not really because Kentucky is not regulated a state for the radon. They're working on it right now, it's in the process. I do have the certification, but as of insurance, it requires a special type of liability insurance that has more about the environment. So, there's limited companies that will do that type of insurance. Usually, it's $150 a month. So normal liability insurance for a contractor is $50, this one starts as $150, and a special type of insurance. There's a couple companies that offer it, one of them in Louisville. I reach out for, but it's not required, it's more for the environment." [#19]
- A representative of a majority-owned professional services company stated, "They're just constantly looking over a company of our size. Sometimes there's insurance requirements, and things like that, versus what we stand to gain." [#28]
- The Black American owner of a construction company stated, "The insurance requirements? Now, that? I can. Because these people from out of different states coming in here, coming out of here and they're having accidents in our state, okay? That goes on our insurance purposes, do you know what I'm saying? For the overall state. And then, you've got people moving from out of state to get into a different area, because of the pandemic, because I've heard several people move because the pandemic was so bad here in one place, and so they moved to another area. And then now, they've got to cross here. They're having

all these accidents because... Since the pandemics been going on, I could name hundreds of people going down the road over a hundred mile an hour and having accidents." [#29]

- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Having to have liability insurance is expensive. And I have just bought it when I have to. So, if I get a contract that requires it, I can get it and I can afford it. If I have the contract. Of course, you can't charge directly for it, but you just have to make sure that your contract is profitable enough to help pay for it." [#3]
- The owner of a majority-owned construction firm stated, "I can get insurance if I'm on the Hills, like on a dangerous job, I can get insurance for that job. But for right now I don't really have good insurance for big jobs. I need bigger insurance, which I don't have." [#32]
- The woman owner of a professional services company stated, "I'm not required to have insurance, but to have personal insurance as a business owner is very disheartening." [#33]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "And a lot of the times what they're asking for is a tall order compared to the scope of work that you're doing. In my situation in particular, a lot of the times the bids that I am bidding on fall below whatever threshold it is. They don't even have to bid out or something. I forgot how that was explained to me. A lot of the time, it's almost like who you know, or you got to spend X amount of time making sure that you comb wherever these bids are going to be, or what, or sometimes you just don't even know about the opportunity existing at all." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "And in most cases, if I can't even meet the insurance requirement, I don't even bother with it because if a contract's $50,000, but they want you to have a $5 million insurance policy, and a $500,000 workman comp, then all I got is a little [contract]. Why am I going to even bother to do that? And then, there's no guarantees that you'd get the contract. Even if they gave you the opportunity to say, 'Well, you have 90 days after the contract, or 30 days after the contract to secure it,' but I'm not going to do that on a whim. I don't know if I'm going to be the successful bidder." [#FG1]
- A representative from a focus group consisting of construction companies stated, "For us, we're larger now, so it's not as tough. But let me tell you, we spend a lot of money on insurance. Seven figures go out the door every year just for insurance and health insurance. That's a small thing. All the other insurance that we have. Yeah, if my safety is bad, I'm going to be paying more money, and it's all about ... When it all comes down to it, it's the safety of your employees that you're concerned about." [#FG2]

4. Factors public agencies consider to award contracts. Fifteen business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms [#1, #2, #22, #25, #28, #30, #6, #AV, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "In the public industry sometimes some of those PMs are frustrated that they always go with the lowest dollar, lowest bid, because they know the quality of work, or they know the previous history of a specific contractor or somebody who's within that team of the

contractor. The biggest breaking point that I don't see is just getting in. There are other bad contractors out there, and there's quality that's not as great. I know several. They get low bid jobs. They're quality is not that good, but that's what the city has set up." [#1]

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We bid on stuff, we bid with prime, so mostly subcontract, you can't... Again, if you never get the opportunity to lead and do prime, you can't get prime work. You're going to never get a prime. They're not going to do that as a four-year company, even though you may have a history of leading projects bigger than that company. That personal doesn't matter. It's about your business and what your business has done. … Some [people] underbid the project by three, four, five million dollars, maybe even more. But they can survive it because they had a buffer of money. They could afford to go in, low ball it, and survive through it. How could I ever compete, or any other small black company compete with people who can do that? We'll never, if it ever, if the city, the local, state, and federal governments never come to that understanding and start putting mechanisms in place to give you an advantage, a handicap. We need some type of handicap, and then put in place until just one or two, two or three of us get to a certain point where now we can say, 'We got it from here.' Now we could make it happen." [#2]
- A representative of a majority-owned professional services firm stated, "The people who are grading them are mindful of giving small businesses an opportunity, or even give them a boost for being a small business." [#22]
- A representative of a majority-owned construction company stated, "Usually they have, they require three bids a lot of times. And it just strictly goes off pricing. I can tell you that happens. It does happen still. I wish it didn't happen, but it still does happen. And that's just, I'm going to call it a game, because in reality it is a game. The individual, if they do show favoritism, it's just the competition, my competition, has done a better job, I guess, of providing service in some aspect, or just knowing the customer themselves. As far as favoritism goes, we're very neutral. We have a pre-pricing matrix that we use. So, we can't really adjust pricing or anything like that." [#25]
- A representative of a majority-owned professional services company stated, "They're just constantly looking over a company of our size. Sometimes there's insurance requirements, and things like that, versus what we stand to gain." [#28]
- The male co-owner of a woman-owned professional services company stated, "I tell clients this... is you get what you pay for, which sometimes may, I guess, shoot me in the foot, but the fact of the matter, I'd rather have people hire us on our experience and our project stuff than just what the cost is. But that being said, we still have to pay our bills. And so, it's like I don't know when we bid on stuff, are we bidding way too high? Are we bidding way too low?" [#30]
- A representative of a majority-owned construction company stated, "They'll take low value, they'll take best value over bringing in a DBE company. I'll just be honest you. There's a lot of DBE companies that it costs them a little bit more money to do the work then it may take the next person. You know. I've seen workforces show up with Hispanic labor and I'm not sure that they that they are legal. How do you compete to against somebody that's not paying their people much money? When you're hiring good, qualified people, you know,

that's the differences and we can do it cheaper, or we can use a DBE company that's doing it right. And it's costing a little bit more money to do the job. The finish line for LFUCG is definitely 'how can we do the work the cheapest.'" [#6]

- A representative from a majority-owned goods and services company stated, "It is hard to get in - how much is about relationships and how much is being on the radar and bidding low." [#AV314]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Typically in Lexington, I think Lexington procurement is predominantly driven by two factors, past performance with them, and then they're also highly price sensitive buyers." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "In the engineering world, a lot of the qualifications-based selection are based on past performance. That's very common. The other big factor that they consider in of their selections is the cost of the proposal." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Some of my other public sector clients are qualifications only selection, and then my private sector clients they're a combination of factors. The most competitive markets would be those that receive public funding. K through 12 is the most competitive that's out there. And then, I would say the second most competitive would be the federal and the local municipals. And then, at least all the state work that I do is qualifications on my selection. And the university work I do is qualifications only selection." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I would say past performance is the biggest thing I've seen just in my short time of business was just how you've done previously with other clients. Recently we won a contract that I wasn't the lowest bidder. And I think more so we want it because of past performance. That's what I've seen." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "For myself, it was based off just being the lowest price. My first couple of contracts just had to be lowest bidder. And I was able to do that, and then until I get my foot in the door, and then eventually get my margins up to where I wanted them to be." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "We just continue with renewals based again on past performance. As long as you were meeting the margins, and the price were at the appropriate spots." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I know for myself, past performance is huge when you're meeting a GC. They can verify that, 'Hey, you did X, you performed it well, you finish up the project.' And I think if you establish your past performance, any GC is going to take you seriously if they can verify, and that will get you at least to the table. And then beyond that, you've got to have competitive prices." [#FG1]

5. Personnel and labor. Sixty-two business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #2, #3, #4, #5, #6, #7, #9, #10, #13, #14, #15, #16, #17, #19, #21, #23, #24, #25, #26, #27, #28, #30, #31, #32, #34, #37, #AV]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "The biggest thing a lot of us in this industry is dealing with is to not enough skilled trade individuals. A lot of companies are stealing from each other over a dollar or 50 cents more pay, just because we can't find the help. … I try to be active with the BMW Program, try to be active with the youth of my church. And then also to, I think you got to be active with the parents and the community as a whole. … a lot of people think, just because you in construction, work is seasonal. That's not true. They don't think you can build a building or pour concrete in 12- or 13-degree weather. The technology is amazing these days. So, what I'm trying to do now, is encourage our youth to be more hands on, understand concrete, understand masonry, have some general knowledge of framing and drywall. Even if you'd like to go to college, that's fine. I do believe not everybody's meant to go to college. If everybody in our world today went to college, we would not have manufacturing and everything else. Our country is built off of hardworking hands and labor, but I do believe people can be educated. There is a great education that you learn just in a trade system. … You have guys retiring and you don't have the group of 18 to 25, to 30-year-olds, [they're] just missing in the industry, there's a gap. … you keep getting these, not just the gentlemen retiring, but at the same time when you get up in age, they're knowledgeable ones, they're not your hardcore laborer in the field. So, a lot of times, just when I say I'm hiring a youth and letting them learn by experience, is because you put them with someone that is mature in the industry and they're going to teach you. At the same time, you have to do, I don't want to call it the backbreaking, but you have to do the labor that they shouldn't have to do." [#1]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "The hiring of people is challenging all the way around because you have people, you have problems with drugs and getting somebody, because we don't hire... If you do drugs, you do alcohol, we don't hire you. I think everybody has an equal issue with that. What a lot of people have done is just stop testing people so that hiring becomes easier for them. But for us, mostly, if you do get workers, you draw probably more minorities, but then you have problems because there's a dynamic in this area with the minority resources that they don't have trusting relationships or they don't have trust amongst their own people. Basically, on both sides, it's difficult finding people with the skills and we end up having to do a lot in the training." [#2]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Our original concept was to not have any employees, to use subcontractors. And in our business, a lot of times young people come in and they learn the business and they go out and freelance, and so we were taking advantage of experienced freelancers as our partners, but not hiring people. But I found that in order to get some of the quality work that I wanted, I needed more people, that I didn't have enough of the team members to either do the work or to be seen by our prospects as a company that could do the work. … people would think you have to have 'X' number of people to be able to handle their work. And if you were too small, they might not hire you. In the marketing and PR business, there are a lot of people

looking for jobs in this field. … It's knowing my barrier was having a stable contract in income to know that I could pay people. So, a lot of the work in this community in our field is project work. And it's good, but it goes away. And you never know. And sometimes when you get caught up in a project, when you're small, you're not cultivating those new clients to come in. So that project goes away, and you don't have the work and you may have ebbs and flows in your income. For that reason, I was really concerned about hiring people, because I was afraid I'd have to turn around and let them go. So, I would say that one of the biggest barriers to me was having steady income and contracts that would support ongoing workforce I was hiring people. Hiring them was not the problem. Keeping the money coming in on a regular basis was the problem. I now have an administrative person doing the bulk of the actual fulfillment on the job. I was running the company, hiring people, getting the business, fulfilling about 50 percent of the work. It's too much to juggle. I wish I knew then what I know now, which is the first person you should hire is an administrative person." [#3]

- The owner of a majority-owned construction company stated, "I don't think it's COVID. I think we've got other problems, systemic problems, in the labor pool, which we can discuss at a later time. But I think it's very difficult for people to find help now. And whether you're a DBE or majority contractor doesn't matter, you going to have a hard time finding people. That's just the way it is. I don't even think it's restricted to the construction business. Everybody's having a hard time. I don't see a shortage of help wanted signs anywhere. Everybody's hiring. Everybody needs help. They can't bid because they don't have any help, or the job is too technical. So, we tend to go for nasty jobs because they pay better. It's a function of how much work is out there. And I mean there's people out there that could do twice the work if they had the help. It's just nobody, there's nobody out there" [#4]
- The owner of a WBE-certified construction company stated, "There's only a certain number of qualified people to do specialized work, and that has dramatically changed in the last three to five years. So, as I said, I do my share of it, but would I be able to hire enough personnel to do 70, 80 people? I'm not sure I would. I mean, there are not enough craftsmen available. I mean, in construction it's a believed fact that there aren't enough craftsmen coming up through the ranks that are learning trades. Trades make pretty good money, but there's a lot of other things that people would like to do for quicker, easier money." [#5]
- A representative of a majority-owned construction company stated, "Lexington has a workforce but it's been difficult to hire within the county. We have had to use people, even subcontractors from outside the county to do the type of work that we do. It's very hot work in the summer. It's you know, it can be long hours, weekends, nights. … it [has] been difficult as far as that goes to try and keep people and work force that comes from around Lexington. A lot of our people travel to Fayette County to work I don't know it's it seems like the people that are inside the county aren't interested in that type of work. You know, the heavy highway construction work. A lot of those folks like you know, they've had a background in it outside the county and they'll come here to do the work. And they'll travel home. You know, there may be an outlying county or two counties over you may drive from 30 minutes an hour to come in work and work for us. … We've done job fair here. We've worked with people that have placement out halfway houses for people that are re-engaging society we do some hiring services. That's not paid off well. We've tested the water and it kind of got away from we found the people that were we would hire for hiring

services were like kind of short-term employees and want to move on. You know, our longer-term employees have been people that come more from a rural area background to do the kind of work that we do. If young people or young adults don't want to do this dirty work. You know this works dusty and hot. You know asphalt, asphalt when it comes out the back of the paver is over 300 degrees and you're standing within a few feet of it. We continue to find those people. you can't use an old school approach to how you encourage workers you know, to learn and get involved. You've got to give them a very safe environment to work in. the workforce, the younger workforce, they're still eager to work. There's not a problem with them. It's how you treat them when they show up. That's the key. I'd say the best thing is that it's you've got to provide a culture that they're expecting when they get here your work. It's not to make fun of them. It's not to you know, in some way ignore them a feel like they're clued in what you're doing. You're going to train them you're going to help." [#6]

- The Subcontinent Asian American woman owner of a professional services company stated, "The staffing itself is very challenging. One of the key challenges for staffing solutions is being able to get the contracts and get the employees, consultants, but at the same time, for you to place them somewhere, you need the contracts with any company or entity. The challenge has been to get such contracts. It's job boards, state private job boards, and at the same time, personal contacts." [#7]
- The Black American owner of a DBE- and MBE-certified construction company stated, "Another Black guy that I've become friends with that needed some help, and I've been helping him. But if I would have had enough work, I could have got the good employees a lot sooner. I wasn't having enough work, so when I'm getting done with a job or two, my next job is two weeks away. Okay, the place that you work for right now, if you get paid today, and they are talking about they ain't got no more pay for you for two weeks, okay. You like it there. A month later, they tell you we ain't got no work again for you for two weeks. How long you going to do that? Not very long, are you? First of all, we pay for very well. We pay our employees $40 an hour. A lot of our employees may only make $26 to $30 an hour but we pay an extra $16 an hour on top of that. If we pay an employee $30 an hour, we really pay him $46. The other $16 goes towards his benefits. We pay for their insurance, for the whole family, 100 percent paid. It don't matter if you got 10 kids or 20 kids, the insurance is completely paid. Your deductible is only $600 something per year. We give a full a pension as well, that pension is not a 401k, it's a full pension. It never runs out until the day he die. It's based on you're the service that you put in. We also give training for free. We send you to be trained in certain... Whether it be flagging, traffic control, doing different things, we send you down there. It's all paid for by us and it's free. I do, I have big concerns. I fight every day. It is tough. But if I got the work and it's solid, I can figure out how to get them young people from around Lexington, I can get them." [#9]
- The Black American woman owner of a goods and services company stated, "I don't have a concern about finding people, but I'm of the mindset that you hire slow. So, I think the only concern would be is finding the right person." [#10]
- The Black American owner of a DBE-certified construction company stated, "Now the problem that I'm running into is trying to find good people and hold on to good people. Because it's hard, because they are staying at home drawing unemployment and making

just as much at unemployment [as] they're making working. And so hopefully that'll change, because it is starting to take effect that construction companies like mine, we can't find good employees. They're not out there anymore. We're losing them. … the economy has been so bad and just wasn't a lot of jobs out there. They tend to work a couple weeks and then you won't see them again for another ... You might not see them for two or three months. They'll come back asking for a job. So, I think right now it's tough because of the economy, and we're providing unemployment for employees. They would rather sit at home and draw unemployment. That's what I see right now, instead of wanting to work." [#13]

- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "The labor pool been kind of hard." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Finding personnel, yeah, I think that's a barrier for everybody and like right now, but usually it's not very difficult to find personnel, what is difficult is you have to have the capacity, so you have to get the work in order to pay the personnel, the type of money that will match up with some of the larger contractors and benefits. I think you knew that by the experiencing of your workforce, I mean, a lot of times, you can do that by hiring people that come with experience as opposed to trying to train people up." [#15]
- A representative of a majority-owned professional services firm stated, "The biggest challenge we face at the moment is finding qualified people to hire. There's a real shortage of people. And this has nothing to do with unemployment insurance or anything like that. It just seems to be a shortage in the engineering science marketplace." [#16]
- A representative of a majority-owned construction company stated, "We're dealing with what we call the great resignation. You know? Everybody jumping ship. Of course, we experience trouble finding people just like everyone else." [#17]
- The Middle Eastern American owner of a majority-owned construction company stated, "Well, it's half-half because I'm not steady at work, so having a helper and be able to put them on a payroll is a big challenge. I have someone that helps me based on the house. If I do a house this week, give them $100, something like that. But having somebody stay on my payroll like a normal employee, is not going to happen until I see I have a consistent workload. I need to get at least two to three houses a week." [#19]
- The Black American owner of a professional services company stated, "It's been an issue keeping labor, qualified labor for sure. [They've generally] been untrained." [#21]
- A representative of a WBE- and DBE-certified goods and services company stated, "Getting people to show up has been ... For instance, we used to get 60 people a month we could get in here or something. Background, drug screens, interviews, that kind of thing. Mix of whoever guys, girls, races. No problem. Now we're getting, I would say 75 to 80 percent women are applying to the guys. I don't know where the guys are. I guess they're home gaming. I don't know. They're making it big on YouTube, but then when you get them to come in, they'll go through everything and then we'll get them hired and they're gone. They never even show up the first time. If they even make it to the interview… We've actually put a questionnaire out and asked, I think it was close 6,000 of our employees through the years and we're getting a good mix. I think I gave about 10 different examples of why they're

working, why they're not working, would they come back… Just like a where are you at right now in your professional work life. Are you working? Great. Are you not? And then if you're not, why. And then usually there's all these different reasons as to why. And there's been a vast array of answers. It's mainly stuff like I'm getting paid too much at my job to leave or I'm scared to go to work right now because of COVID. There was a large percentage of people who were saying they were burned out. Especially people who are in the medical field, which is understandable. I'm responsible for caring for an elderly loved one, a parent or something like that. And I don't want to put myself in the situations where I might be exposed and take it home to them. No childcare. So, there was nothing really shocking that we weren't expecting to see. That's pretty much what we saw as the reason why people didn't want to put themselves out there as a person available to workforce. … We have one client that is willing to pay people that ... To work with us, you have to be 18 and have at least a GED. And this one client would pay so much an hour. And then if people would work for a full week, they would give a bonus to that person. That's how bad it is. Facilities are given bonuses just for people to show up. We do a lot of work in the medical field. And so, I don't know how like all the extra COVID pay works out with these nurses and things. A lot of them are getting paid about $20 more per hour. And then they get a shift bonus of usually $250 on top of that. That means they're getting paid roughly probably close to $60 to $70 an hour. And then they get after the end of the shift like an extra $250, just for showing up." [#23]

- The owner of a majority-owned professional services company stated, "That's the nature of the beast. You train everybody who comes in the door, and you assume you're going to invest a year in a young person coming in to get them fully up and running." [#24]
- A representative of a majority-owned construction company stated, "The other thing [that] probably breaks [even] there with the inventory is just finding associates. What we're finding out is we're trying to develop a culture that is different from the culture that we're coming from and finding the right person to fit into the different teams. And people just aren't applying." [#25]
- The owner of a WBE- and DBE-certified professional services firm stated, "[COVID has] made it much easier for me to hire people. People come to me now because they're like, 'You've been remote, and I don't want to go back to working in an office.' And so, I get people, I mean, I just hired somebody out of Texas." [#26]
- A representative of a woman-owned professional services firm stated, "We'll post it. We've got actually postings on Indeed right now. It's usually word of mouth where I get my best people. The guy that was in here, I got him through Indeed. I think he was one of my best hires." [#27]
- A representative of a majority-owned professional services company stated, "That can be a problem. Actually, we just had a field technician leave Friday. So, we're back in the business of looking to replace them, and it's not very easy to find somebody to fit, that can work with our budgetary constraints. We use Indeed, and some of those online services that are available. You can't afford to pay a salary like that. Somebody that... we don't have work for them to do. It's a catch-22. When you land the work, and a lot of our competitors do this. Do you land the work and not have a staff person on hand to do it, then try to find somebody to

get the work done, or do you hire somebody and don't have anything for him to do, and hope that you can get some work for him to do?" [#28]

- The male co-owner of a woman-owned professional services company stated, "We're kind of a niche business, so there's always people that are looking for work in my industry. It's reaching out to people and basically saying, 'Hey, we have work. Do you know anyone who's looking for any work?' There is a couple online listservs that advertise specifically for the types of work that we do. And so, we can put a posting on there if we need to. We're fortunate." [#30]
- A representative of a majority-owned construction company stated, "The labor force, I think it's really adversely affected our labor force when you start looking at roles like labor, lower paying jobs as a whole, I think that ... It's hard to say, but I guess in my opinion at some point in time the government's going to have to quit supporting people for no reason and they're going to have to go back to work." [#31]
- The owner of a majority-owned construction firm stated, "I can look, I don't know where to look but I don't mind. If I get bigger job, I'm going to need more employees, but where do I look? Where do I find them? Also, I was thinking about it. Like I can post on the Craigslist, say, 'Hey, I'm looking for people with experience in this field. I need these qualities and maybe this many years of experience and I'm going to pay this amount of money depending on the contract in the job.' I was thinking about it, but I don't have enough jobs yet to even think about employees." [#32]
- The Black American co-owner of a professional services company stated, "That is always challenging. It's two things. It's culture, right? Cultural competency to work in the environment for the type of company that we're building, and then I think just sheerly numbers. Where are the people who are available? Most people have a job at this moment. … We steal them from other companies." [#34]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "It's not too difficult. Yeah. It's kind of hit or miss. I can go either way. Sometimes if you want to get a bigger diversity of candidates, it is kind of a struggle to find different candidates, but for the most part, we don't have huge issues with it." [#37]
- A representative from a majority-owned construction company stated, "Business has been brisk and probably driven by the pandemic the last two years. We would love to be able to provide for services [but we are] having issues finding work force to provide those services." [#AV12]
- A representative from a majority-owned construction company stated, "Plenty of work, economy is strong. Just a lack of people." [#AV16]
- A representative from a majority-owned construction company stated, "Work force. Finding employees is very difficult right now." [#AV17]
- A representative from a majority-owned goods and services company stated, "We are downsizing. We can't get help." [#AV22]
- A representative from a majority-owned goods and services company stated, "We don't intend to expand at this point. It is really difficult to get employees. They won't show up for

interviews, they don't show up after you have made an offer and hire them. We are desperate for employees in all three locations." [#AV23]

- A representative from a majority-owned goods and services company stated, "Right now, every competitor is struggling to hire employees." [#AV26]
- A representative from a majority-owned professional services company stated, "The biggest problem in the marketplace right now is that nobody can find any help." [#AV33]
- A representative from a majority-owned professional services company stated, "We are looking to expand, we just have a hard time finding labor." [#AV45]
- A representative from a majority-owned professional services company stated, "We have not had trouble finding work, but the problem is in staffing." [#AV54]
- A representative from a majority-owned professional services company stated, "It is extremely hard to hire in this market. 75 percent or more of the organizations in Lexington are currently hiring. There are more open jobs than there are candidates available." [#AV60]
- A representative from a majority-owned goods and services company stated, "There's no problem to hire workers, just getting them to show up." [#AV66]
- A representative from a woman-owned professional services company stated, "We as a childcare provider would like to be able to get a faster more efficient process to be able to hire help." [#AV78]
- A representative from a woman-owned professional services company stated, "It's been very tough because of the lack of people wanting to come to work. They'll schedule interviews and then they never show up. Some people get awarded the position then still not show up." [#AV80]
- A representative from a woman-owned professional services company stated, "[It's] hard to get employees to get work." [#AV204]
- A representative from a majority-owned professional services company stated, "Very hard to recruit due to COVID, unemployment issues, and wages." [#AV227]
- A representative from a majority-owned construction company stated, "Extremely difficult to find personal as well as an addition location." [#AV234]
- A representative from a majority-owned construction company stated, "Don't do it. You can't find help, manual laborers. I went through 24 helpers in 2018. I can't pay a man to work. There is a crisis for construction workers." [#AV243]
- A representative from a majority-owned construction company stated, "There is no shortage of work but of laborers." [#AV251]
- A representative from a majority-owned goods and services company stated, "We have talked about going to that area, but we just can't get the help to open another location." [#AV254]

- A representative from a majority-owned construction company stated, "A lot of businesses are going out of state to hire and then the out of state come back and hire us. That money should be kept in Kentucky." [#AV273]
- A representative from a majority-owned construction company stated, "Finding help [is] a more severe problem than in years past." [#AV280]
- A representative from a majority-owned construction company stated, "Finding qualified competent help to do the work [is] one of our biggest issues right now." [#AV288]
- A representative from a majority-owned construction company stated, "Good luck finding help with licensed electricians." [#AV293]
- A representative from a majority-owned goods and services company stated, "I think everybody has lost their mind about the way we're handling optional employment. It's about to get really bad for everybody because whatever political affiliation is or whatever your goals are an economy is just jobs and they aren't going well." [#AV304]
- A representative from a majority-owned construction company stated, "It's been stable for us, and last year and this year were as good as or better than the year before. It is very difficult to get employees though." [#AV308]
- A representative from a majority-owned goods and services company stated, "I don't have much on the Lexington, but Kentucky-Louisville area, finding employees is downright impossible right now." [#AV310]
- A representative from a majority-owned construction company stated, "Biggest issue is finding people to do the job." [#AV315]
- A representative from a majority-owned construction company stated, "We need more of a workforce." [#AV309]
- A representative from a woman-owned goods and services company stated, "Where are the employees?" [#AV307]
- A representative from a Hispanic American-owned goods and services company stated, "The industry right is really booming, but finding employees is next to impossible." [#AV305]

7. **Working with unions and being a union or non-union employer.** Three business owners and managers described their challenges with unions, or with being a union or non-union employer [#5, #17, #29]. Their comments are as follows:

- The owner of a WBE-certified construction company stated, "I have been requested to be union a number of times, but I was not willing to do that. And when UK was building the hospital, I submitted a bid and I was qualified and had been pre-qualified, but they come back and wanted me to be a union shop and I said, no. So, I withdrew my bid. There's not real big issues with being a union. I'm from a union family, I grew up with parents who were both in unions, but I guess I have control issues. I have the issue of the union having control of what my overall costs are, and I've just always had issues with that." [#5]

- A representative of a majority-owned construction company stated, "Prevailing wage jobs, you got to be really careful with the employees that you have there. Just because as you well know, that's a pretty good wage to be making. Sometimes, it's hard to motivate people who, quite honestly, are making more than you are. So, you know? 'Hey, we need to hurry up and get this done.' And they're like, 'Okay. Yeah, I'm going to hurry up and get this done. But the longer I stay here, the longer I'm going to make $70 an hour.' So, to me, that's a hurdle. And we have had some issues with union, just because they're there to protect their workers and, hey, I get it and respect it. We had one project where we were supplying some stuff for, and I had no idea the architect contacted us direct, and it was a union project. I showed up to bring something to them. And of course, when I got on site, the steward asked me where my card was. Like, 'I have no idea. I don't know what you're talking about.' And he said, 'Well, just stay right there.' He went and found out what was going on. He came back and said, 'Just pop open your tailgate. I'll have some people unload it and you can leave.' I said, 'Okay.'" [#17]
- The Black American owner of a construction company stated, "I don't fool with the union because unions [are] only for a lazy man to have a job." [#29]

8. **Obtaining inventory, equipment, or other materials and supplies.** Twenty-nine business owners and managers expressed challenges with obtaining inventory or other materials and supplies [#1, #12, #13, #15, #17, #19, #2, #24, #25, #3, #30, #31, #32, #4, #8, #AV, #FG1, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Our biggest problem right now is acquiring, which through a vendor, will say have a problem with anything related to doors and hardware, windows, fabricated finished metals, roof canopies. There's even, right now there's mature roofing industry, is having a material shortage and speaking with them, it's not the manufacturer. It's just the manufacturer can get the raw material to make what they need. Nobody knows on that end. I know the doors to the hardware when COVID first hit, it was COVID related. There's a lot of door hardware manufacturers, I have a couple the Southern States, there was impacted heavily by COVID. They didn't say anything and kind of puts everybody behind." [#1]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "It's expensive. You know, these softwares now, as you know, are going to, instead of buying a hard copy, you're renting. You're renting seats and it's quite expensive, and yeah, technology has gotten a lot more expensive, but you've got to do it. You've got to stay up with it." [#12]
- The Black American owner of a DBE-certified construction company stated, "Thing is I always had accounts, good accounts from the very start. That's one of the things I always set up, is accounts with supply companies, and I didn't have a problem with that." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "That's a barrier to obtain the equipment, and then it goes back to the capacity issue, if you have to have larger, long-term jobs in order to justify the purchase of equipment, in order to maintain it, the maintenance on it, and to keep it available. I'm not familiar with it, that would be good. I mean if there were programs." [#15]

- A representative of a majority-owned construction company stated, “The biggest issue we have right now is just shortage of materials, lead times. And then of course, the volatile price increases that's happening all the time. So, the sooner we get those contracts in line, the sooner we get the materials bought, then the more comfortable we feel. Only since COVID- we've had issues. Steel supplies were basically non-existent. Of course, that led back into the material increase, the price. And once again, we were talking about that earlier, it seems like steel now has kind of gotten back in line. And now we're seeing other things. Doors, hardware. I mean, it's just every time you turn around it, it's the next thing is having a shortage.” [#17]
- The Middle Eastern American owner of a majority-owned construction company stated, "The furthest I went was Mt. Sterling, but a little challenging for me right now is having a reliable van to reach for the further areas, let's say like E-town, Louisville. If I have a newer van, I would've, but I don't want to push my luck. … It's the financing. I can't afford to have that kind of monthly payment on a van when I'm just starting. I wasn't fortunate enough to get any of the SBA loans because of the way and date my company was formed. I think it was in July 2020, and any loans or the relief loans or the stimulus loans, I wasn't qualified for them just because that date. Everything has gone up as material prices because of the pandemic, the prices are changing. The flows I'm really looking for is to get a new van. I can't have big inventory because the fans has a five year warranty from the day of installation or from was made. So, I try to have fresh fans with me at all times, so I order in portions. Now I can't order in bulk, as PVC pipes goes, because of finances. The more bulk you buy... If you go to a Home Depot or Lowe's and tell them, 'Hey, I need a thousand PVC pipe,' you get a different price. So that stuff affects your profits. So, the lower the cost for the raw goods or the components that goes into your system, the more net profit you'll make. You know that saying, 'You need money to make money.'" [#19]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "With this pandemic situation, those are hard questions to answer because there hasn't been a lot of purchasing or going up against that, but in the past, we have had challenges with getting financed and finding the monies to do what we need to do. A lot of our resources that we have created for us have been very creative, because I come from a corporate background, tapping into resources and organizations that I've previous proudly worked with and helping along the way. Also connecting with political resources that understand how money and stuff moves and networking with them and figure out to build relationships, to figure out how to get certain things. But when just solely on our own, going to the bank, we've been told no, no, no, no. It wasn't until we found creative financing and/or creative means that we, and just using our own money that we had from our corporate background, that we've been able to survive” [#2]
- The owner of a majority-owned professional services company stated, "We constantly have to acquire updated equipment. But it's not hard. It's not a big issue.” [#24]
- A representative of a majority-owned construction company stated, "A barrier now is finding inventory.” [#25]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Just the affordability of it. So, we work with a nominal amount of equipment, but little by little

we've added some, but it's still kind of limited. It doesn't take a lot to do our work. We use internet and a copier, some cameras. That's about it." [#3]

- The male co-owner of a woman-owned professional services company stated, "Well, honestly, we use a lot of the same technology that your survey folks use. So, we're using the GIS. We have a Trimble, which we don't use as often as we should. And I think a lot of that is just because we don't have the technological use of it. And also, that technology gets really dated, and it gets really expensive. And so, either I go out and purchase one, which is a heavy-duty cost, or I go out and rent it, but then I need to have a project that could justify me absorbing the cost of renting a piece of equipment. And things like GPR, ground-penetrating radar, is something that we could utilize more, but that's also such a rare piece of equipment that the amount of projects, it might be once a year or once every couple of years I'd even need it. So, in a case like that, we just hire someone to do that stuff for us." [#30]
- A representative of a majority-owned construction company stated, "Probably the biggest challenge, if you will, if that's where you're going with this, that we've had with COVID has been both on getting supplies and securing supplies like pipe and things like that and concrete products that we use out on the job." [#31]
- The owner of a majority-owned construction firm stated, "It's getting finance. Like I looked around to get some grants from ... maybe like government support or something, but I couldn't find anything, and I have barriers because I need more equipment so I can be more beneficial, and I cannot buy it because I don't have finances yet." [#32]
- The owner of a majority-owned construction company stated, "We were able to get equipment because we were able to finance equipment. We used to finance everything. Now we just pay cash, but, and save the interest cost. But in the beginning, we would buy things on time, and get loans from the bank. That was important. That's one of the impediments to the DBE community is probably some blatant kind of, or maybe subtle, yeah, I won't say blatant because nothing's blatant maybe. I'd say in a little indelicate to say it, but there's got to be some acceptance of the fact that there is some racism in the lending. And I don't quite know how to put my finger on it except to say that everybody denies it, but you know what, I sit across the table from somebody. They're looking at a white guy, and I don't even know. It's very hard to explain, but I just think there's probably some difficulty there." [#4]
- The Black American woman owner of a professional services firm stated, "I had to get a fast scanner, had to get a dual tray, laser printer. Of course, you got to have a computer. Of course, you need a car in order to get places that you need to go. A barrier right now is gasoline. So, gas is high. So, I pick and choose where I'm going to go." [#8]
- A representative from a majority-owned professional services company stated, "We are pretty busy but getting supply of materials is tough right now, but we do have the work for our employees." [#AV32]
- A representative from a majority-owned professional services company stated, "It's been fairly busy. The pandemic slowed things, but it is picking up. Labor shortage tough to get materials in a timely way." [#AV35]

- A representative from a majority-owned professional services company stated, "Logistics and materials are hard to get right now - labor sources are hard to find- but a good to work in the Lexington area." [#AV43]
- A representative from a majority-owned construction company stated, "Material, it has gotten crazy with lead time. Bidding a quick job you have to be careful because you may not get the materials in time." [#AV259]
- A representative from a majority-owned construction company stated, "I would like prices to go down on electrical material in general." [#AV263]
- A representative from a majority-owned construction company stated, "There is quite a bit of uncertainty in the marketplace given the current state of events, the political structure of the City of Lexington and the United States in general. There is grave concern about the availability and cost of construction related material." [#AV276]
- A representative from a majority-owned construction company stated, "The outlook is positive despite supply chain issues - finding help a more severe problem than in year pass - lot of help could be done in Frankfort, [in] particular paper work for those who work from county or county or municipality." [#AV280]
- A representative from a majority-owned goods and services company stated, "Survival mode, as supply chain has us hold right now." [#AV297]
- A representative from a majority-owned construction company stated, "Major supply chain issues." [#AV320]
- A representative from a majority-owned construction company stated, "Materials are hard to come by and very expensive right now." [#AV325]
- A representative from a majority-owned goods and services company stated, "Parts and materials are very hard to get with prices changing daily, which makes it very hard to give out quotes." [#AV308]
- A representative from a majority-owned goods and services company stated, "Competitive market. It slowed down due to the supply chain issues." [#AV310]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "my biggest hurdle with business right now is that I have my year sold, but the projects, because we're waiting for supply chain, or the construction progress to get to a point where we can work, we can do our stuff. It's slowed to a halt, and so that's really packing our velocity, and our ability to deliver on time based on what the schedule projections were when we deliver the work. Just delays. It's not so much that the sales backlog isn't there, it's just you can't perform any of the work because it's a not ready for you to do. That's really creating, we just had a really rough January because of that, and coming off a rough December. That's the biggest thing we're seeing right now in terms of just market conditions, and the impact of them." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "What I've seen, especially on electrical pricing in contracting is a lot of times I'm getting prices that can only be held for seven days, and sometimes you won't get an award in seven days. Sometimes you have to evaluate what do you do if you get

awarded the contract, and then that price you had that was 20,000, well, now they're saying it's going to cost you 30? You're taking on all that risk. Those are the factors that we have to look at when we're bidding." [#FG1]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "It affects it, but at the end of the day, you've got to land work. You have to be more detailed, and do your due diligence, and make sure you've got everything looked at. And feel comfortable with what you're putting out, because you could definitely put yourself out there on a limb, so to speak. You just look at things twice, two or three time." [#FG1]
- A representative from a focus group consisting of construction companies stated, "The prime contractor can be there to help in certain instances where you might have a hard time procuring certain materials that are going to go into the job site. A lot of times the manufacturer or the local distributor will ask for almost like a comfort call or even a comfort letter to say that they will be the backstop to make sure that these bills are paid and paid on time. Once again, it's the relationship that is built up slowly and you have to be flexible in the mind. You have to be very flexible and presentable. I would approach it from that perspective, for sure." [#FG2]
- A representative from a focus group consisting of construction companies stated, "A lot of times when you have a huge amount of material that a DBE has to supply to us through their subcontract, sometimes the vendors will require joint checks. Hey, that's fine with us, but it's one more thing that's required sometimes." [#FG2]
- A representative from a focus group consisting of construction companies stated, "For us, we've got jobs out there that we can't start because this piece of equipment has not been made or not been shipped, or it won't be shipped for another eight months, and we sit on the side and wait, which has hurt us." [#FG2]
- A representative from a focus group consisting of construction companies stated, "We try to tie down suppliers on a ... Let me say, 99 percent of what we do is bid. We bid jobs. So, if I'm going into a job, and it's a two-year job, I'm going to say to the supplier, say, 'Hey, the price for this widget is this much. That's what it's going to be for the next two years.' Yes, some people are having a problem with that, and sometimes we'll have a built-in inflation on their pricing, but we bid our job that way too. So, we know it up front. … Those escalation clauses. I was shocked to print out some of the addendums or whatever for these contracts now, a rebar, they wouldn't hold their prices just for a couple of days. That's shocking. Pumps, pipes, and valves… seemed like the valves used to be made in Mexico. Now they're made over in India and floated over, and they were hit with COVID, India was. So, if you don't have valves, you can't put in these piping systems. It is just shocking. We spend most of our time just trying to track down where this equipment or materials is sitting on a big container ship somewhere, and where is that at? But yeah, the air can get pretty thin. The organizations will try to work because they know it, but still, push comes to shove, the contractor has to get those materials eventually and at a decent price. It does affect, yes, it's a major factor." [#FG2]

8. Prequalification requirements. Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on

government contracts. Eight business owners and managers discussed the benefits and challenges associated with pre-qualification [#13, #16, #29, #30, #6, #FG2]. Their comments are as follows:

- The Black American owner of a DBE-certified construction company stated, "I could tell you right now, disadvantaged businesses going to have a tough time. Because first of all, say for example I can go out and sub out a job that has to do with asphalt or earth moving equipment and stuff like that. I can sub it out, and I can run the job and my guys can run the job, and I can estimate it. But when it comes to being prequalified with the state, if you don't own the equipment, it's not going to do you any good. That needs to change. It really does. To me, if a person can do the work and understands how to manage the work and get it done, it should not count against them. I think if you can prove that you did the job, and you ran the job and it's your job, it's just proven it that you can do jobs like that. That's why I think that's what you need to do, is be able to prove it. If you can prove it, why not?" [#13]
- A representative of a majority-owned professional services firm stated, "I hadn't thought about that because we don't do any transportation work in Kentucky. And I'm not that familiar with the work we do in other states related to that. But yeah, I could see that could be a real barrier." [#16]
- The Black American owner of a construction company stated, "A whole lot of my work you've got to be pre-qualified. Right now, I've got two trucks sitting right now because of it. You've heard the old saying, 'You've got to wipe somebody else's butt to make their stuff right. And then you've got a [expletive] problem'? That's what the problem is. They certify a lot of people that don't really need to be certified, because they ain't really had the experience at all to even be doing some of the stuff that I do." [#29]
- The male co-owner of a woman-owned professional services company stated, "If there was something like that where we could kind of pre-qualify to be on the short list, then all we would have to do is submit a cost, because obviously we're qualified to do the work. We could just submit a cost without all the rigmarole of the thing." [#30]
- A representative of a majority-owned construction company stated, "One thing that you look for when you're trying to determine who is qualified to do work is there's a pre-qualified list with the Highway Department, they have some pretty test requirements as far as they'll build with the company and make sure that they are truly a DBE or a woman-owned business. They'll prequalify them and only certain types of work that they're capable of doing based on their experiences and their resumes. And so that that's one place to go. You know, if somebody is not on that list, that doesn't necessarily preclude them from doing work for LFUCG, but it is a starting point. They have to be able to provide and be pre-qualified to meet a certain capacity or whether that's a certain volume or certain you know, they can provide the equipment, they provide the resources to be able to do the work. So, so that's really the best way for us to know if we were hiring is capable, once before we go into a contractual subcontractor relationship with him. The DBEs construction that we worked with, and they got, like, went through the process of the pain pre-qualified it's been a blessing having those folks to be able to count on, you know, because we come up short, even with our own workforce, and sometimes we just, we have to let work go that whether

it's a DBE requirement or not, we have to let that work go. And know when we had those folks to count on is this great." [#6]

- A representative from a focus group consisting of construction companies stated, "I think showing that you are a real business, I can remember actually the subcontractor I talked about earlier, the largest subcontract that the city of Lexington has ever seen, $7 million electrical contractor. I can remember back 20 years ago when we asked him to supply us his audit and financial statements, which he supplied to us. I did analysis on him and realized that he was a real business. He had worked for a non-DBE, the president of the company, and he had learned how to be a businessperson. He had learned how to be an electrical contractor. That was a big help. If I'm in a meeting and somebody wants to give me their card or wants to do this, or wants to do that, I want to know your real business. Who else have you worked for? Show me those things." [#FG2]
- A representative from a focus group consisting of construction companies stated, "General contractors have to do the same thing. I mean, we have to pre-qualify for a job. It's been something I've had to do for 29 years. Send prequalification statements to an owner and say, 'Hey, I've done this job, I've done this job,' and all kinds of facts and figures. I've spent a lot of time in my career qualifying our company to do major projects." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Yes. I've seen that listing and it just shocked me a lot of times how much time you'll have to spend collating, processing that information, and getting it on paper. That's a big expense and you might not get the job. It's a big deal." [#FG2]

9. Experience and expertise. Interviewees noted that gaining the required experience and expertise to be competitive in the public sector can present a barrier for small, disadvantaged businesses. Experience is often compared to the requirements for prequalification [#12, #15, #17, #2, #3, #33, #37, #4, #8, #9, #PT2]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Early on just the perception of when we're smaller, when you're comparing us to a Stantec or to Bell or some of the larger ... at the time, some of the larger companies, having the confidence in LFUCG or KYTC to select us. That was a hurdle, but that's to be expected." [#12]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Access to barriers to entry, to larger opportunity. It's, like I said, access to projects and access to capital. You have to be able to [bid to] work on larger projects in order to make enough money to where you have enough profits in order to grow your company. And because the way, things are with, there are only few amount of large company. And from my perspective, they don't have an interest in trying to work with a smaller contractor to help them build capacity." [#15]
- A representative of a majority-owned construction company stated, "So just years of doing it over and over again to get that experience." [#17]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We bid on stuff, we bid with prime, so mostly subcontract, you can't... Again, if you never get the opportunity to lead and do prime, you can't get prime work.

You're going to never get a prime. They're not going to do that as a four-year company, even though you may have a history of leading projects bigger than that company. That personal doesn't matter. It's about your business and what your business has done." [#2]

- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Understanding the RFPs, and what people are looking for, and then the time and effort that it takes to complete the work. Another barrier is just the same barrier that any business experiences, is where the company or the organization is comfortable with the people they've been using and they don't want to try new things, or try new people, or bring in new people because it takes more effort. And I think that can be hard. But that's just the challenge of being a business owner is giving people a reason to hire you over someone else." [#3]
- The woman owner of a professional services company stated, "It's not cost effective for me to be able to pay for that furthering education on top of being away from my businesses to take those classes. I just Google and research it on my own." [#33]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "I'd say for new clients, sometimes even if we think, man, we should probably be charging more for this project. It's almost like if we can just get our foot in the door, that'll lead to future opportunities, which is actually worked out. So, it's like yeah, we might be taking a hit this time, but on the, down the road, it can lead to more projects and so, you just got to be careful what you're bidding, because we'd rather win the project. Sometimes I think it's better to just win the project and show that you can do a great job and you're capable of doing great work and then that and build that comfort level with the client and then that just leads to more work as opposed to always just strictly looking for the highest profit on a project." [#37]
- The owner of a majority-owned construction company stated, "I had learned about that when I worked for the other companies that I had worked for. So, when I started into this, I kind of knew what the ropes were. I didn't have to start from scratch on learning the business." [#4]
- The Black American woman owner of a professional services firm stated, "At first, the barriers were just trying to learn the business, learn what I needed to do, learn the documents. All the legal aspects of it, but I cannot give legal advice to any of the clients. I just kind of explain it to them, and then know how to direct them back to the title company if there's questions that they have. But some of the barriers would be traveling. I have to travel quite a bit to the people to actually get those documents taken care of." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "For one, I'll be honest with you, there was a couple, when we first started out, there was a couple Black companies, one in particular, that I've known for years, and I went to them for some help. Not no money, just tell me, help me out. Help me, if I'm doing anything wrong, because ma'am I'll tell you, I'm from the country. I mean, I'm country as can be. So, we don't have these opportunities down there. You don't never hear about this type of stuff." [#9]
- A respondent from a public meeting stated, "So typically when you go to a pre-bid, LFUCG encourages larger prime contractors to utilize minorities as a subcontractor or whatnot." [#PT2]

- A respondent from a public meeting stated, “So if a contractor, non-minority or not, never have the opportunity to do work directly for LFUCG to create a resume, how can you encourage a larger prime contractor to utilize this minority contractor? So, if LFUCG doesn't have a track record and can stand behind a worker and saying, 'Hey, we want to encourage you to use [this minority firm] or other companies because they have done work for us directly and they're very good contractors.' If you don't have that resume or research or data, why would a prime contractor say, 'Okay, I'm going to be interested in using this contractor.' Really in any business, to be honest with you, beside the business job, your reputation, and your line of work, then your business is really done by word of mouth or reputation, or that you have been able to perform on different projects. So, I feel like the city needs to, instead of going and forcing and saying, 'Hey, team up with these clients,' there should be a set aside to say let's focus on this minority sector, give them the direct opportunity, allow them to build up, allow other smaller businesses to be encouraged to do work with the city. And then once you have established a relationship or resume or a portfolio and grown the business where you may grow outside of utilizing the city as a steppingstone, other larger prime contractors will consider using these other smaller contractors as a sub if need be.” [#PT2]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Three interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#20, #25, #26]. Their comments are as follows:

- The co-owner of an SBE-certified professional services company stated, "I think, what we've seen in our industry is, people are getting licensed sooner but that's not a barrier for us. It's part of doing business. I think, it's the same as insurance. You have to have it.” [#20]
- A representative of a majority-owned construction company stated, "More the building permits, more than anything else. Just to have the retail space licensing, maybe through the trucks, because we run our own delivery system.” [#25]
- The owner of a WBE- and DBE-certified professional services firm stated, "The planning and zoning board hates me. They get mad at me because I say what they're doing violates the state survey standards, and because I won't just do whatever everybody else says. For example, they want me to take the buildings off of my plats. They will not accept my plat if I have a building on it. But the state law says I can provide more than the minimum, and they can't make me take stuff off that's less... If I'm going above and beyond the minimum, they can't make me take it off. So, I fight with them often, and that's very frustrating. That's a very technical thing. Is that because I'm a woman? Maybe. Is it because I'm not from here? Likely. Is it because they're just super in bed with EA partners? Also, likely. They don't want to address the root causes of those problems; they just want to make life difficult. I had another one of my gals, who is the most chill person in the world. She's like a very strong person, like [she] won a chainsaw contest, but you can't make her say an angry word. She got chewed out by the planning and zoning department. The planning and zoning department doesn't have a licensed surveyor, just like most places in the state. And so, they try to tell surveyors that you need to adjust the plat, and that's just not how it works. And that, to the point that, for me, I have to go to the State Board of Registration for Surveyors

and say, 'Look, they're trying to get me to do this again.' Because I'm supposed to have a note that says, 'This plat complies with KAR 180.' And they're like, 'Well, it's Lexington. They're just screwed up, so you can change your note to say, 'This plat does not comply with 180, but we provided a separate drawing to our client that does meet that.'" [#26]

11. Learning about work or marketing. Twenty-four business owners and managers discussed how learning about work is a challenge, especially for smaller firms. They also discussed how networking opportunities can be helpful in overcoming this challenge [##1, #11, #33, #34, #35, #36, #6, #9, #AV, #FG1, #FG2, #10, #13, #14, #17, #2, #21, #24, #28, #3, #32, #7, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "So right now my company, three of us act as going out as far as finding work. So, whether it's on the public bid, whether it's on LFUCG, whether it's on UK or LIN, on the public work, and then through our previous owners, and relationships, and contacts. We're just out networking and trying to find work." [#1]
- The Black American woman owner of a goods and services company stated, "I get emails from, I think it's called Bid week. Is it Bids? It's something. I get something. I get a lot of emails. But my number, whatever that code is, not CAGE code, but is it CAGE code? I'm thinking, I'm sure that work is being done, but I wonder if it's not being RFP'd because it's not up to a certain amount of money or they're not doing RFPs. I'm sure they have to do it for a certain amount of money, because I'm sure that work has been done. But when I look at those emails, it's mostly construction. I see lawn service, and I've seen a lot of counseling, but I never really see anything for personal care." [#10]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think that's sometimes a challenge for all of us, especially in a small firm, but I think I had mentioned earlier that, at some point, we hired a firm to assist us with kind of developing our marketing and we continue to keep them, I guess, on retainer for lack of a better word, but to seek out RFPs and RFIs and things that we would not normally see on our own." [#11]
- The Black American owner of a DBE-certified construction company stated, "The thing about it too is, we're not privy to those bids like that [private contracts] a lot of times, I'm finding out. I'm like, 'Now, where do you go to bid on that?' And you can't find out where, yeah. My Mentor-Protégé, they were an 8(a) company before me so they kind of introduced me to their people. And then they told me, 'This is how you need to market toward ... For yourself to pick up other agencies that you don't know anything about, just market to them.' So basically, I just learned from them and just market to my own people, and I kept their people that they introduced me to. Because as long as you do a good job, they'll keep asking you to bid on their work, they'll send you RFPs and stuff. So basically yeah, I just learned how to market to them and was successful at it." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Then, that kind of deters you from when people saying, 'Hey, come look at this, do this.' Or, they'll say, 'Hey', they'll email you, and say, 'Hey, this job bids on September 2nd. Can you give us a bid?' Today's the 30th, you know? Paying attention about making sure that we've got information about the bids, the projects, and bids." [#14]

- A representative of a majority-owned construction company stated, "It's challenging. We have a marketing department, sales, and marketing we kind of combine together. We hired a branding company to re-brand us a few years ago. We have re-built our website. So, it's still challenging because we're not the typical, 'Hey, let us sell you this...' You know?" [#17]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Like RFIs, requests for information, the city doesn't really do that, put out feelers for it. Who has these capabilities? It gives us enough time to prepare. A lot of times, when we get wind of it, everybody else knew, the non-minorities knew about it before us, and they had time to prepare- within their pool, with their pools of friends. Somebody might be working in the wastewater plant and be like, 'Oh, you know,' I'm just making this up. 'Two of the tanks, they're planking right now, they're about to blow up. I know about the replacement; we've been talking about it in meetings.' And they're talking about with their other counterparts, which are white, and hear about it, and then, okay, they already know and they're like, 'Oh, you know that.' But they give them the information. That costs us a quarter million dollars to do, yeah, a quarter million dollars. They've already got time to go in and map out their numbers. Now then, it becomes official and gets rolled out, they already got their information and numbers, and then when we come to the table, we're like, okay, now we're starting to do it. We're already behind the eight ball." [#2]
- The Black American owner of a professional services company stated, "They got the various websites. Land imaging and the city has the website as a well and Fayette County schools." [#21]
- The owner of a majority-owned professional services company stated, "We've marketed in the past, but gosh, I don't want to sound facetious, but we've had no reason that we've had to market, probably for the last 10 years." [#24]
- A representative of a majority-owned professional services company stated, "We don't have the personnel for marketing. We don't have a marketing person. We're pretty much on word of mouth on the work we do. Let it speak for itself. Sometimes we are given leads, or we find out about leads and we'll follow up on it. Sometimes we get the work, sometimes we don't. I don't know if you're familiar with Lynn Imaging. They maintain an online platform that advertises good opportunities throughout the state. If you don't have the facilities available to hire a marketing person, you have to make yourself known somehow. Whether it be the quality work that you do, or through social events. If you have the time to do that, and the luxury to do that. But you have to be a known entity for people to call upon you for help." [#28]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "We do our own marketing. As a marketing firm, we do our own marketing. But of course, we know what to do, we just don't always have the time to do it. And with the ebb and flow of the business cycles we're like the cobbler who has no shoes. Sometimes our marketing gets put on hold for doing the work for our client. But we do have a system and for the most part, it's working. But we could definitely use more help in that area. I mean, I need to... One of my next hires is going to be someone to do that for the company more. I'm always going to do part of it because I'm the top professional in the business and people have to see that with a mix, and today you have to have a mix of experience but that young enthusiasm. So, I

am trying to include my whole team in the process. We are on a list to receive notices of those, so we usually know about them. But we kind of have to keep looking." [#3]

- The owner of a majority-owned construction firm stated, "I would love to because I heard there's some ... Government is trying to help people like me who start out and struggling. So, I was thinking to get into it maybe build on some contracts from government, but I don't know where to start. I don't know where to look. I don't know. It's very hard, guys even laughed at me said, 'Don't even start because you're not going to survive.' But I need to survive. Somebody told me, just go on a Facebook, create your business page. And when you do any job, just take pictures, and post it there and say, 'Hey, I can do this job and that job.' So that's how I do it, I don't know any ... And I paid one lady, she made a website for like $300 or whatever, but she said, you need to upkeep it every month. And she told me the price, I cannot afford it. So, I have a website, but I cannot I don't do anything with it. So, I think I'm on the right track." [#32]
- The Black American woman owner of a goods and services company stated, "I do not have an online presence. I did try that; I was not successful with that. So, I let it go. I did have a website where people could go on and make their appointments, because I do my consignments by appointment only, seeing as I am the only person, I'm a one woman show, so I do require people to make appointments with me, to consign with me. I know that if I don't push, then it's not going to come. I've experienced that over the last few months, I took a step back due to life things, things happening, and I could see the results of me not pushing, not having... Yeah. Not doing any social media or anything. Facebook and Instagram are my marketing plan. At one time I was really heavy into doing that. But like I said, here recently, I had to take a step back. However, I will be stepping up again. But what I would do is, and people really, I get so much great feedback, and when it's just you, it can be a little..." [#36]
- The Subcontinent Asian American woman owner of a professional services company stated, "It's always has been through other vendors. Let's say state of Kentucky has primary vendors reaching out to contacts and then working through them, not necessarily directly with the state, but sometimes through the vendors." [#7]
- The Black American owner of a DBE- and MBE-certified construction company stated, "And the work that I'm getting was residential work. It doesn't pay enough money for you to be able to get good employees and be able to keep them on a payroll. And I'm going to get to that in a minute, because I got a guy who's going through that right now." [#9]
- The Black American owner of an MBE- and DBE-certified construction company stated, "But in the construction management, and what I was doing, a lot of people didn't understand that I had already had 20 plus years of construction. I started within this area, but I left. And then when I came back, some say, yeah, they knew me. Some say, 'I never heard of him before.' Or the ones who say, that knew me, literally speak up and say how much they knew about me because they hadn't seen me for a while. It was a slow start, especially getting into construction management. Everybody thinks I just want to pull the MBE card and say, 'Hey, give me a contract. Let me make 10 percent off of it,' and keep moving. Until I got out there, I'll tell you, one of my first projects, big projects here in town was [building a local non-profit]. It really helped me market. See the evidence of us being a quality and fit contractor. The owner of that facility was very supportive of us, and loved everything that we did, and

spoke real highly of us. And it was a slow start, but eventually got over the curve. One minute, you think everybody has their own little pocket. Which typically, on a company my size, typically a year ago, or right at COVID, or whatever, it's probably always the same four or five of us that's bidding a job, certain jobs. We all have a mutual relationship because we always see each other at the previews, we always talk, discuss, and we always bid the job's hard if we go back. But it's always the same four or five contracts. You have, sometimes you have a team, and even here, we have established some pretty good relationships with ourselves, okay. So, when you develop relationships with your subs, hopefully your subs and all, and their numbers, everybody's good. Sometimes there's a bad number, you have to go out. Even from the bigger contractors, you wonder why you always see some of the bigger contractors, all of them always on the same job, okay. I don't think its shopping, it's by accident, I don't think it's done intentionally, on purpose, but they have relationship with each other, and I feel like when that job goes down, when that job may go south, say for example me, if they brought us in, that first time I've worked around say six of them, the main key components of this truck, and then come to us, right. And we can all have a meeting, and it can be something to see here. I can see it too. My performance on the job may be great, right. It's a team when you go bid on a job. It's not a head general contractor, and then all the subs are just individuals, and you get to come in and do your work and leave. No, we're all on the team. So, if the job starts to go a little bit bad or south, as long as it's not just blaming one individual was just how it was, it's a bad project. You have the sales, that you're a part of that team. So, if it starts to become a financial risk or a bust, you have to accept a little bit that financial risk and bust, because you want that same support, right? So, it's not to say everybody's going to go down together, but you have to figure out like, 'Hey, I bid with you guys, or we work together on the next job, right?' I might've done good on this job and overall is going to, it looks, say the job can be 1 percent over what the thing is, and they're looking at me and saying, 'We'll bid you. I know you did good; can you get us some help.' When I said help, it's a business decision. Do you want me to say no, and then they don't call me for the next job? You know, was the team, you build relationship, you can't be greedy and take your money and run… And not to have a right to save them, right. I have the right to say, 'No, I need mine to go over or let's figure this out, how to make this work, or throw extra here.' I figured out how to get this done on my end, then make this work, so it's not directed. You got to understand, it's a team. When there's rainy days, we all in this together, when its sunny days, we ought to be here together. So just, you got to understand that it's all part of the team relationship. And I'm not saying this because the job may go bad, a sub does have the right to be say went well for me, and go on, but at the same time too, you got to be willing to, if some might ask you, do you have a relationship with this person? You got to be willing to help out. Treat me like the next guy. Just treat them like, what I want to hear from a bid or ask for the bid or a sub, just say, 'Ey, we provide a bid on the same thing, our number's the same, or my number was $300 less than his, why did you still pick him,' you know? And then at the same time, you got to be given the opportunity to work or prove your work, right, or when you go approach somebody to get work, you have to have a resume of work, and it has to be valid, 'Hey, look, I've done this job, this job, this job.' You can contact this person or drop by, look him up, you know? So, people get the comfort with you. Like I said is you got to understand ... For example, I hate to use the residential side of it, but if you're a person who's building your own house that you knew how to build your own house and you're used to dealing with a painter, just because I come

and knock on your door, you going just let me come in paint that house because I'm saying I paint? No, I need to see your work. No, I need you to tell me, so I need to speak to somebody who said they have good experience with you as a painter. Just because you come up in here with a roller and a business card doesn't mean I'm supposed to let you paint my house then. If there's a dedicated line of work, right, for minorities. It's not that they do all the work, just say from a general contract standpoint. As a matter of fact, if you go in and you say, you have to renovate a floor of this office. General contractor doesn't do electric. They don't do the plumbing or the heat and air. So now you have to go and get somebody who does those, which typically is a sub who's out here in the world. So now you build a relationship with him. So now when you go outside of that, and you'll start bidding the bigger jobs, they already know who you are because they've done work with you." [#1]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think probably the biggest thing is making connections and getting people to know you, give you an opportunity and start building those relationships that are so important in our industry. You know, I think if you're an unknown name and people are used to using the same XYZ firms, that can be a little bit of a challenge to kind of get that foot in the door with new clients whether they're architects or engineers or cities. I think that's probably the biggest challenge is just getting that foot in the door and starting that relationship sometimes." [#11]
- The woman owner of a professional services company stated, "Probably connection I think with government and politics. In most things, it's who you know, and if you're extremely well-connected, you're probably going to get the bid above someone that's not as well-connected as you." [#33]
- The Black American co-owner of a professional services company stated, "I mean, sometimes it is a third party... not really third party. It's normally somebody that we already buy something from, but a lot of times that introduction doesn't come until you get to scale. A lot of those relationships come that way. I mean, a lot of my access to capital comes that way. One of our investors I took them to IPO, and that introduction came from our current outside general counsel. Right? So, he's like, 'Hey.' He's a brother, and he's like, 'Look.' I mean, frankly, we're intentional about hiring other black people as vendors, and as employees, and so we used those sorts of cultural relationships to grow over time." [#34]
- A representative of a majority-owned goods and services company stated, "I'm in some groups on Facebook. The first vendor event I did was a group of other direct sales. So, there was about 10 different small business owners, like Pampered Chef. There was a woman who made paper crafts. Again, I have a lot of friends in the community who own small businesses. So just on a personal level, I do a lot of networking as far as supporting each other's businesses and shouting out when another business shops for me or when I shop from them and whatever I've bought from them. And so, it's a lot of personal connections." [#35]
- The Black American woman owner of a goods and services company stated, "I have tried to encourage other people to join this class, because businesses have been birthed out of this class, just because of the comradery, the networking, the encouragement and the support, that's what I'm trying to get to, the support of other business owners who've been down the road to tell you exactly what you need to do to get to where you're trying to go." [#36]

- A representative of a majority-owned construction company stated, "I think values dictate how well relationships go. If you for instance, we both agree that you know that honesty is a great is a great value to have and that's pretty easy, but, but, and we both agree. But if that person over there does not value honesty, we're going to shy away from that relationship. Right? So, I think those relationships are built around those values. So, it's common values. And I just don't see how values are race or gender dependent. They're inherent to people not a specific race or anything else." [#6]
- The Black American owner of a DBE- and MBE-certified construction company stated, "He said, 'I'm going to call you.' He said, 'There's a lady in Lexington, and she's getting ready to lose her contract, and I want you to go up there and try to help her, and then you can be able to get your own contract with [a large local construction company].' And I said, 'I'm really busy.' I go, 'I'm trying to get this paperwork done.' He goes, 'Look. You better get on your computer and look up and see who [this large local construction company] is. And then you call me back.' I'm like, 'All right.' So, I'm still busy. So, I'm not even paying no attention to it. I was like, 'something's telling me I better look it up.' Actually, let me take a step back. My money got real low from trying to figure all this out. I looked up at God, and I said, 'I need a little help.' I said, 'God, look, now listen now. I'm doing my part, and I'm living right, and I'm doing everything I'm supposed to be doing. I need a little help.' And it wasn't 72 hours later is when I got the phone call. So, when I looked up and seen what [that large local construction company] was, I was like, 'Oh. I might be on to something.'" [#9]
- A representative from a Black American woman-owned professional services company stated, "It has some barriers one is to get a contract you have to a relationship. I know for minorities business they designated a certain percent for minorities does this really meet there intend. If one award equates to 10 percent but all is given to one company." [#AV215]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "For me, it was introductions." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I have attended the Minority Business Expo in the past, and yeah, I think a lot of it is business fundamentals, and stuff like that. But one thing I try to do is I'll try to research who's coming and see if they have any projects that interest me on the horizon, just to try to get a leg up maybe on the competition's what I try to do, and just try to market them. Or if not, just see what they've got going on, and see if we'd be a good fit for them. But I think all in all, the outreach, they're good just for networking, period, I think." [#FG1]
- A representative from a focus group consisting of construction companies stated, "My advice for a lot of small minority contractors is to start a relationship with the prime contractors. They're constantly always looking for people. That's where all the experience is. My advice to them would be to start there and even go work for them. If you're small, that's even better. But that's how we got started. One thing led to another, and we just built relationships up with these prime contractors. It's been a really good thing, but you have to stick with it." [#FG2]
- A representative from a focus group consisting of construction companies stated, "If you're small, you can actually break down into one or two and go work for them. Even if you have

to go on their payroll, there's nothing wrong with that, and you build even a stronger relationship. You see how things are done, and then you get the experience. That's the most important thing. Because this is small business and small businesses are subject to fail. But the prime contractor has been there year in, year out, and they have the experience." [#FG2]

- A representative from a focus group consisting of construction companies stated, "You can't go and work for somebody if you don't know them. How do you know them? You go to pre-bid meetings. I remember in Louisville, we had open meetings for all DBEs. We actually sponsored luncheons at local hotels and invited these groups in there and tried to show them the perspectives on a certain ... These were like project meetings and tried to show them what we needed basically to get my foot in the door and establish past performance." [#FG2]

12. Unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Two interviewees commented on personal experiences with barriers related to bidding on public sector and private sector contracts [#2, #24]. Their comments were as follows:

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "The requirement to be a prime is past experience as a prime. How can you bid as a prime when you're not given the opportunities to subcontract, let alone get the past experience so you can be able? That means LFUCG is going to have to provide smaller projects and allow companies like ourselves to bid as a prime. Now, you go to my corporate clients, and I manage billion-dollar projects. We're capable and profiting. It's just that they won't because you need past performance within their box. If you don't give us something to prove so that our experience can come out, then we'll never meet the qualifications, so that means these one or two companies that did everything, they will continue doing it." [#2]
- The owner of a majority-owned professional services company stated, "Over the years, we have run into contracts that have had unrealistic requirements in them. Usually, it's something written by or edited by someone's attorney. We usually get to the point. We've even negotiated out unrealistic expectations. Turned it over to our insurance entity to negotiate on our behalf. Or just said, 'It isn't worth it,' and just stepped away from it. So yes, we've encountered them. Yes, we've had to manage them. In most cases, we can work it out. Those few we didn't, we just walked away." [#24]

13. Bid processes and criteria. Twenty interviewees shared comments about the bidding process for public agency work; business owners or managers highlighted its challenges, particularly those surrounding the electronic bidding software and online registration [#1, #17, #2, #23, #28, #30, #6, #FG2, #10, #12, #16, #21, #24, #25, #26, #28, #29, #37]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Well, that is, that's a huge barrier for minorities and small businesses. The reason that's a barrier, is because the knowledge of. … I've been in the industry for 20 years, so when I got

it, we had to read those spec books. I eventually got to a point to where a couple of people I was working for, I was writing a spec book with the owner. So, I understood some of that language that you're posed to put in there to protect the owner. It is being, it is thick, and it can be intimidating, but a lot of it is repetitive policy, and you just have to take the time to read it. So, if you don't have a background in it or you don't have a support, it is a huge barrier or block. So, I really think that you shouldn't just assume that big public jobs are always great and say, 'Oh, how come it doesn't have any minorities.'" [#1]

- A representative of a majority-owned construction company stated, "Having the most amount of time. I know that's not always feasible, but just having the time to be able to go through the plans, and really build it in your head." [#17]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "One of the things, because like I said, we have so many huge minority, Black-owned minority businesses, a lot of times we don't get the exposure to do something again and again and again. There's so much, the training and learning how to do the paperwork, and then it's always that stipulation that's easy to give in order, again, to isolate and alienate minority businesses. If you don't do this right, then your application or your packet will be discarded. That in itself becomes a caveat, and it causes minority-owned companies to be like, 'Well, who wants to constantly get rejected or failed?' It causes a lot of us to just say, 'Well, I'll just leave it alone.' And like myself, I've gone outside of the area to find business so I can survive." [#2]
- A representative of a WBE- and DBE-certified goods and services company stated, "What happens is on the bidding process, I'll usually get one in on an email. And then we obviously discuss with the rest of the team and stuff to see, is this something that we do or don't, if not, why don't we. And then if we do, then that goes to the accounting department to get the financial stuff together. And then we start doing all the steps that gets us in, scanned in, emails, discs, whatever they need." [#23]
- A representative of a majority-owned professional services company stated, "It's a hard thing to realize, after the fact, that you left a lot of money on the table. With three project managers and an administrator, we pretty much have to have people invoicing, billing, doing billable work. But to do one those contracts, sometimes it took 40 hours. That's a whole week's worth of work that we have to pay an employee to do, but we're not able to do that. While you're doing that, you're taking away from actual billable time." [#28]
- The male co-owner of a woman-owned professional services company stated, "I remember correctly, the actual RFP that was put out was worded very oddly for what was needed. And I think fortunate for us, but I think it scared off a lot of other companies that were going to bid on it. I think the biggest hindrance of the whole bidding process is it is such a time sink for an uncertain return. And the problem is too if we're working on a couple projects and the choice comes down to bidding on additional work or working on our billable stuff, I'm going to have to go working on the billable stuff. However, the problem is that as soon as that billable stuff is done, then if I don't have something lined up, then we're eating ramen until we can get another contract." [#30]
- A representative of a majority-owned construction company stated, "I think the bidding process is as follows what's called the Kentucky Procurement Code, haven't ever seen

anything out of turn for what they're required to do as far as advertising and making public bids and accepting bids in an appropriate manner. So, I haven't seen any irregularities." [#6]

- A representative from a focus group consisting of construction companies stated, "We require, as a general contractor, we tell people, 'Hey, if you're interested in our project, we want to see your prices. We want to see your proposals not one hour before the job bids, we want to see them two days before the job bids.' Bid time for a general contractor is very tough. It's very, very stressful." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I often wonder, 'How do they weave all this stuff together.' Things are flying in there and you're trying to nail it down and then you have to submit the bid eventually. It is amazing the process they go through, and that's why it takes experience and that's why a lot of contractors go under a couple of times before they get it right. Nothing's easy." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Frankly, when we talked about COVID, Lexington went totally electronic submission of their bids now, and I miss going over to Lexington for bids." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Submitting the bids electronically, without that human contact, because it is COVID, you really see how much that human contact really adds to the GDP of our nation and just self-awareness, knowledge, transfer, it's scary. Because it's the first time I've ever been through anything like this, and I don't particularly like it. Well, this is what we're stuck with." [#FG2]
- The Black American woman owner of a goods and services company stated, "I get emails from, I think it's called Bid week. Is it Bids? It's something. I get something. I get a lot of emails. But my number, whatever that code is, not CAGE code, but is it CAGE code? I'm thinking, I'm sure that work is being done, but I wonder if it's not being RFP'd because it's not up to a certain amount of money or they're not doing RFPs. I'm sure they have to do it for a certain amount of money, because I'm sure that work has been done. But when I look at those emails, it's mostly construction. I see lawn service, and I've seen a lot of counseling, but I never really see anything for personal care I had a coach over at, is it KPAC? He was helping me with the coding as far as what to be seen under, based on the services that I would offer. So that was what he had suggested is because it is personal care, salon, beauty salon, but I haven't seen any. And I've been in the system for a few years, and I haven't seen any." [#10]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Everything's online now." [#12]
- A representative of a majority-owned professional services firm stated, "Well, one thing that's fairly new is electronic submittals. Which is very helpful, rather than having to print six or 10 copies of something. And that might seem like a minor thing, but it really helps just in terms of timeline. That's a whole day that they don't have to fool with that. Electronic submittals is good. I would say in general, the municipalities, because of technology, the process is much more streamlined than it was in the past. So, in general, I think it's easier than it was 20 years ago." [#16]

- The Black American owner of a professional services company stated, "I have laptops and all this stuff, but I could do some training." [#21]
- The owner of a majority-owned professional services company stated, "I'm a little resistant. But that's just because of my generation of people. But we have everything available to us. You always find somebody, hire somebody who's more adept than you are, if you need them." [#24]
- A representative of a majority-owned construction company stated, "Understanding the technology, because I believe technology is used. We really haven't bid that much; I'll be right up front with you on that. But as long as the technology is easy to use, we'll continue to place the bids. I don't even know, I'll be honest with you, I don't even know if we're on the bid list or have that ability." [#25]
- The owner of a WBE- and DBE-certified professional services firm stated, "It's just, if you don't have the money, you can't buy it." [#26]
- A representative of a majority-owned professional services company stated, "I don't know if you're familiar with Lynn Imaging. They maintain an online platform that advertises good opportunities throughout the state." [#28]
- The Black American owner of a construction company stated, "If the internet was a whole lot better? I wouldn't mind doing it." [#29]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "I'd say the biggest thing is just unfortunate, as subscriptions expired, having to keep up with the latest programs, it gets to be a huge expense on a smaller company to maintain and upkeep a lot of these licenses for all these different types of programs." [#37]

14. Bid shopping or bid manipulation. Bid shopping refers to the practice of sharing a contractor's bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process or a bid to exclude fair and open competition and/or to unjustly profit. Nine business owners and managers described their experiences with bid shopping and bid manipulation in the Kentucky marketplace [#1, #11, #12, #15, #20, #24, #3, #4, #5]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "That's weird. When I was with the steel fabricating company, I felt there was bid shopping going on, that was 10, it has to be 15 years ago. Now, as a bid, I still think there's probably bid shopping. Am I heavily impacted now? I don't know. Does it discourage me? No. I've thought little bit more, because I'm on the general side or sometimes I can bid against this so, which I've done. Everybody is very competitive, right now. I spend all that day filling out the paperwork or waiting on getting subcontract bids from my vendors because there's so many people bidding it. So, they don't want the numbers to get out early. So, what you brought up earlier, shopping the number when on the private end I may get a bid from somebody two or three days early than other times, it's trust. Because they know their piece of paper, their bid is not going to get shopped all the way across three or four other people." [#1]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I've run into that a little bit. That doesn't happen to us too often because usually architects have to go into a bid process with their team assembled. We've seen that actually on Fayette County Public School work where the architect is selected and then sometimes shops their consultants after the fact. That's happened once or twice that we've kind of seen but I've not seen any of that from LFUCG and you need to go in with your full team, so things are sort of set ahead of time." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "We run into that. Well, it all depends on the platform. If it's a qualification base, they should not be doing that. I don't know how you get around that, though, for if we're submitting a proposal to SD1, they don't have a DBE and we would submit pricing for surveying and then they would, whether it be [a large professional services company] or wherever. I don't know how you get around that, but for the qualification base, it's just flat out wrong." [#12]
- The Black American owner of an MBE- and DBE-certified construction company stated, "All the time. Yeah. Some of the organizations they shop your bid, or they might share it with people that they've already do business with, or somewhat of the network that they already have and also large contractors shopping your bid." [#15]
- The co-owner of an SBE-certified professional services company stated, "Yeah. I do see that on the construction side. Not much. We have run into a couple of, not for profit organizations that have taken bids but they've not necessarily shopped our bid. We've just had to competitively bid which is atypical with A and E services. I don't know, that's common but I think, it's come up at least recently but with regard to A and E services, typically, you're not worried about anybody shopping your bid around. I think, that's definitely more on the construction side." [#20]
- The owner of a majority-owned professional services company stated, "We see it still a lot in the construction industry. If you're familiar with the procedures that the state uses, they've done as good as anybody, as far as preempting the contractor from doing that. That seems to be pretty successful. The sub-contractors, if you're familiar with the industry, they've gotten to the point where they won't even submit a price to a contractor, until 15 or 20 minutes before he has to submit his bid. Which drives the generals crazy, but that's how the subs are protecting their pricing." [#24]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I have heard of it. I think that it happens overall. Yes. And in some cases, it's just because there's a relation... I think bid shopping is not good. But sometimes there's a relationship there, so discussions happen. But I know that at least, the department that I have contracts through with the city is very careful about that." [#3]
- The owner of a majority-owned construction company stated, "So I'm a general contractor and I don't shop bids, but a lot of people do. A lot of people do. In fact, it's an impediment for some subcontractors. It's a big impediment because you know, they have a good price, but the contractor goes out and after the fact, he relies on the price. I say, he... I'll just be, he or she, but the general contractor relies on the price when they submit the bid. Let's say you quote as a sub; you quote $50,000 to do the plumbing. And then the guy puts 50 in his bid,

and he gets the job. Well, now he's got 50. He's going to go find somebody that could do 40 and then save 10 grand, because he's already bid the job and already low. So, there is a lot of that goes on. A lot of that goes on. And the reason it affects me is because if I don't do it, sometimes they'll get prices of, let's say, three people bid 50, 55 and 60,000. They use 45, a lower number than I can get. No one's even quoted 45. They just know that they shop around, they'll get it done for less. And so that is bid shopping. And it's very difficult to beat that because I don't use prices I don't have. I don't guess at prices and then wind up, just keep looking and looking and looking. And I've had people come to me and ask me to do work. And I'll say, 'Well, who'd you use going in?' I mean, use that guy. Don't be calling me afterward, that kind of thing." [#4]

- The owner of a WBE-certified construction company stated, "I went to a bid here two weeks ago, and a young woman, and I considered her young, wanted to share numbers and I felt like that was collusion and I refused to do it. But her version was, I take mine off really quick and I can share my numbers with you, and you share your units with me, and I refused and walked away. I didn't submit the bid. I think she felt like it was going to enable her to learn more about bidding, and she wanted the work really bad for her company, and she wanted me to help her. It's a competitive bid situation, that's how we make a living, so I wouldn't be part of it." [#5]

15. Treatment by primes or customers. Three business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#15, #32, #33]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Some treatments by the prime contractor for not understanding that, especially in the beginning when we were new to contracting, they take a lot... Some of them take advantage of the fact that you don't know all the paperwork details that you need to be able to get done in the beginning of a job or the contract on the job. But, yeah, we've ran into that. We ran into situations where prime contractor, they request or ask for you to do additional work and they promise that they'll pay, but they never pay." [#15]
- The owner of a majority-owned construction firm stated, "They trick me. They say, 'Hey, just tell me the price for how much it's going to cost to do this job.' And I start doing the job. They're like, 'Okay, okay. Now do this addition and now do a little bit more here and a little bit more there.' And by the time I end the project I do so much extra work for same price. They take advantage of me because I'm so small. They know the big builders and the people who's been in the business a lot. So, they know how to trick you. I'm very fresh, but I'm learning. I was thinking to write everything in a contract myself because I trust people too much. So, I say, 'Yeah, yeah, sure, sure. I'll do it.' And then they [try to trick me]. I'll do a contract saying, 'Hey, this is only what I do anything extra will be about what we agreed to." [#32]
- The woman owner of a professional services company stated, "With ad agencies, anybody that's ever worked at a TV or a radio station in their life, think they can just quit and open an ad agency. So, they go out there and mess everything up for the business. So then, the business says, 'No, I'll never work with an ad agency again.' So, I come across that lot when I

try to set up meetings and do cold calling and stuff. They're like, 'No, I don't want to talk to you. I had an ad agency once and they messed this up and did that and the other.'" [#33]

16. Approval of the work by the prime contractor or customer. Two business owners described their experiences getting approvals of the work by the prime contractor or the customer [#24, #28]. Their comments are as follows:

- The owner of a majority-owned professional services company stated, "I've had client groups that, it just didn't work out. We tend to give as good as we get, in that respect. Our focus is still delivering what we promised to deliver and performing what our contract says we need to do. But you have relations break down with individuals. You misjudged who they were, and you misjudged how you were going to work with them. That happens. But we don't allow ourselves to be bullied." [#24]
- A representative of a majority-owned professional services company stated, "A lot of people we work for really don't even understand what they're being required to do. So, we fill that position for them." [#28]

17. Delayed payment, lack of payment, or other payment issues. Nineteen business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#1, #13, #15, #24, #26, #28, #29, #3, #30, #32, #33, #35, #37, #6, #8, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I've heard there was issue of people getting paid before. I will say this because I do this myself. Some people struggle with getting paid. Let's say there's a deadline and wouldn't get paid, you got to pay attention. Sometimes, say for example, payout is for a 30-day run for the end of the month, but typically the payout is due, might on the 20th, but you still bill it out to the 30th, right. So, people miss a deadline cut off. There are sometimes when slow pay, of lot of times from the owner. I have heard of … big general contractors holding subcontractors' money, which I don't think is right. And I don't think that they hold just the MBE contractors. I heard of regular Joe Blow contractors fussing about bigger companies holding their money also, it's not right. And not everybody can sustain it, and so that's why I said, really, it comes back to growth, line of credit and have enough projects to where you can sustain an issue on a job. Well, yes, you see, now if it comes to payment, I mean, you ain't got paid and you have the proper paperwork, somewhere your performance on a job and you cement the path you should've been paid, especially if you know that the general has been paid. Typically, it's in writing somewhere in the front end of the specifications. Like I said, typically you work for 30 days, you turn in a payout, you have ... Basically the owner has 30 to 45 days, whatever's written typically, to pay the general. Then whatever contract you signed with the general, you may pay ... A lot of times they may have 15 days, five to 15. It just varies, 15 days to pay you, sometimes it's 30. So, at the end of the day, when you first started work, you may not get paid for 90 days out. So that process. Now, when they refuse that process, you need to be contacting the general and speak. I do it on a regular basis when I submit an invoice. I submit it and I say, 'Hey, we're late on payment, is there any issue?' I get a reply, this was going on, this may go on, or it's going out Friday. If it doesn't work with general, you need to have a conversation with the owner or whoever's next

above. From a relationship standpoint, I think you should notify that general, or whoever, if you're acting as a sub. They'll say, 'Listen, I'm going to go to the next level if I don't have a definite response within so many days.' Really, I'm telling you it's really ... It boils down to relationship and make sure you can communicate with everybody." [#1]

- The Black American owner of a DBE-certified construction company stated, "Sometimes you run into situations like when the COVID came in, it slowed down everything. Sometimes some of your payments was a little longer because of COVID, yeah. And that was from agencies paying late, too. And the general on time, and then the general not paying, yeah, on time." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Prime contractors that, yeah, they don't pay timely. They play with money, they call it margin aggression, where they can hold on to the money for a little bit longer and gain interest on that money. [It would help] for owners to penalize the contractor if the payment is not made in a timely manner, or to penalize the contractor by obtaining the subcontractor, a finance fee that comes out of the prime contractor fund, if they don't pay in a timely manner, like any other bill that's due." [#15]
- The owner of a majority-owned professional services company stated, "I've had a few, not delinquent but ... Well, I'll call them delinquent. They were just not timely. I've never been stiffed. For some reason, only god knows, we've never had a payment, and had to go chase a payment through the courts or anything. The only vehicle we can use for timely payments is really interest clauses in the contracts. Of course, if you know anything about our contracts in our industry, really, we've got to continue to perform under the terms of the contract, regardless of if we've been paid in a timely manner or not. We have to protect ourselves from the liability of not performing." [#24]
- The owner of a WBE- and DBE-certified professional services firm stated, "Pay-when-paid-if-paid. Payment terms as set by the government agency, and payment terms as set by primes. Both of those are poor. 'The system is broken,' is the answer. In other states, you can get paid in net 7, net 10, net 30. And up here, I'm lucky if I get paid in 90, and it's not a net 90. Net means I can count on it. There are no 'I can count on when my bills will get paid' in Kentucky. It's all, 'Whenever the [expletive] somebody felt like processing my invoice,' and hopefully, 30 days after my prime got paid, I will get my check." [#26]
- A representative of a majority-owned professional services company stated, "Generally not with corporations. Sometimes with individuals." [#28]
- The Black American owner of a construction company stated, "There's a lot of them that don't want to pay. They try to get it cheap as they can. That's for private customers, and that's for some public customers, I've got a problem on both hands. Well, some of them is late payment, and then some of them I've had to take to court. And you waste really a whole lot of money, and then by they do pay you, then you just got way deeper than what you thought." [#29]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "The prime for the city of Lexington had organizational issues, it didn't really directly relate to the city, but that was very difficult. And again, they were having internal problems and then they had changes in the person over the contract who I was working with, and the

relationship deteriorated with the city which made it very difficult for us, because we were providing services. And eventually they were going out of business and had not paid us. So, payment was slow and then payment wasn't happening. And the Procurement Office helped us in the process of... I confided through the person who's the coordinator with minority in small businesses, confided in her that this was happening. And so, Procurement was aware, and they supported us in our effort to work with the prime to get paid. And as a result of that we were able to get paid even though it was late. And that would have been extremely detrimental to our business if we hadn't because it was substantial money. They communicated with the prime to remind them to pay. And they, in essence, worked out a deal where they would pay us for the prime because they hadn't paid the prime everything yet. And so, it decreased the risk. Yeah, so I guess my answer is yes, they helped us get paid." [#3]

- The male co-owner of a woman-owned professional services company stated, "I think it was last year, or maybe even longer than that, it was like four months from after we put in our invoice to them turning around and paying us, which the problem is that my employees aren't going to wait four months. I have to pay my employees. And so obviously, I'm spending all this money until the money is going to come. Now, with private sector, now I've been really fortunate. I haven't been stiffed by a client yet, mainly because I kind of pick and choose, because the prime has to get paid, and the prime's not going to pay their subcontractors until they get paid. And if it takes four months for the prime to get paid, then it might be another month or two before the sub-consultants get paid. And see, that also goes back to why if they broke up contracts instead of making... Which I know it's got to be a lot easier on the bid people to have like one uniform contract." [#30]
- The owner of a majority-owned construction firm stated, "Not many, but some naive people they don't want to pay, or they like, 'You're kidding me, you're going to charge me this much.' And if I charge less, I have to pay out of my pocket. I cannot charge less." [#32]
- The woman owner of a professional services company stated, "I have a system to where I am choosy about who I work with for reasons of gaining wisdom throughout the years of such things as not being paid. That's happened to me a few times. And so, basically the first time anybody advertises or hires me, for the first two months, they pay in advance for whatever advertising dollars they're spending." [#33]
- A representative of a majority-owned goods and services company stated, "Yes. I don't have problem getting paid, but they've had a couple of issues with the people paying and the normal schedule that we are supposed to get paid has not been consistent. Actually, I'm going to check my wallet now because I was expecting a deposit. And so, I think I could say yes. And even if it's not a problem, it's not very the schedule I should expect to receive payment, but I think that they've been having some issues with paying out my commissions. I think it's probably the system they use because it didn't used to be an issue." [#35]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "There's times when we're expected to go 3, 4, 5, 6, 7 months without getting paid and that can really put a company out of business if you're always floating cash, because the one thing we can't do is not pay our employees. So, employees expect to get a paycheck biweekly and so it's, we have to have enough cash on hand to carry those costs and if you're still doing the work and it gets frustrating when you're having to beg and chase down to get

paid from your prime contractors. Any contract, it's just sort of the luck of the draw, and I've come to just believe it's sort of the nature of the business that when you submit an invoice in January, we might not get paid until April on it." [#37]

- A representative of a majority-owned construction company stated, "You got to realize a company like ours that has the ability to kind of be a bank for the for the city where you know we have enough extra money in our checking the pay DBE and get their payroll met, you know this week, and then in six months, we may see our payment and the very few people that are like us and have the ability to do that. We try to make sure that their cash flow doesn't put them in a bind because it's tough to run a business if you got more going out than what's coming in. We've just done that. Can't borrow enough money to like keep that going very long. So that's the number one reason small minority businesses fail is the cash flow. Until after the two years of making payroll every Friday, it's hard to understand that." [#6]
- The Black American woman owner of a professional services firm stated, "Well, I love it. I really like the freedom of it. It's been great. It allows me to be able to do the things that I want to do in my life. So, I like that part of it. But also, my accounts receivable, with them being on a 30-to-60-day term, it also is kind of diminishing my life a little bit because I'm waiting to get paid from these different companies on their terms. So, to be able to have a little bit of cushion would help. I know that I'm going to get paid." [#8]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Delayed payments is big." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Very big. Delayed payments is a big one." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "Yeah. Obviously, I try to setup any hurdles to where, like ACH, so it's not as big of a hurdle as far as waiting for checks, and things of that nature. But essentially, you budget out, and budget, at least for my industry, we budget out expectations of on-time payments. When on-time payments don't come in on time, the influx of capital and cash goes up and down. Especially in a personnel business, so most of our payroll is our actual people, our expenses. We can't obviously [continue] with payroll, and things of that nature. That's really our biggest hurdles is when things aren't on time. When things are on time, everything runs smoothly, but when things aren't on time, it definitely causes you to have a plan B." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I have payroll. We have food orders coming in several times a week, so there's only so much credit. We're talking 30 days or less. If the payment is not on time, then you don't get [your supply]. You have to figure things out, or you have to buy retail, or things like that, which can really hurt the bottom line." [#FG1]

18. Size of contracts. Seven interviewees described the size of available contracts as challenging. [#1, #13, #14, #21, #32, #FG1] Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "That's just like me trying to figure out my niche. Where do I want to perform? What level I

want to think about? How do I want to grow? Where can I be efficient? Speaking of the bigger jobs, you know bigger jobs look great, and I only made 2 percent profit, and deal with more headache. Where I can do some of the smaller jobs and make 15 percent profit. At the end of the day, three of my smaller jobs far exceed the headache I would have done with the bigger job. So, it's just a balance." [#1]

- The Black American owner of a DBE-certified construction company stated, "I think that it's really hard for minority companies to participate with these bigger companies, because first of all we don't have the staff they have, and we don't have the resources. They have money in abundant capacity, so that when it gets slow ... When it gets slow, sometimes these bigger companies bid smaller jobs and they just knock us right out of the water." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I think, like now, all these firms, they email me, and call me about doing work, you know? But they're just trying to get, to say that they're looking to hire some minorities. What happens is, I'll go, and go meet them, and look at the job. It might... Say, for instance, it's redoing a pump station. We got an electric division, and we do drywall and painting. He'll say, 'Hey, come look at this pump station.' I'll say, 'Okay.' I'll go look at it, and the only thing he wants me to do is demo the drywall off the walls in the pump station. He's going to do the electric. He's going to put the drywall back. Then, he says, 'And send me your certificate.' I'm like, 'Well, I don't want to come over just to demo the drywall.' You see what I'm saying? The main thing is, the part they want us to do, it's not enough for us to spend time, to go over there and do the work. If they say, 'Hey, I want you to do all the electrical on the job, or I want you to switch all the lights out, or polish the concrete floors,' then we could do stuff. But we don't want to come over there and just tear out the walls and the ceilings, and then we're done. You see what I'm saying? It's probably 30 percent. 30 percent [of the contracts we're asked to look at]." [#14]
- The Black American owner of a professional services company stated, "It's just the size of the jobs that, when you're dealing with the public sector, the size of jobs is just a little bit smaller [for] construction companies." [#21]
- The owner of a majority-owned construction firm stated, "I cannot bid like on bigger jobs because there's so much competition and those guys been for years in the companies and they have all the equipment, they have workers working for them and I'm just by myself." [#32]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "And a lot of the times what they're asking for is a tall order compared to the scope of work that you're doing. In my situation in particular, a lot of the times the bids that I am bidding on fall below whatever threshold it is. They don't even have to bid out or something. I forgot how that was explained to me. A lot of the time, it's almost like who you know, or you got to spend X amount of time making sure that you comb wherever these bids are going to be, or what, or sometimes you just don't even know about the opportunity existing at all." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "A lot of the times, you're under the radar. You don't even meet that

threshold. Forbidden. And when they don't do that, they don't have to post the bid. They can just, I don't know what it ... Open market or whatever." [#FG1]

19. Bookkeeping, estimating, and other technical skills. Ten interviewees discussed the challenges back-office work such as bookkeeping, estimating, and other technical skills present [#1, #12, #15, #17, #3, #30, #32, #36, #9, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I will say I'm good at, but that's one thing I do believe in, is documentation and bookkeeping, and putting them books together, and paying for the system for your bookkeeper, because when it comes down to your line of credits and stuff, that's all you have to make sure you can move forward." [#1]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "The bookkeeping, yeah, we evolved from a QuickBooks platform to a BillQuick platform and [the owner] led the charge on literally all of that from the financial standpoint." [#12]
- The Black American owner of an MBE- and DBE-certified construction company stated, "That's a barrier, training on that would be good." [#15]
- A representative of a majority-owned construction company stated, "We have a fully staffed estimating department who have a lot of years' experience. I don't know if this is fortunately or unfortunately, the owner of the company is still heavily involved with estimating." [#17]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I hired a CPA, an accountant who helps with my finances and she also advises me on decisions that I'm making financial, like paying people, how much is fair, and helping with flat cash flow analysis and taxes and all that. So of course, I pay her, but it's a reasonable fee for the service that she provides. And so that's been great. I had experience in contracting from my other job, or my consulting before I went into business, so I know how to do that. It's just the matter of how time consuming it is, more than knowing how to do it." [#3]
- The male co-owner of a woman-owned professional services company stated, "Yeah, that is something that we struggle with. Neither [my business partner] nor I went to college for business. All the business acumen that I have was because of the last company I worked for. I was really fortunate that that company kind of taught me the ins and outs of running a small business. But that being said, it's still sometimes a shot in the dark when we're supposed to provide cost estimates to know, okay, are we in the ballpark?" [#30]
- The owner of a majority-owned construction firm stated, "I reviewed the contracts in my job but personally as one on one. I didn't bid on any as a person, as a business, I didn't bid on any, but reviewing the contracts I had looked at the contracts before." [#32]
- The Black American woman owner of a goods and services company stated, "In the beginning I did create like an Excel spreadsheet with formulas to try to let me know, what date is this item going to be, have to be marked down 30 percent. But I found a program that would actually do that for me. And all I have to do is run a report and mark the things that way. Dealing with Square, they offer to keep up with your transactions as far as your

point of sale is concerned. But as far as bookkeeping, no, I'm not good with that. I'm actually in the market for a bookkeeper." [#36]

- The Black American owner of a DBE- and MBE-certified construction company stated, "And, on Saturdays and Sundays, worked all the paperwork that really I didn't know how to do that well, but I fought through it because I figured if I could fight through it and make enough money. If I could just hold on long enough to make enough money, that I know my paperwork ain't going to be 100 percent right, I know it's going to get a little bit behind, but if I could just make enough money at some point in time, I'll hire somebody to come in here and straighten it all back up. But I got to get the money. I got to go up there. I have no choice. So, that's what I did. And then I hired, I started paying a team around me once I had the team to put the team around me. Start putting a fair team around me. I went broke, … I wasn't completely broke, but I was almost. I was about broke. Went broke, I think it was either two or three times, and then put a better team around me and just kept fighting. … It's been great. I mean, where I'm weak, he's strong. Where he's weak, I'm strong, and vice versa, and then his son was an estimator for another company. His son came on board six months ago, and now we got a full-time estimator. Now we have a full-time office manager. Now we have a full-time office manager, but now I have help. So right now, if I took you in the other part of my office, they're out there estimating right now. They're estimating and the office lady is taking care of the office stuff. And I got two crews out there working right now, one in Lexington and one in Indiana." [#9]
- A representative from a focus group consisting of construction companies stated, "Initially, [we'd] just write it down on a piece of paper, that starts the documentation process. Then you can put it, when you get back in the office or you get home, you got personal computers now, type it in. That's a big help. I did an assignment on a major retailer, and I was going through the records, and one of the contractors they used, he was small, and he wrote out an invoice handwritten. One of the office personnel said, 'Why are we doing business with these people? Look at the invoices, handwritten.' So, it does make a difference, your presentation." [#FG2]

20. Size of firm. Nine interviewees discussed the challenges that come with being a smaller firm competing in the general marketplace [#10, #13, #22, #24, #26, #28, #3, #30, #32]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "That's my issue. That's where I run into to the issue is that I can make the connections, is that I don't have the support, as far as who can help me. And that holds me back because I'm thinking, like, 'Okay, I had this person in mind, but will it fall through because their kids or scheduling? And I've made this verbal commitment.'" [#10]
- The Black American owner of a DBE-certified construction company stated, "I think that it's really hard for minority companies to participate with these bigger companies, because first of all we don't have the staff they have, and we don't have the resources. They have money in abundant capacity, so that when it gets slow ... When it gets slow, sometimes these bigger companies bid smaller jobs and they just knock us right out of the water." [#13]

- A representative of a majority-owned professional services firm stated, "You do have to have some capacity to do it. But every individual project a small firm can do. There's no problem with a small firm generally look, it's a lot of small architects doing a lot of small projects. People could do a $10 million project no problem, but they don't get the opportunity to because they haven't done it, they don't get the opportunity to do it. It kind of perpetuates." [#22]
- The owner of a majority-owned professional services company stated, "Because we're a small firm, there's certain jobs we're not going to be considered for, but that's okay. We know that. So, I wouldn't consider it ... It's an obstacle, but it's one I'm willing to accept." [#24]
- The owner of a WBE- and DBE-certified professional services firm stated, "Both of those departments [within the City] have so many people that came from large entities, that they don't think that any small business can actually produce a project. They think that small firms can only be subs. Which is just stupid. I mean, we're doing a $60 million project in Atlanta and $180 million project in Henry County, but Lexington thinks that we can't show capacity to do a $400,000 job." [#26]
- A representative of a majority-owned professional services company stated, "We are active project managers. We don't necessarily have the personnel, just purely administrative personnel, that would be our person to call to give or handle those kinds of people. Where the larger companies ...they have them. They have people that can go out and contract negotiations, and that's all they do. They don't have to worry about invoice, or deadlines, or things like that." [#28]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Most large organizations, the biggest barrier is what they expect a small company to do in order to win the business and the time and effort that goes into completing RFPs. That's one barrier." [#3]
- The male co-owner of a woman-owned professional services company stated, "We're a small company, so it's kind of chef, cook, and bottle washer, everything from trying to get the work to actually doing the work and then invoicing for the work, which is a lot of fun." [#30]
- The owner of a majority-owned construction firm stated, "I cannot bid like on bigger jobs because there's so much competition and those guys been for years in the companies and they have all the equipment, they have workers working for them and I'm just by myself." [#32]

21. Other comments about marketplace barriers and discrimination. Eleven interviewees described other challenges in the marketplace and offered additional insights [#1, #12, #13, #15, #16, #2, #26, #31, #4, #FG2, #PT1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Basically, you can't have all your eggs in one basket. So, if you want to go after a big job, you better have a lot of smaller jobs rolling, because that one big job, if it goes bad, you got to be able to sustain the incident. Even if you have smaller jobs, if I have 10 small jobs, one out of 10, I'm going to tell you, I'm probably going to break even and lose money, right, but I

got to have the other nine to be able to sustain that. So, there's kind of a nature of the beast. That's why I think a lot of companies realize, I have to grow. You have to grow just so you can sustain fine manage. And then all of a sudden you realize you grew too much, and typically, you don't go down, what do you do? You go up, and that's how companies all the time just keep getting bigger, and bigger, and bigger, because they realize why, in the order of market share, because they have to sustain whatever that payroll and their operations cost. I know my industry; I know sometimes I got blown out on a bid by companies that's twice my size and my overhead is a tenth of theirs. I don't know how they do it, but that's the risk they take, or they've seen something will come up the way financially that they can deal with that. We're not too much at the stage to where we can take a lot of risk and that nature. Some sometimes we call it, they are keeping them guys busy. So, every now and then they'll take a job, I would say, and I'm trying to say this, what they do, I just feel like they have to be doing it. They take up a job that costs to keep their manpower busy. So, to keep from losing their guys, their crew. So, they may have several jobs going on, but at the same time, you sit down when you're bidding a job everybody has only so many guys. When you are bidding a job, your manpower is not on the job full time due to other trades. So where are they going in between that? They have to be going somewhere else. So, if you've got six jobs going on, and all of a sudden you can see a gap within that job, and you have this bid opportunity and you kind of just like, we'll may just take this one to make sure we don't lose our guys for two, three months because we're going to need them like crazy. If we lose them, they can complete their other jobs when there's something down the road. So, we may do that just to keep the guys busy." [#1]

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Early on when we were smaller, trying to convince people to utilize our services just in the beginning because we were small, and then a big hurdle was getting over the hump to being a prime consultant, particularly for KYTC. Once we got over that hump, people saw that on our resume, but getting that first KYTC project as a prime consultant, getting the first LFUCG project as a prime. Getting over that hurdle was a barrier that took some time, but yeah." [#12]
- The Black American owner of a DBE-certified construction company stated, "This is something that needs to be done in the minority community. Is a lot of times, we as minorities, we don't have the opportunities to… Like I said, the bonding and the capital and stuff. And a lot of times when we do a job, I see a lot of minority companies I work with, they want to take all the profits and not put them back in their company to build up bonding and stuff. That's something that I think we need to give some courses on, of how to build up your bonding and how to keep money in your company for buying materials and building up enough monies that you can have a supply company say they will open up an account for you." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I just think it's the barrier to entry. I think that, if you don't give anybody the opportunity to work because people have monopolies on the industry and there's no access to entry, that's discrimination. I mean, that's, again. Yeah. Anybody trying to grow, that's why you haven't had the growth in the minority business section in the public field with as much public work, with 1,000,000,000s of dollars' worth of public work that has went on in license. And over the past 10 years, you don't have one minority business enterprise with a

concentration on minority business enterprises, you have no minority hasn't allowed me to do..." [#15]

- A representative of a majority-owned professional services firm stated, "We have some pretty high standards related to safety. And particularly when getting into federal work, our sub-consultants have to meet the requirements of the client's safety protocols. And the federal government keeps a lot of records on that. So, if a firm has a bad track record that could disqualify them from us using them" [#16]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Most of my business is outside of the area because of the challenges of getting business in the local area. I literally only have about one client in this area, and not including on the trucking side, but we work out of Louisville. This has always been an issue for minorities here in the Lexington and Louisville area. This has always been a big discussion for minorities. It's the reason why we have so few minority-owned companies. We have a large population of recorded Black- or woman-owned, black- and/or woman-owned businesses in this area. And a lot of them work under the radar. They may be there, have their licensing, doing it out of their home. You're still living back in the 60s. We need a Green Book. We need a Green Book to find out where the companies are." [#2]
- The owner of a WBE- and DBE-certified professional services firm stated, "The volume is not as high on the design side, and the majority of this stuff is coming out through the DOTs. But this is also all related to the fact that we have a screwed-up tax system that funds our infrastructure in Kentucky. Basically, our gas tax system is so broken that it trickles over into not having much projects for the highway department or for the city of Lexington. It's both/and. Compared to all of our adjoining states, with maybe the exception of West Virginia, but they passed a, a GARVEE bond, so they're rolling in it over there as far as design fees right now. We're just... There's very little work for the amount of firms that are here." [#26]
- A representative of a majority-owned construction company stated, "I guess you could probably sum it up with one word, being inflation or increased cost of products. Business has just been amazing this past year, but now as we're starting to see fuel prices spike and other goods, everything. Anything from groceries to anything and everything that you deal with every day, I expect to see that that start to slow business down some, people are just not going to have the money." [#31]
- The owner of a majority-owned construction company stated, "I got a leg up on the first part by getting a partner. The partner actually did provide some bonding help. So that was not a pain. That was a good thing. But the bad thing was, he wanted to control the company to the point where he didn't even tell anybody that I existed. He wanted to bid the jobs himself and sub it to me. And so, I had a hard time getting out from under him. Since he owned half the business, he felt like he could have me do work on his jobs for less than it cost me to do. I mean, that was a leg up in a way. I needed to do it, but the growing pain part was you don't want to be in a position where you can't make money because someone else is telling you what to do and trying to control how much money you can make. He would bid a job that would have a price in it, and he would have me do the work for less and he'd keep the difference, but he'd also own half of my company. So, whatever we made, he owned half of that. So, he kind of sapped a lot of the early money. He didn't take any out.

Neither did I. But when I bought him out, I had to give him that money. I had to give him the value of the money when I was first coming out of college, he offered me a position to open up an engineering firm here in Lexington. And I said, no, I was already working in the construction business, and I wanted to stay there. And he said, 'Well, then I'll just... I'll help you do that then.' He just wanted a part of me, I guess. And that was kind of the way that went. He was not a good partner. He didn't do a lot of the things he said he'd do. He, for example, told me that he would... He said, 'You're like a capital. I'll provide all the capital,' but he didn't provide any capital. All he did was sign a note at the bank and made me sign a note at the bank, so we borrowed the money and I guess that helped some, but I thought that he was going to invest in the company, and he didn't actually contribute any cash. … Actually, the amount of Hispanic workers that are being used by majority contractors is, I think, a detriment to the minority community because I don't think they're getting any credit for it per se, but they're cutting the price by having people that aren't paying taxes. They don't have to worry about it. They hire this contract labor, and they don't have to pay any benefits. And if one of them gets hurt, well, that's too bad. We got another one over here. We just use him. And I think it hurts the community, the minority community, to be allowing that kind of thing. Some jobs, they say, you can't do that. You can't bring people in here that aren't legal. Some don't, and sometimes they say it and then they don't enforce it." [#4]

- A representative from a focus group consisting of construction companies stated, "The private sector, most definitely they have safety issues on job sites. A lot of it's the same. If you can learn anything, and like I said, and if you can go work for them on that project to help them, go work for them and they'll appreciate it. 'Hey, this employee showed up. He brought a couple of other people. They are helpful to us.' That's a big deal." [#FG2]
- A representative from a focus group consisting of construction companies stated, "We have two dedicated safety people in our office, and they travel. They travel probably half their time to job sites. But as [the other focus group participant] alluded to earlier, construction's dangerous, dangerous as [expletive]. We've all suffered those injuries. Any contractor had injuries, and that's one of those prequalification things. What's your EMR? That's experienced modification on your workman's comp. It's all about how many injuries you've had. You have to show them your OSHA logs and show them your safety manual, this and that. All those things are experience that you get from working for somebody else, frankly." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Because if you wait till you run into it, it can cause some problems. I've heard of people stepping out of their vehicle at the job trailer and not having their yellow vest on and hard hat and things get thin. They don't play anymore on these job sites. They want you to be safety conscious because it's a cost figure. So, yeah." [#FG2]
- A representative from a focus group consisting of construction companies stated, "If you can prepare and like I say, the prime contractor is well aware of it. They live it day in, day out. The more you get around these job sites, it makes you more conscious of it, because this stuff is basically not taught. You're not taught it in school. You can go to engineering school and still that safety stuff is not taught heavily." [#FG2]

- A respondent from a public meeting stated, "Squeezing means that... It means what you said, but in addition, also, they want more out of you than what they paid for and what they're willing to pay for. So if you go... If a prime goes into a contract and grossly underbids it in order to win it and then they feel like because they have a minority participating on a contract, they can then revisit their pricing because, 'Look, we're using this minority resource.' And then they go back to their customer, which is LFUCG, and says, 'Hey, look. We got to incur more cost, and look, we used this minority/woman-owned... minority... whoever you're using, and now we need 40 million. I know we said we could do it for 10 million, but now we need 40 because, look, we're using this minority.' And then the company says... Or let's say LFUCG says, 'Well, this is what you said you could do it as a prime.' Then they're stuck. The prime is stuck because they thought they had a plan to ultimately win it and then fund it for what it's ultimately cost to do. And then when the customer says, 'No. Hey, this is how it's going to be. This is what you said you could do it...' Now, the prime is... They have to find that money or jeopardize going out of business too. And so then, someone gets squozed, that's what the term means, squozed, and a lot of times, it's the sub-contractor. And if the sub-contractor is woman and minority, then they get squozed too." [#PT1]

I. Information Regarding Effects of Race and Gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority- or woman-owned firms:

1. Price discrimination*;*
2. Denial of the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of a contract;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environment for minorities or women;
9. 'Good ol' boy network' or other closed networks;
10. Resistance to use of MBE/WBE/DBEs by government, prime or subcontractors;
11. MBE/WBE/DBE fronts or fraud;
12. False reporting of MBE/WBE/DBE participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. Seven business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#1, #13, #15, #19, #5, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I do feel like there is less of a restriction, or less of a concern with non-minorities going and walking into a bank and asking for a loan versus the minorities. It's pretty evident. You see it all the time. You see one guy start a business. Two months later, he's out of business, and six months later he got a new business, but with three more trucks. Something of that nature. Now, the only discrimination side of it come to is those number is higher than everybody because the same sub. Another example, if we bidding a job, we bid a job. I'll get a bid from the same four plumbers, they're my competition. Lot of times the only way, that the other contractor, the only way you get competitive with somebody, you're able to use a subcontractor that typically doesn't fool with everybody else. So, then you may get a better price, that's how you get low, right. But I'm giving the same numbers out, but at the same time too, from those subs, it's the nature of the beast. You're going to get a different number than probably the other guy based on the relationship. If this sub with me does $1 million worth of work with me doing other work, you think he going give the same number to a guy that he's bidding to for the first time? No. Why would he want to be on the same playing field if he done most of his work with me. Listen, and he's never worked with that guy before. It's going to be marked up more. So, your bid may be higher if you don't have relationship with your subs." [#1]
- The Black American owner of a DBE-certified construction company stated, "A lot of times too on loans, your loan will be higher, and the payment will be higher on the bank loans or stuff like that." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "We had a lot of issues with banks, not treating us fairly our treating us the same as they would other white contractors. And, yeah, we dealt with that a lot in the beginning." [#15]
- The Middle Eastern American owner of a majority-owned construction company stated, "I couldn't even get my bank to give me this online invoicing because I was a risky business, according to them. They expect you to get paid less. When I quote a house, I have a skill set. They're going to get a very high-quality system. There's a reason for my prices. If they don't like it, that's fine. They can go somewhere else. I don't even worry about it." [#19]
- The owner of a WBE-certified construction company stated, "There were issues. I went to a banker, and I tried to do a line of credit, and I hadn't thought of this in years, and she said, 'The best thing you can do for your business is just to save your money, because I don't think a banker is going to give you a line of credit.' So, I took her advice and that's what I did. Way back then, when I got married, the bank made me close my checking account and open a new checking account with my married name. Even though I owned a business and had to pay everybody in cash, for two full weeks, while that checking account was getting up, there was nothing else that I could do. He was not going to be a part of the business, but I had a married name. So, back then you couldn't have a professional name and a married name, I had to close my business and sign by my married name." [#5]
- A representative from a focus group consisting of construction companies stated, "Well, if you're looking at a supplier and saying, 'We're ready to send you a purchase order for $2 million,' versus sending a purchase order for $200,000, yes, I'd say it would definitely be a factor." [#FG2]

- A representative from a focus group consisting of construction companies stated, "Once again, it's your relationship and it's a card game, bluffing. Sometimes they'll call you on it and say, 'No, we're not holding this price.' Then you go to the prime contractor that you're working underneath of and say, 'Hey, talk to the prime contractor and yank them around like that.' So sometimes you have to backtrack and run to the prime contractor, and the organizations are trying to work. They realize it, but it's just everybody's just in a bad situation now till this thing clears out, and you just try to do the best you can without stepping on too many toes." [#FG2]

2. Denial of the opportunity to bid. Three business owners and managers expressed their experiences with any denials of the opportunity to bid on projects [#5, #12, #24]. Their comments are as follows:

- The owner of a WBE-certified construction company stated, "I would think I'd be delusional if I didn't say yes to that [being denied the opportunity to bid because I am a woman]." [#5]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "You know what? There was an instance, and it was totally our fault. We didn't have a particular pre-qual. It was up in Indiana where we were not allowed to, and it was something we missed, but yeah, they got to get the paperwork in." [#12]
- The owner of a majority-owned professional services company stated, "They were public nonprofits, that had very, how do I say it? They in and of themselves were quite biased. They didn't like the notion that I was a Caucasian male. They wanted someone else, and that's fine. If you tell me up front, ain't going to break my heart." [#24]

3. Stereotypical attitudes. Nine interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#11, #14, #29, #32, #33, #7, #8, #9, #PT2]. Their comments are as follows:

- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "When we on those jobs, you always, you get treated a little different, because they're not used to seeing us around. You know those? If you a DBE, 90 percent of the time, you're working black and brown people. Usually, when we're on the job, we're the only black and brown people around, you know? So, you get treated a little different. So, it's a lot, especially if you are doing work where people are like union contractors, they're from sort of the mountains, so they're not used to being black and brown people. So, everything's a little different." [#14]
- The Black American owner of a construction company stated, "Sometimes it's in the daily dealings. Sometimes it's over a period. Just certain areas in the counties and stuff." [#29]
- The owner of a majority-owned construction firm stated, "Probably my accent doesn't help." [#32]
- The woman owner of a professional services company stated, "I think being a woman in the marketplace, personally, with what I do, it does seem to be a more male... I don't really want to say dominated, but I think that men seem to be taken more seriously in this field that I'm in. It's very competitive. And so, I would say that is a barrier to me being female, and it's

something that I have fought very hard to overcome. I think we've come a long way, but there's still some men business owners that have the mentality that men work harder and that men are wiser." [#33]

- The Subcontinent Asian American woman owner of a professional services company stated, "There may be subtle discrimination, but I don't think it is to surface to my level for us to understand. I would say there is evident. The best way to tell is in a meeting, people could crack a joke to make people more pleasing, to make people listen to you, but at the same time, when somebody is giving you just answers, they may not be as appealable though they have the skill and the resources, right? With my wife, she's very conservative in our happy hours or out of office circumstances, office situations. It's not comfortable. We are not used to those things." [#7]
- The Black American woman owner of a professional services firm stated, "No, not the particular business that I'm in currently. I would say so with my other, with my accounting business. Because I would say that some people look at you, like, can they really trust with doing their finances? That's what I see. It doesn't matter whether you have your certifications or whatever, I think some people just kind of look at you. Trust that you could do it right." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "So, what we do is I had to kind to get him on board with this: I will send him sometime out in front. And if I have a feeling that certain people aren't, you know how sometimes you can just taste it, you can smell it. You just know that this bunch ain't quite right. I'm sure that you've been there." [#9]
- A respondent from a public meeting stated, "A lot of times with minorities we're selected for work by janitorial or work in a particular category, whereas a large division of my area deals with the engineering, sciences and different things and being considered for that or bidding for those things, even remotely having an opportunity. I attended one, I think it was either a LFUCG function or a UK function where literally one of the prompts told me that I had to do my time and when I did my time maybe I will be considered for more opportunities. And that was just an outright blatant discriminative cops statement saying that I wouldn't really get anything or get anywhere in a particular category in this area until I served my time like in prisons, my time in prison. So being cut off to get maybe more of the more skilled opportunities in, like I said, in the design and engineering, those types of things, I've seen an issue there." [#PT2]

4. Unfair denials of contracts and unfair termination of a contract. Two business owners and managers discussed if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract [#15, #30]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "We've dealt with that before, especially, when they shop your bid." [#15]
- The male co-owner of a woman-owned professional services company stated, "I have seen that, but I've definitely seen it more on the private side. And I think a lot of it is they just have a... Oh, no, I have seen it on the federal side, which is frustrating, but for the most part,

it's on the private sector side. they have the old boy network. It's not what you know, but who you know." [#30]

5. Double standards. Nine interviewees discussed whether there were double standards for small, disadvantaged firms [#1, #11, #13, #14, #15, #3, #32, #34, #9]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Always life, I feel I got to prove myself more by being a minority business. That's just, I mean being a minority, I think it's part of life. Is it fair? No, it's not." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "Maybe occasionally that's something that we see." [#11]
- The Black American owner of a DBE-certified construction company stated, "I think sometimes we as minorities, we're scrutinized more about if we can do the job and not ... And I believe that I could say yes, I know of contractors that has before, they were scrutinized because of their race, yeah." [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I've seen that a lot in the private sector." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Mainly clients like the public agencies, they would require us to do certain things that they wouldn't require someone else to do." [#15]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I think that there is favoritism out there. And it is harder as a woman-owned business, in some cases. In many cases, I think that it can be an asset too, because some people prefer to work with a woman, and even people you wouldn't think like male executives. Sometimes they will take advice from a woman that they wouldn't want to take from a man. But as institutions, I think that there have been barriers, and some of it is just the small business side of it, that they think it's too small, and they underestimate capabilities. The one that comes to mind is an opportunity we had, and we were one of the top three choices. And my team was two women and a gay man. And the comments that the executive made in it made me think that he thought we were too soft to do the work. And I used the word hope, in a time or two in the process like, 'We would hope to do this,' and he said, 'In this business, we don't hope. We make it happen.' And I think that was a terminology. I left and I thought, 'Okay, I've been working for nonprofits too long,' because they would have gotten that. But I think that was a discrimination." [#3]
- The owner of a majority-owned construction firm stated, "I just had customers that making fun of me that I'm giving them that bid, but just not accepting my bids or I don't know. Saying it's too much other people do it for free. I can't do it for free." [#32]
- The Black American co-owner of a professional services company stated, "There is one standard for black businesses and there is another standard for everybody else. Which is why I don't generally agree with certification because certification actually puts a tax on Black business that somebody else may not be spending. I'm like, 'Why can't you just let everybody just opt in, and then put severe penalties on the back of perjury, or lying, or all

these different sort of things because, come on, everybody should just have to do it the same way.' I'm speaking directly to our supplier diversity cohort of people is that they have a job, but they don't necessarily have the burden of understanding what the business owner is having to encounter from a P&L and balance sheet perspective. So, they sometimes create processes that serve their purposes, but don't necessarily serve the purposes of the business owner." [#34]

- The Black American owner of a DBE- and MBE-certified construction company stated, "And I was telling her that a lot of people, there's a lot of people that are prejudice, a lot aren't prejudices but they just never been in a situation that it hits home, that it's really hit at home to them. And then they get to a point where they realize it's nothing but this. I mean, we have dealt with vendors that we're pretty for sure that we would not have been treated a certain way had we not been a minority company, but this is what we do. Well, one of the biggest problems we have is that we have inspectors out here that can completely change the job site to where we go from making money to just basically robbing us. And then they hold us to such a high accountability on standard on our work, which we want to do, we want to do good work, but then we turn around and we see somebody come in the next day, because we had a piece of curb that wasn't acceptable. We went by back up there and we see this other crew come in with no accountability, no inspectors hovering over them. They set it up in a couple hours where it took us two days to set it up because they were right there changing everything. We had three inspectors and they poured it and it's setting up there right now, wouldn't pass the straight edge test, but we couldn't pour like that. And this guy's got, we find out he's got a track record. So, I mean, when the person has the ability to be that detrimental to our business and can turn a plus into a negative that quick, they need to be vetted to where they're seeing a project, not skin colors. And he's right." [#9]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor was mentioned by one interviewee as barriers to success in both public and private sector work [#2]. Their comment is as follows:

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "They [the prime] paid us what they wanted, not what they owed us. And they currently owe us over a million dollars." [#2]

7. Predatory business practices. Two business owners and managers commented about their experiences with predatory business practices [#11, #2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "The only example I can think of is that notion of bid shopping, where sometimes architects will be awarded a project and then I'm picking on them because it's usually them that are architects over the prime, and then they will go and shop their consultants, but I don't think that is typically a big issue in the industry." [#11]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "They kept asking us to remove ourselves from the project and they would pay us out. And we said, 'No, we're here because we want our... We want to create our path to performance,' and so we began having severe issues. And I may have time to elaborate on the severe issues to the point we were called out of our names, racial slurs on their sites,

they would put us in horrible conditions that would damage our trucks. They would not pay us; they had underbid the contract. The city wouldn't give in and paid them more, so they stopped paying us. And it really almost put us out of business, to the point where it became almost non-sustainable. Less of the money, more of our equipment was being ran over by big dozers going on the landfill, anything to sabotage us. And we would raise the flag, engage with the city, we complained. It got to the point that, either some of the city officials that we thought were being on our side started calling us incompetent and that we shouldn't be on that contract. The prime even threatened our lives. We literally, it's a police report that got filed because they were like, 'If you don't get off this...' Because it's like they couldn't. We kept going because I knew how to fix trucks. They would damage our stuff out there. No matter what, to the point where the main guy, he was like, 'Look, if you just don't basically go away, I'm going to do whatever it takes, by any means necessary, to make you go away.' And we had a police report was filed, there's all kinds of emails and everything and recordings showing. We went to the city about it. From recordings, paperwork, everything based on... We even got recordings, where their landfill worker pocket dialed, and it got recorded, and they're calling our drivers idiots, N-words… When a prime can basically tell you, 'I can kill you and nobody will care,' How many Black businesses do you think you're going to get to do anything in this area? When a prime can just come in and sabotage your equipment, run over it, and then tell the city it was an accident and then don't pay, and they literally do it every other day, put you in sub-par working areas, just everything they can do to destroy it, and then the city says, 'We can't do nothing, that ain't on us.'" [#2]

8. Unfavorable work environment for minorities or women. Two business owners and managers commented about their experiences working in unfavorable environments [#5, #15]. Their comments are as follows:

- The owner of a WBE-certified construction company stated, "I think in our environment, I had a woman last year say she had some harassment. Now, it was not from my employees, she felt like a truck driver delivering some stuff to a job made innuendos towards her. We sat down in my office and had a serious talk, and I was pretty blunt with her. 'I expect you to wear more professional clothes on the job. I expect you to present yourself this way. But I can guarantee you that will never happen again.' So, I went to the general contractor and said, 'I feel like she was disrespected and treated less than professionally. I'm going to take my people and leave your job.' And he backed up and said, 'Don't do it. We'll solve this problem.' So, I take a very active interest in my business. I'm on my jobs, almost every job, every day." [#5]
- The Black American owner of an MBE- and DBE-certified construction company stated, "A lot, especially for minority, I mean, yeah, and it's like, a lot of times when we come on the site, we're the only Black contractor on a large site and we have the only Black people. So yes, and it's always, yeah, we've dealt with tons of racist issues, the communications, the way they talk." [#15]

9. 'Good ol' boy network' or other closed networks. There were a number of comments about the existence of a 'good ol' boy' network or other closed networks. Nineteen firms shared

their thoughts [#1, #11, #13, #15, #2, #20, #24, #29, #30, #33, #37, #5, #7, #9, #AV, #FG1, #PT2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "It is a small world. I will say this, as you say small world. I might've said this on this other conversation, when you say the good old boys, there is just like myself, I said it earlier, there's typically five of us that show up at the pre-bid every time, same five. So, if there's five of us, I mean there's four non-minority and one minority. The same four non-minority. So, when you say, 'Hey, we need more minorities to bid this work.' Well, if you do the numbers and the math that's 20 percent that's bidding on the work or jobs, you don't see a lot of new non-minorities jumping into the industry at all. Even in Lexington or anything, or like I say, I was in the Cincinnati region heavily. I was in Columbus. Certain markets you always want to have the same people, everybody kind of finds their space. Everybody realizes where they can win and work together and move on. That's like you don't give me any trouble." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "But to me, if there have been barriers, it's been more of a, I hate to use the term good old boy network, but sometimes a lot of these firms, particularly when I started working 20 years ago, were run by people that were well-established in their careers and were used to working with other people that they've worked with for years and years and years. And that's understandable in terms of those relationships you develop, but sometimes ... I don't golf. So, sometimes there were certain ways that it was difficult to kind of get that contact face time. I feel like that has changed. I definitely would say this was more of a thing earlier in my career, but it was kind of almost this ... I mentioned golf. I don't golf and that's kind of a joke, but it's also there was some reality to that, that there were some competitors and things that use those types of events or relationships to continue professional relationships and those were barriers I think earlier on." [#11]
- The Black American owner of a DBE-certified construction company stated, "That's a main problem. But what's happening now is that those good old boy networks, their buddies went out of business, they were working with forever. There's no one trained in that interest. They haven't trained their kids to keep, say, pouring concrete or framing, and now they are looking for people. These bigger companies are looking for new people to work with now, these ..." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "From that standpoint, I've been in business 15 years, I'm probably the longest standing contractor that worked on public works in Lexington. And I have one relationship with one prime contractor, and I have tried to develop relationship with several other ones, and it went nowhere. Definitely good old boy network. That's why you won't get jobs sometimes, because the good old boy network, they don't feel the need. Nobody's going to do anything to them if they don't work with minority contractors. So, yeah, it just keeps the same. So, yeah, and then they can talk the way they want to talk when no black people are around." [#15]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "People work with who they like. White males like to work with white

males. Within their pool, with their pools of friends. Somebody might be working in the wastewater plant and be like, 'Oh, you know,' I'm just making this up. 'Two of the tanks, they're planking right now, they're about to blow up. I know about the replacement; we've been talking about it in meetings.' And they're talking about with their other counterparts, which are white, and hear about it, and then, okay, they already know and they're like, 'Oh, you know that.' But they give them the information. That costs us a quarter million dollars to do, yeah, a quarter million dollars. They've already got time to go in and map out their numbers. Now then, it becomes official and gets rolled out, they already got their information and numbers, and then when we come to the table, we're like, okay, now we're starting to do it. We're already behind the eight ball." [#2]

- The co-owner of an SBE-certified professional services company stated, "We've tried do a lot of business in [city] and I was from [city] and I've not gotten a lot of business there. I think that there are some places where you're, obviously, going to face the good old boy network and you just are. I think, it's just part of Kentucky. Unfortunately, it's still part of Kentucky and there's a political environment that you're always, not always but sometimes, in given areas you are going to be an outsider and if you're deemed an outsider, you're not going to get that work." [#20]
- The owner of a majority-owned professional services company stated, "Well, I have been a victim of it. But all of us are. It's just part of the way the world works. So, I could say yes, but it's limited to very limited occasions, and very limited circumstances. I've seen it. I was a victim of it, if you would. I have a hard time using the word victim. I just don't feel victimized." [#24]
- The Black American owner of a construction company stated, "That experience is pretty, pretty crappy feeling because you know you've got to be in it. You know when you're in it, because you been in it so long, there was no reason nobody else should touch it. And then, that little good old boy, he winds up with it at a higher price than what you're getting it at. And that's pretty [expletive]." [#29]
- The male co-owner of a woman-owned professional services company stated, "They have the old boy network. It's not what you know, but who you know." [#30]
- The woman owner of a professional services company stated, "It's the good old boys club and if you go to bars and buy them drinks and hang out with them, or whatever, you're going to get preferential treatment, definitely. So, obviously I don't do that, and I will not do that, but yeah, those guys and with the agencies, and with it being male, the guys are more likely to go out and do things like that." [#33]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "We've been on interviews where you kind of get that sense of sort of the good old boys club and you're just kind of here for doing the interview to sort of check off a box and sure enough, the project gets awarded to who you expect it to get the project. And so, you feel like the whole process was a sham. It happens enough to where, it's noticeable and it's frustrating." [#37]
- The owner of a WBE-certified construction company stated, "There always has been. Is it less than it was 25 years ago? Oh, definitely. No question about it. Is it gone? No. No, it's not.

Do I hold my own? I think I probably do. But back to a question you had earlier, have I lost jobs because I'm a woman? Sure. But I've won some because I was a woman too." [#5]

- The Subcontinent Asian American woman owner of a professional services company stated, "Yes. Culture differences play a lot than we know because of the socially attributable acceptable situations. You go out, to spend the evenings or things like that are not common in any culture, right? The way we present ourselves are different. The way we mingle. I felt it definitely helps. For example, this may not have happened with me in person, but social drinking. Is that something that we could change? I don't know because I have never had that situation. For the sake of business, I'm not planning to change that, but that's how the business is, that's how people get to know each other, that's how people... Yeah. If you understand what I mean, right? Cultural barriers? I would say it's not as much as what they could do, things like what they could not, should not do. It's cool, entertaining. It should be more work-based than anything else, right?" [#7]
- The Black American owner of a DBE- and MBE-certified construction company stated, "When we walk around, people won't even talk to me. They'll walk to you like you're the owner. I said, 'They will walk to me. Walk up to you like you are.' And sure enough, it happened more than once. And he stopped and he looked at me and he goes, 'Look, I see it. I see it.' So, there's been a lot of learning experiences right there." [#9]
- A representative from a majority-owned professional services company stated, "The firms that have been in Lexington, especially engineering, have plan sets and are ahead of the curve. Have local projects and knowledge of site we won't have. Makes it hard to compete." [#AV53]
- A representative from a majority-owned professional services company stated, "There's lots of work, all around, but as far as public work, usually that's invite kind of stuff. You got to get in with the people who award the contracts. We've done some work with you guys before, been about 5 or 6 years, but we'd love to work with you." [#AV59]
- A representative from a majority-owned construction company stated, "It's a difficult environment, it's an inside track, and it's very hard to advertise in this market. It's hard to get on the inside track." [#AV265]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I know that the Lex, I'm not sure if the city has any effect over the working with the primes. And there's only a few primes that can really do large projects or whatever, but if there was any type of, or if there were any plans for any type of rules or situations in place at that second level, underneath the actual bid, that didn't allow for it to continue to be the same people, and things of that nature. Or at least some type of verification of outreach, and things of that nature from prime, and things of that nature. I just know that it discourages others to even try to work for the city. I know that was mine. When I hear some bad stories about working with the city, and things of that nature, I'll just go the path of least resistance. The city could encourage prime contractors to use subs that they haven't used before. And they could also encourage more opportunities so more people get a chance to work with them to get that positive first impression to keep wanting to work with them more." [#FG1]

- A respondent from a public meeting stated, "I just have a comment about relationships. Before I went into business I went through a lot of training, and that's all I heard is relationships. You have to have a relationship. You have to have a relationship. But to me, relationships equals friendships. If they don't know you and they don't have that friendship with you, you're not going to get the contract, which there's got to be something. And then it seems like you're constantly giving the contracts to your friends. There's got to be something legally incorrect about that. And I don't think that a lot of minorities are in a position to develop these relationships. So, then it becomes a problem. I work in HR, as I said, and I look at plenty, plenty of applications and can determine qualifications based on the information that's really written. So, I know that the 'relationship' maybe just a cover and not really a real factor. And it shouldn't be a real factor." [#PT2]

10. Resistance to use of MBE/WBE/DBEs by government, prime contractors, or subcontractors. Eleven interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#1, #13, #15, #19, #2, #21, #4, #5, #7, #8, #PT1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "There's a previous history to where... I know it's not necessarily just with the city. Just overall with minority business there was this thing, say 30 years ago, minority participation jumped up and minorities jumped in it. Well, there's a trust issue, too. As a GC, a non-minority, you've got a $10 million job. There's a minority that has a $2 million scope of work. Some on his $2 million scope of work, he may be holding $2 million, but there's some internal subs under him, too, or your material suppliers. He has a million dollars' worth of suppliers. That supplier can furnish you material based off of credit for the job. You get paid from the owner through the GC. You get your section of the bill to come in for 1.5, which a million that you should be paying your supplier. There's history where the supplier never got their check and they had to go to the GC and figure out, hey, where's my money. That got stuck on minority contractors. People took advantage of a point of time with minority contractors. I've been told to my face, 'I'm going to tell you upfront, I haven't had the greatest experience with minority contractors.' I say, 'You haven't?' 'No, I haven't.' I say, 'Have you had bad experience with non-minority contractors?' He say, 'Yeah.' I said, 'Well, so why are you remembering the minorities?' He said, 'That's a good point,' because nature of the beast, discrimination of our culture around us. He might have had 20 relationships with contractors, two of them been minorities went bad, five of them been non-minority went bad, but he, off the top of his head, he remembers the two." [#1]
- The Black American owner of a DBE-certified construction company stated, "I think too that a lot of times these larger companies ... What I'm finding out too is, as dealing with these larger companies now, is that I guess before they wouldn't use you on specific problems. Now they're kind of being forced to or being pushed to use minorities. If they don't have to use minorities, they won't. They'll just use their friends and the same people. That's what I'm seeing in this industry now, that I think that's one problem that I see. It's like before, when they start losing their subcontractors that they had before, and now they don't have them. Now they see you, you give them a bid, now they're going to use you now, because they don't have them. I've seen this happening, and they'll come to you. It just seems like they'll come to you when they don't have, I guess the specific subs that they always had

before. They have to use you now. These bigger contractors, general contractors, I think that sometimes they have their people that they've been using for years and now they don't have access to them anymore. Maybe those companies have gone out of business, or when it got slow, they didn't have anything for them. And I think they lose them, and then they turn around and they will try to work with you on that level after that, when they can't find those guys after they went out of business." [#13]

- The Black American owner of an MBE- and DBE-certified construction company stated, "I mean, I don't know if it's resistance or, yeah, they [primes] just don't care." [#15]
- The Middle Eastern American owner of a majority-owned construction company stated, "Sometimes you can't overcome when people don't like you because of certain stuff, you should know what I mean. I don't come across it all the time, but it does happen. It is what it is. I'm providing a service that they don't want it because how I look or my accent. It is what it is. Any career you'd come across it. It's the way it is. You just have to be strong and overcome it." [#19]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "And then I was like, so from there, that's where we had come together to say, well, maybe there's an opportunity for us to do something together. And the plan was to buy him out of his manufacturing, and that was here in Kentucky. He had a partner. And his partner, both white males, his partner did not want to sell to me because I was Black. The partner was like, 'Well, why don't you start your own thing and then I'm going to go ahead and purchase the rest of this out, and then after a while, I can sell the company to you or sell you a piece of it.' Well, that never came to fruition, so basically, I found myself with this ground floor company and having to figure how to grow it myself." [#2]
- The Black American owner of a professional services company stated, "In the public sector until, like I said, everyone's being intentional I think it affects it because everybody tries to work for people they're around and who they're comfortable with." [#21]
- The owner of a majority-owned construction company stated, "Well, 'I don't trust them,' that's racist, but I mean, why? What? Because he's a minority? I mean, what's the deal? So, I don't know. I don't know where that's coming from, but I would say that if somebody were thinking about it, they would probably rephrase and say, 'I trust Billy Bob, because he's been working with me for 20 years and I always use him.' Well, that's an impediment right there to not leave the door open to new people. It's frustrating." [#4]
- The owner of a WBE-certified construction company stated, "There's always been a glass ceiling there. I mean, it's always been there, and am I one of the only women on construction jobs? Yes, I am. When I go to 85 percent of my jobs, when I go, I'm the only woman there. Now, I'm comfortable in that, and I've been doing it for a long time, so do I feel like... I work with people who treat me with respect, but do I have to stand my own ground? Yes, I do." [#5]
- The Subcontinent Asian American woman owner of a professional services company stated, "That is one thing that I was just telling you. … big companies shadow small companies. They don't let the small companies grow. Not from a company perspective, but from a personal perspective, I have been one of the victims for that, but I'll just stop there." [#7]

- The Black American woman owner of a professional services firm stated, "No I don't. And some people, it could be that. I don't know what they're thinking, but you know when you know that somebody's looking at you and judging you." [#8]
- A respondent from a public meeting stated, "I have a contract business dealing with the federal and state government with IT because they don't like to hire IT people because it costs a lot of money to keep them on when they just have specialty projects. And so, I was bidding on those contracts, and usually I was in the one or two positions, but they still went to men." [#PT1]

11. MBE/WBE/DBE fronts or fraud. Ten business owners and managers shared their experience with MBE/WBE/DBEs fronts or frauds [#11, #14, #15, #23, #24, #37, #4, #9, #FG2, #PT1]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I've maybe seen a couple of things probably more on the construction side than the consultant side." [#11]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Yeah, I've seen a couple of those. You'll see a lot of like construction, landscaping, hauling, and trucking. They basically probably put their wives' name on it." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "Tons of them. Yeah. Especially in the WBE category. That's why the standards should be with the minority on business category. A ton of that, are companies that just put the business in their wives' names just to say yeah, they'll WBE. When the wife never has anything to do with the company." [#15]
- A representative of a WBE- and DBE-certified goods and services company stated, "I know that some companies put up a front person and they might be smaller business entity doing business as something that is like a big conglomerate or something, but okay I'm not, I'm not seeing anything like blatant." [#23]
- The owner of a majority-owned professional services company stated, "I've seen it out there. It's obviously stretching the truth, let's say." [#24]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "I think, we've seen more and more examples on how you get these white on companies, let's say the husband, they're putting these, they're forming new companies in their wife's name and under their wives' names, they're able to check women own businesses. So, they're truly getting double the work and so you see that, and it gets frustrating. So that's sort of a way they've learned to sort of cheat the system or beat the system." [#37]
- The owner of a majority-owned construction company stated, "And I'm going to tell you right now, there are some excellent people in this town, women contractors, but very few. Most of the WBEs are run by men and they just put the stock in their wife's name so they can qualify as a WBE. And I don't consider it to be in keeping with the spirit of the rule. If somebody's disadvantaged fine, there's another majority contractor whose mother happened to be from Central America and she's not. So that's just the way it is. In Central

America. There are indigenous, which are the people who, I guess you would say, they even appear to be Mexican. You would see, look at them and say, that person a Mexican, and they're your Europas who are... If you ever watch Telemundo or some TV news show, there's a woman looks like Katie Couric, only she's speaking perfect Spanish. And they're more European Spaniards. And so, his mother was a Europa and he's as white as I am. You sit down across the desk from him. And he's a white guy, but because his mom was half Mexican, or a citizen of Mexico, he got a DBE and he's out there just taking jobs, right and left. So that's an abuse. There's another guy in town that can't see very well. So, he got a DBE, he's a white guy. And then he's a millionaire, but he gets the certification and meantime, there are decent companies that can't make it because you got DBEs in there. Really, they're not DBEs and WBEs. And when you call their office, you don't talk to the supposed owner. You talk to her husband, he's the one out there pulling all the strings. You know what I'm saying? Just, it's wrong. there's even a well-known MBE contractor in Lexington that has a deal with Toyota where they shop the heck out of something, and they decide they're going to buy something that's cost $200,000. And they do all the procurement and get the best deal they can get. And let's say it's 200,000. Then they just let this guy add a few percent. And then they get the credit for the whole... Let's say he add 5 percent, he gets 205,000 or he'd get more money and he'd just take the top. So, none of the people doing the work are actually MBEs. It's just one person. And then Toyota gets a big medal pinned on their shoulder because they have all this minority procurement, but it's not helping the community develop companies that can do the work. So, if you would've got this and then turn around and subbed it to a majority contractor for 95 percent of what you're getting paid, that would not help you grow your business, you would just be getting a fee. You know what I'm saying? It's not any different with anything else. I think that the way to grow a business is to get a reputation, learn how to do stuff, accumulate some money, accumulate some equipment, get employees that come to work for you full-time. That way you can hire within the community. That money flows down to everybody. I mean, you're always going to have people doing it. I don't know. You can make a rule that you must self-perform. UK's done it. They had a rule in one of their contracts said, you have to do all of the things in this bid. You have to be able to do it. Or don't bid. The state Transportation Cabinet, where you can't subcontract more than 50 percent of the job. You go to do half the job; they don't want you on the job if you're just a broker. There's many jobs that say this is not open to brokers, you must perform on this job with your own forces. And they could do that." [#4]

- The Black American owner of a DBE- and MBE-certified construction company stated, "They were all illegals. The man that owned the company, I'm pretty sure was a Caucasian man. I'm pretty sure now. I'm pretty sure. All his workers were illegal Hispanics or most of them was, knocked us right out of it. Let me ask y'all something. How are you going to want to scold us and get on us for not using a minority company? When we find a good one, we go through a whole bunch of them because we can't find a good one. Y'all are acting like we just don't want to use one. We're racist, crazy, the whole nine yards. We find a good one and say, 'This is our guy. He can do the work. He's good.' Then you guys turn around and let a few dollars get in the way of this program that you guys say that you guys' desire to make it a great program and to build up these minority contractors. They bidded it so low that they didn't come back. I don't know if they're back yet, but they got back in the city and said, 'We

want to raise the price.' The city says, 'Well.' Now I heard them in the city was fighting and these people ain't came back yet but I can find out very quickly. But no, they are not calling because here's why. I hate to say this, the city is not holding them accountable. Here's one more thing they're doing. You can just go with your wife, just go put it in your sister's name or your wife's name. Now they can use somebody that looks them. Now here's what Indianapolis does; Indianapolis stopped that. Indianapolis says, 'No. You're going give at least either 15 percent or 18 percent to the Black male, 12 percent or 14 percent, whatever it is to the female and so much to the Asian. It's only two percent.' Yes, yes. I think that Nashville does it too. Because they're calling me to come down there and do some work as a minority. MSD, they were having people putting these companies in their wife's name and stuff. MSD stopped it too, they changed their whole thing around. Buddy, I tell you right now, if you want to do some work in MSD, you ain't going to get signed a little good faith stuff. We do work for MSD now." [#9]

- A representative from a focus group consisting of construction companies stated, "Louisville also suffered some well-publicized situations where minority subcontractors were really a sham. They had a big material supplier that was local, and it was a total sham. That caused a lot of their problems. They're just not easy to deal with." [#FG2]
- A respondent from a public meeting stated, "And this lady, she signed up as a woman's contractor, but she didn't own the business. She worked there, but it was registered like that, but she didn't own the business. Her boss was a man, and this is definitely disparity, and the only way she could keep her job was to sign up and let him be in charge. And really it was his business, but they were saying that it was a woman-owned business. So that's how he kept her on... That's why he kept her on, because he signed it up as a woman-owned business, and she had to be there when they asked questions. So, I'm concerned that that is what's going on, and that the women-owned businesses, really the women-owned business, are not getting contracts because of this disparity or this discriminatory actions, as far as women-owned businesses." [#PT1]

12. False reporting of MBE/WBE/DBE participation. Fourteen business owners and managers shared their experiences with the "Good Faith Efforts" programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith Efforts programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals [#1, #2, #4, #11, #12, #13, #14, #15, #30, #AV, #FG1, #PT1, #PT2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "This is how a contractor is working it around the goal. … there's a sheet of paper that says that I, as a contractor, will make a good faith effort, even when I bid a job I'll make a good faith effort to attempt to reach a minority contractor. You know what they do, there's two things they do. One they cheat, indirectly, out of harm's way, and unintentionally on their end the first thing they do, they go to Commerce Lexington and say, 'Hey, we're looking for some minor contracts to bid on this. Here goes that bid invitation, can you please distribute this for us?' Guess what they do, they distribute. So now that contractor made their good faith effort of utilizing a resource that's already with the city to send out to the minority. So typically, what happened is the administrator within that company did that. I didn't get that

bid invitation and picked it up and say, 'I'll be there.' Call that contractor directly and they'll ask me like, 'What are you talking about?' Or 'Oh yeah, you're going to bid on a job. Yeah, submit your bid.' No relationship. No like, hey, how can we work together on this? What do you need? Make sure you got your insurance together. Where is it? None of that. It's just like it's a blast. So now they made their attempt. I've had contractors just say, 'Hey, when you submit your bid make sure you send us a copy of your DBE certification.' No. You know why I say no? Because I send you a copy of my DBE certification, from now on every job without my knowledge, you can bid a job as if you have me involved and here goes my cert floating through the industry for a year. That's has been done. I had to be told, I had to be informed of that. Listen, if you don't know them, and you ain't got a relationship with them, don't do it, do not send your certificate, because they will use your certificate for the next 12 months or until the duration of your certificate expires. LFUCG has a list of certified contractors or notified minority contractors that they can find. But then, two, what happened, okay, utilize contractors, utilize them too to do the effort. Out of those city jobs I see come across from my board and they supposed to make the 10 percent goal. Some may apply but we're not. Say, if they send out 30 a year to come out, I may get a phone call from one contractor from the year and say, 'Hey, we've got your information from the city, we trying to meet the goal. We see what you're doing. Are you interested in bidding? That's what I'm working.' I might get one, a genuine phone call. The rest of it was just the email saying, bloop, we tried. They made a good faith effort and then move on. Outside of LFUCG there have been a big increase ever since the COVID, plus the ... You see it on the TV, all these big corporate people. I have received emails from people across the country just seeing where they can make the effort. Hey, we want you to register with our company and they're in California. Just so they could say I'm on the registry. They're just checking the box and they try to get your information. There was even a ... A scam, to where the state of Ohio and Kentucky had to put out and say, 'Do not provide any of your information if this entity is asking for your certification and business information.' Because now what they realized, there was scams. It was like, oh, people are handing out all their business information just because they attended some DBE effort. Then started to ask all your internal business information. I thought, why would I do that?" [#1]

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "We won it, the company that we were winning the bid or the contract from bought it, it was all in the newspaper, but we won. When we were going for the contract, we had to go to the city council meetings and stuff. People had to speak on it because it was the other company didn't want to lose it. One of the things that the prime would do would ask us to attend. It wasn't necessary for us to attend, but they would ask us to attend every time. The reason why, because of our sex and our color. And it would be, meet with their attorneys, they would have us sit in between them, they would purposely put their arms around us and do all these things because they're recording visually, cameras, everything, and they would just say it. We'd been through, we would brief with their attorneys about, how to utilize us to demonstrate that we're not just being used, but they really like us. During that process, our prime would always say, 'Well, if we win this, you girls, y'all don't have to stay on this project. We can buy you out. We'll buy you out. Just, we can win this, and this is too much for you girls. We can just buy you out.' And we were like, 'Well, no, we're not coming to the table to just be bought out, we're coming here to

prove ourselves and do our job.' Long story short, we won it. But those type of scenes and the things were... We were always beckoned to be there in front of the cameras or in meetings where people were to see us. And I strongly believe that no doubt that had a big influence on them winning, because based on current situations, they're undergoing a lot of situations because of their inability of not having what they've said they had to do their job, even though we are not working on that. They kept asking us to remove ourselves from the project and they would pay us out. And we said, 'No, we're here because we want our... We want to create our path to performance,' and so we began having severe issues. And I may have time to elaborate on the severe issues to the point we were called out of our names, racial slurs on their sites, they would put us in horrible conditions that would damage our trucks. They would not pay us; they had underbid the contract. The city wouldn't give in and paid them more, so they stopped paying us. And it really almost put us out of business, to the point where it became almost non-sustainable. Less of the money, more of our equipment was being ran over by big dozers going on the landfill, anything to sabotage us. And we would raise the flag, engage with the city, we complained. It got to the point that, either some of the city officials that we thought were being on our side started calling us incompetent and that we shouldn't be on that contract. … The other thing is, which I know just from experiencing this, they'll win the contract, they'll call us, and they'll say, 'Hey, we won the contract. We used you guys.' And we never hear from them. What happened? And then you try to reach out to them, phone call, email, and they don't contact you. But when they're looking for that quote, they're calling you day, night, emailing you like crazy, where's your quote, we need your quote. What they're doing is, they win it, and they give it to one of their counterparts. Doesn't that seem like a break in the contract on LFUCG part? Well, it would appear that way, but LFUCG has conveniently, or in the past, has conveniently used the verbiage that they encourage, it's not a mandate. That gives them a loophole that gives these prime a loophole to slip through. Now, that may be changing, but in the past, that was the loophole. That's how they got through. That mean was encouraged to reach out, but once you put them in that contract, then it's in writing, then you have a legal obligation to work with that company. Here we go. What these primes understand is that these smaller companies won't sue. They use a fear factor so a small company like us who really understands, we're suing because we understand. But it's not many small companies, minority or non-minority, that want to go up against a Goliath and do that. Fear, it's almost like back in slavery times, using a certain factor of fear, and with minority companies, they don't always know the law and know what they're entitled to. Nobody's going to follow up. That's just it. It's easy for a prime to put a smaller company out of business. And there's nobody held accountable for that. If LFUCG is going to have a program where they're encouraging minorities to bid with primes, somebody has to be accountable for that minority business going out of business or almost going out of business because of that prime." [#2]

- The owner of a majority-owned construction company stated, "It's a results-oriented thing. So, if you're not getting it done, then do something different. I mean, it's like, you can't just say, 'Well, they did everything you want, put an ad in the paper.' Well maybe not that many people are reading the paper. 'I put out there, I put...' I see it all the time in the newspaper. 'So and so's bidding this sewer plant. We'd love to have your...' And that's it. They just... Then they go in there and say, 'I ran an ad in the paper, and I didn't get any quotes.' Well,

you got to figure it out. We work with people, ask them, 'Well, what do you need?' 'Well, I need to make payroll every Friday.' 'Okay. I'll pay you every Friday' Or whatever, credit. Do whatever we got to do. I guess, ethically I was signing a statement saying that I tried. And here's where it really boils down to. If you want to do it, you'll find a way to do it. If you want to just half-ass it and say you tried and do the minimum, then you're not really trying. … The city's got this list of contractors and they send... And you can click on their tab there and see everyone they sent the invitation out to. And in many cases, there's 1500 names on the list. Well, how you going to call 1500 people? I just, it's even hard for the minority contractor to know who's been, because when you click on that tab, you get 1500 names. What are they going to do? Quote this guy in Boca Raton, Florida that might be coming up here to bid a job? It's just very difficult." [#4]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "We did have one experience on a project where we were used as the DBE with a certain percentage. And most of our work scope was eliminated after the fact. And that's happened probably a couple of times. I don't know that that's necessarily specifically anybody's fault or issue, but it has happened where we've been listed and then not really received the work." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "There's been a time or two maybe we were underutilized, so yeah. There's been a time or two that that's happened." [#12]
- The Black American owner of a DBE-certified construction company stated, "I get a lot of calls from companies that need DBE participation. That's with a lot of different agencies, so I do get calls for wanting participation. Sometimes you don't know if they just call just to say, 'I talked to a minority company' or not. That's one other thing that needs to be tracked, because they can still end up getting the contract and they can have ... If they have to call three minorities, they can say that they called three minorities, but the minorities didn't participate. I get a lot of letters wanting me to bid jobs, or send me a thing to fill out, but they never ask me to bid a job. I just don't send it back in. I tell them, 'I'm not stupid.' I say, 'You want me to bill a job, let me know what area you need a pricing in, and I'll price it, if you're sincere about it. Just don't send me an RFP and want me to bid it, want me just to sign it and send it back in that you sent it.'" [#13]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "We got an electric division, and we do drywall and painting. He'll say, 'Hey, come look at this pump station.' I'll say, 'Okay.' I'll go look at it, and the only thing he wants me to do is demo the drywall off the walls in the pump station. He's going to do the electric. He's going to put the drywall back. Then, he says, 'And send me your certificate.' I'm like, 'Well, I don't want to come over just to demo the drywall.' You see what I'm saying? Then, that kind of deters you from when people saying, 'Hey, come look at this, do this.' Or, they'll say, 'Hey', they'll email you, and say, 'Hey, this job bids on September 2nd. Can you give us a bid?' Today's the 30th, you know? Then, they'll say, 'Hey, can you email me back, and let me know that you was thinking about bidding, or you're not going to bid it.' So, unless you know, they're only doing it to meet the requirement. Do you see what I'm saying? It's like, they'll send us a certified letter asking us to bid. I'm like, 'See, why do you guys send a certified letter for me to go be at work?' They just wanted a price. They really didn't have no intentions of working with us." [#14]

- The Black American owner of an MBE- and DBE-certified construction company stated, "If there was a way that they could work with the prime companies or they could approve them is to have someone audit the prime companies about their minority business enterprise participation, like audit them to see if they're really having participation. And if they're really actually trying to work with companies with minority companies." [#15]
- The male co-owner of a woman-owned professional services company stated, "Yeah, I have. It's more predominant in the large-scale contracts. And I wouldn't even say municipal. I wouldn't say even state contracts. I see it with federal where... It happened more when I was with my last company than this company, but we've definitely done cases where a large company who does not qualify for SBA will contact us and say, 'Hey, we want to partner together to go after this contract.' And it's like, okay, well, that's great. And then they get the contract, and we never get a phone call. And not just us, but when I talk to other small businesses, I've definitely heard them say that 'Oh, they wanted to use us because we're an MBE. They wanted to use us because we're a WBE,' on the actual bid, but you know what I see? Once that project's done, they're onto the next thing. And I think that's where a lot of this oversight is on misreporting, that they don't sit down at the end of the day and go, 'Did [the prime] actually fulfill 6 percent of the contract with...' It's once the project's done, you close the books, and you move on to something different. So, I think it makes a lot easier for larger companies to kind of get away with that stuff. There's always better ways of doing things. If they had some sort of reporting aspect and breaking it down when they did do the large-scale contracts so maybe companies put in how much funds that they received off of it, if the prime doesn't hit that goal, maybe there needs to be more teeth in the way of penalties." [#30]
- A representative from a Black American-owned goods and services company stated, "I really don't have anything other than not getting the opportunity to perform." [#AV285]
- The Black American male owner of an MBE-certified construction company stated, "One of the things I guess that I'm hopeful that happens after this study is complete is I hope in contracting, we get away from the good faith efforts. To maybe have some mandatory goals. One of the things that I notice is that on some of these projects where the goals are good faith, as a contractor, a lot of times maybe the generals, they'll call you a day before the bid's do, and ask you, 'Are you going to bid the project?' And you'll ask the folks like, 'Hey. Well, what portion of the scope would you like for me to bid?' Well, the person on the phone won't even know. You get the sense that maybe they're just trying to satisfy that they tried to meet a requirement as opposed to actually utilizing your skills. I think going forward, if we do have mandatory goals, that you will get the best contractors around town to do the work, because they can actually perform the work. I guess that's my two cents." [#FG1]
- The Black American male owner of an MBE-certified goods and services company stated, "I get requests for bids or whatnot in so many deals that I am not eligible for. I'm not a contractor. And I get contracting bid, landscaping bid, construction bid. I'm a chef. I do food. That's the only thing I do. I think a lot of the time, they're just trying to meet that quota in saying that they solicited, or at least attempted to [solicit] so many minority businesses, or whatever quota they have." [#FG1]
- The Black American woman owner of a professional services firm stated, "The prime had been trying for 20 years to get the contract, but through working together and doing the

things that a team's supposed to do, we were able to help them win that. And long story short, once we won it, soon as we walked out of winning it, the first thing they asked was, 'We want to buy you out, and we want you off the project.' So, we were like, 'Well, we put so much in it, we've invested.' They were like, 'Well, okay, but anytime you want to sign off of this project, you can. We will buy you out.' We were like, 'We've invested almost $1 million in equipment,' and from day one out of that project, it was just one thing after the other. Basically, we went to LFUCG, there was a lot of dynamics about it, and we tried to get the assistants aid of LFUCG, and their hands were... from their standpoint, their hands were tied because we were a sub-contractor and not a prime. They pretty much left us in the wind, dangling with this ferocious prime who had underbid the project and had no concern for our wellbeing. And as most small, minority/woman-owned businesses, we're coming to grow. We don't have the sustenance financially and everything to just be handled any way. I don't know if you ever heard of the term of squeezing, how prime contractors squeeze their sub-contractors. And because they understand it's difficult for small businesses to sue them, whatever, they can end up carving a lot of dollars off of projects by squeezing the subs because the subs are just going to take what they can get because they don't want to go through legal issues." [#PT1]

- The owner of a WBE- and MBE-certified construction company stated, "We're a trucking company in the Lexington area. And one concern that I have is when it comes to bidding on these LFUCG projects, as a minority woman-owned company you're contacted by these prime contractors to quote as a trucking company minority woman owned. And if they win this project, they contact you to tell you they won but you never hear from again, and they don't answer your calls. So, the concern I had or the question I have is what is LFUCG doing about these prime contractors who are winning these contracts because they're reaching out to these minority companies and nothing comes to fruition?" [#PT2]

13. Other forms of discrimination against minorities or women. Six interviewees discussed various factors that affect entrance and advancement in the industry [#1, #15, #5, #7, #9, #AV]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I believe somewhere in the nature of the beast, discrimination have been around since the term was developed. So, I'm not going to say there is no discrimination that may be involved with any process, specifically if you're saying Lexington Fayette Urban County Government, I don't know of that. What I would like to see is why isn't there more in the effort to bring, to diversify your operation, okay? So why isn't more effort to do that? I've known, not in this market, in the Ohio market, where the minority contractors will let race determine who got the job because of percentage of those within the community. I know there's been times where just because work they're establishing for, he didn't want to use the race card, and he's missed jobs. Why do you have to play the race card? If I'm doing 500 or a 400-million-dollar job a year. I know it, but why use race. He's like, 'I've done this without y'all. Why do I need y'all to play the race card? If you want to do it, let's make it happen.' I've seen it." [#1]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I really think that systemic racism that is really the barrier to entry that, I mean, it's not like a

known factor and it's not like, the larger companies are actually being racist or being, like [it's just] in their practice it's just what they're used to do." [#15]

- The owner of a WBE-certified construction company stated, "Well, if you're asking me am I the only woman in many, many, many construction meetings, the answer is yes. From the very beginning I would walk on a job and there'd be 35 men, and I would be the only woman there. But having done it for a long time now, I'll go to a Walmart and a man will walk by me and say, 'Hi, ' I have no idea who that gentleman is. But I've probably seen him on one of hundreds of construction jobs over the years. So, more people in construction know me than I know, at this point. And that has helped me get work, because it has nothing to do with me being a woman I don't think, it has to do with me being in business for a while. As I said, my next job comes from my last job, because I try to complete each job the best way I know how, and that tends to sell the next one." [#5]
- The Subcontinent Asian American woman owner of a professional services company stated, "Yeah, I would say bigger companies have more leverage to revenue but not necessarily anything else. Absolutely. The way we present ourselves, cultural and language differences, the way we present ourselves, and the way we conduct businesses sometimes is a barrier. Both language and the cultural barriers. The way we could document and present things. Though the business is successfully being run for so far, basically, the way we could explain things and present things has been a barrier." [#7]
- The Black American owner of a DBE- and MBE-certified construction company stated, "So, I go up there and get up there and I have a meeting with them, and I talk to this lady, and she was telling me what they were having her do the work for. And I looked at her and I said, 'What?' I said, 'Listen. I need to talk to them. I'll help you. You got to pay me. I'll contract from you, but there is no way that I can come up here for that. I can't do it.' And she said, 'Well that's what they're paying me. Are you saying that's not fair?' 'I don't know what y'all got going on, but it don't look fair to me.' So, I said, 'Let me talk to them and see what's going on.' So, I go in there and I talked to the president of [a large local construction company], and we're talking, and I said, 'Hey, now look. I know these numbers ain't right.' And he says, 'Oh, hold on [interviewee].' He says, 'Well, let me explain something to you.' I said, 'Okay.' 'I will adjust the numbers for you, because I believe based on what you're seeing that you know what you're talking about.' I said, 'Okay.' He says, 'Can you order your own concrete?' I said, 'Yeah.' 'Can you pay for your own concrete?' I said, 'Yeah.' 'Do you have people out there that can do the concrete work?' I said, 'Yeah.' He said, 'She doesn't.' He says, 'We've got to order her concrete for her, because she doesn't know how to order it. We got to take one of our foremans and put out there on the job to train her guys. Because the work, it lacks in quality. If we send her out there, her guys are going to tear every one of those ramps out, and she'll be out of business within two weeks.' I said, 'You're doing all that for her?' He said, 'Yeah. We're doing that for her because we want her to win.' And it blew my mind. So, I'm listening, but I got to see it for myself. So, we got together on it. I started maybe three or four days later, went down there, and he was right. I mean, she didn't have a clue. And her guys, I mean there was one or two of them, they could finish concrete, but they lacked... they needed a leader. She didn't have a leader. She didn't have somebody that could step up for her and lead, and she didn't know enough about it. So, I said, 'Listen. Here's the deal. I'll help you. I'll help you in every way that I can, and I'll show you how to do this type of stuff, and I couldn't be here a lot, but my dad's here.' I said, 'My

dad's been doing this for over 50 years.' I said, 'So, anything you need from us, we're going to do it. So, you can be successful as well, and then we'll get our own contract with [that large local construction company], and then we'll work together and stuff.' That became unbearable. She was a nightmare. I like her as a person. I mean, I really like her a lot as a person, but it was... when I say unbearable, I mean to the point where I told [the large local construction company], 'I'm not going to do this.' My guys were calling me, they were going to quit. She had them doing all kinds of crazy stuff and telling them, 'Y'all need to do this. You need to do this here.' I mean, it was horrible. So, I got with [the large local construction company], and this is what they told me. 'This has to work. There's no ifs ands or buts about it, it's got to work.' Well, I told the superintendent, 'It ain't got to work for me.' Because I told the superintendent, my exact words to him, 'I'll get my Black A double S and I can get back down the road. But I'm not putting up with this here. At all. I'm just not going to do it. I do good work. I got good people, and we ain't got to put up with this, but if you want a good minority, or a good DBE, we're here for you.' And they thought about it, and that's when they looked at the whole picture and there was some other things that the city had said. So, at that point, [this large local construction company], they parted ways with her. But [that large local construction company] was committed to making that work. But, at that point in time, we started doing work there. ... I had problems, I could tell a few people left me because, or didn't want to come work for me because I was Black, but my vice president is white. And my estimator is his son, he's white. So, my vice president had this misperception that everything is equal across the board. It's all equal. It's money. It's anybody can have anything that anybody else does. I said, 'Oh really?' He said, 'Yeah.' So, me and him actually, we're best friends. We're like brothers. And we actually kind of had some very heated conversations about race. But I knew that what he was saying was coming from the bottom of his heart, he just was misspeaking based on false reputation of America. That's the best way I can put it. And one time even said something like, 'Man, I don't get it. I don't get it with you, Black people, man. I don't get it.' I said, 'Well, get what buddy?' He says, 'You act like, Black people act like it's a curse to be Black.' He goes, 'It's not a curse to be Black, but you act like it's a curse to be Black.' I said, 'Stop right there, buddy. It is a curse to be Black in America. Not nowhere else, but in America. Yeah, you're right. That's a curse that they put on you in America. So, you're right buddy. Nowhere else probably but, America.' And he stopped and he looked at me. I said, 'You see, your dad had a choice. When a person is born in this country, Black, he don't have a choice.' I said, 'Now, I wouldn't trade being Black for nothing in the world because that's who I am. And I'm proud of who I am. But there is a stigma that come with it, buddy.' So later on, he said, he says, this was months later, he's like, 'Me and my wife was coming through at Georgia. Everybody talks about at racism. We pulled over to ask some Black something and they looked at us like they wanted to kill us and everything.' He goes, 'And says some really hard things to us.' He goes, 'So we all experience racism.' I said, 'Well, hold on buddy.' I said, 'No, you're going to pick one time that you was around some knuckleheads that don't control nothing and you're going to say that you experienced racism.' I said, 'Well, let ask you something. You're going to use Atlanta, Georgia. Atlanta, Georgia is a small scale to what the United States is.' I said, 'The problem is, what do Black people run? What do they run?' I said, 'It's not about, Black people don't care about white people being racist. We don't care about people that don't care. We care about the people that are racist that run this country. We care about the people that won't step up and fight for us because they know these people in the legislative

branch, they're racists. We're not concerned about, we are concerned, but Black people don't trip out because somebody Black gets shot. They don't even take it to think a whole lot into it. When somebody white shoots somebody Black, that's not the problem, we expect that the problem is when our justice system don't step in and do the right thing.' That's what you guys, I said, do you guys think that, Oh, it's a great that Black people want to jump up and down and holler because white man shoots a Black man. No. I said, 'White man shoots a Black man all the time. When the white man goes to jail, Black people don't do nothing. They don't jump up and down. When they jump up and down it, when there ain't no justice for the unjust.' I'm sorry. There's no justice for the just and the unjust walk. That's what you guys miss. … So, we go to the world of concrete. I said, 'I'm going to teach you something.' We're going to be out here at this 'world of concrete', around thousands of people in Las Vegas. It's a big a convention. I want to share something with you because I want to give you the best knowledge that I had to give you for you to understand. [A large local construction company] had tried to use several different minorities before and it was costing them a lot of money because their work was not right. It wasn't good. Or they didn't have the money to fund the job. They get on the job, they run out of money. It was just a lot of different things. Now, when [that large local construction company] said that I need to show them the work, ma'am, they're right, because here's why. If [this large local construction company] is bonding these people and they're not bonded, if they go out there and they mess something up and it's not right... And it don't take much. You can go out here and pour this ramp, this... You're walking on the sidewalks, and you'll see these yellow pads at the end of them… If that thing is off at all, you got to tear that back out and replace it, and its thousands of dollars; thousands. So, if you're doing five of them a day or this week, or 10, if you got to tear all them out and replace it, it is a lot of money. So [the large local construction company] would be on the hook for that. So, they definitely need to see that somebody can do the work first before they let go. So, it's different than with your situation. On this side of it, it can be so costly if they don't vet... And also, if they don't vet the contractor, it can hurt the contractor. It's a win-win for everybody if they vet the contractor first. Because even me, if a company came out there and they're wanting to do the work, I'm going to have to vet them. I don't care if they're white, Black, or what they are. I'm going to vet them." [#9]

- A representative from a Black American woman-owned construction company stated, "Obtaining work could be a lot better for the minority owned business." [#AV201]

J. Insights Regarding Business Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;

5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Other small business start-up assistance;
10. Information on public agency contracting procedures and bidding opportunities;
11. Directories of potential prime contractors, subcontractors, and plan-holders;
12. Pre-bid conferences;
13. Other agency outreach;
14. Streamlining/simplification of bidding procedures;
15. Unbundling contracts;
16. Price or evaluation preferences for small businesses;
17. Small business set-asides;
18. Mandatory subcontracting minimums;
19. Small business subcontracting goals; and
20. Formal complaint/grievance procedures;

1. Awareness of programs. Twenty-one business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance [#1, #10, #12, #13, #15, #17, #18, #19, #21, #23, #24, #3, #30, #32, #35, #36, #37, #7, #8, #FG1, #FG2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I'm working on trying to make sure I get linked to one of the construction programs surrounding Lexington, whether it's a CM program out of Eastern or UK. The Construction Management, could I say, the UK or any other program. I'm trying to work on making sure to get involved with them so I can have a direct attachment or pool to review the new graduates, up and coming future leaders. On the technical end, there's a couple of technical schools, actually I just hired two individuals from, that I've just now recently just built a relationship with. ... then there's one after graduates, the CTE. I did a class back from my first time and she had, did a class. I can't think, it was a small business class. It was like four, was it? It was like six weeks or something I did. I can't recall if it was through the city or Commerce Lex. I did participate in that. I did participate in another class, up in the Columbus area. Majority of it was a refresher for me, wasn't nothing new, but I just wanted to participate in the class. It is helpful. I do feel, in the commercial industry, is best to have some background or passion in the industry." [#1]
- The Black American woman owner of a goods and services company stated, "Initially, I didn't really get tapped into SBA and all that until maybe into 2012. So, I did an eight-week

training with Community Ventures (SBA program), with the business plan, and things like that. So that was extremely helpful because it helps me to figure out what I should do, plan projections, and things that. So that was a catalyst for where I'm at now. But before all of that, no. I've sat through multiple things with Web Inc. What's the other one that's for the tri-state area, for Kentucky, Indiana, Ohio. I forget what that one is called. I've been to, I think there was one that the city had years ago, but that wasn't on my radar. SCORE, actually, was probably the first one I ran into and a client of mine actually told me about SCORE, because she was going through a similar process of wanting to open up a restaurant and things that. And so, we would always share notes, and she was the one that initially told me about SCORE. And then after SCORE, I found out about Community Ventures. It was helpful. The only thing is that depending on your business, not everyone is the same. So there really wasn't a lot of people that were in the beauty industry, more of them were consultants, or retired computer people, or whatever. But I was able to glean whatever they were able to share. I had a coach over at, is it KYTPAC? He was helping me with the coding as far as what to be seen under, based on the services that I would offer. So that was what he had suggested is because it is personal care, salon, beauty salon, but I haven't seen any. And I've been in the system for a few years, and I haven't seen any. I'm very grateful to NTOO, because y'all be putting out a lot of stuff. And I'm like, 'Let me save this post. Let me save that post.' And I share it with other people, because not everyone's on social media like that. And so, I'll save it and I'll share it with somebody else because that's what they do. Like, 'Hey, I saw this, I'm going to share with you because I thought of you.' And if we can have more of that, I think that would be great." [#10]

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Partnering conferences, the Kentuckians for Better Transportation, KBT, just being involved in ... I would strongly encourage folks, DBE, to be involved in ACEC and KSPE and Water Professionals. I just got back from a conference in Tennessee, Water Professionals conference. Huge turnout down there, but to have exposure at those venues are big, and then you can follow up on your own after that. Commerce Lexington they had some type of small business lending program that they have. Commerce Lexington's been ... We're a member and it's been helpful on the relationships. As far as other ... I'm trying to think back. In other cities, I think up in Cincinnati with MSD, which I thought was pretty cool, they have these ... They're matchmakers. Where basically it's a reception where your larger consultants are there and it's basically a matchmaker thing. I think those are helpful, having a formal platform, and I don't know if UCG has ever done that. I think they probably have." [#12]
- The Black American owner of a DBE-certified construction company stated, "HUBZone is an opportunity that a lot of people don't know about. I've gotten contracts … $300,000 or $400,000 contracts because I was a HUBZone, and nobody else bid the job and I was the only bidder on the job. Yeah, usually what happens is HUBZone, that certification is you have to have so many employees in the zone and everything. A lot of times, it's hard to keep that up. But once you get in and you can keep that up, it can be good. Because right now, the HUBZone is not that busy but sometimes it comes around where they just issue a lot of contracts for HUBZone. I remember one year, I did really well in HUBZone." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "None of the public agencies. UK, University of Kentucky, big county public schools, KCTCS,

the state, none of their minority business programs are effective, in helping minority business enterprises obtain contracts or obtain opportunities." [#15]

- A representative of a majority-owned construction company stated, "You have questions, you can say, 'Hey, what's going on here? What do I do here? Please help.' Like SBA," [#17]
- The Middle Eastern American owner of a majority-owned construction company stated, "I look for some kind of grant programs. There's nothing that I'm aware of. I think if I have the capability of reaching further areas, I'd be doing better." [#19]
- The Black American owner of a professional services company stated, "I've used SBA before." [#21]
- A representative of a WBE- and DBE-certified goods and services company stated, "We have, and they had a big change in management a couple years ago when somebody stepped down and then they regrouped. That was when I was saying that was happening. I will tell you, they're usually pretty easy because they give lot of information how to get us in the right position." [#23]
- The owner of a majority-owned professional services company stated, "Of course SBA was there, pitching for years. That was probably one of the primaries. I know there have been local opportunity programs, grant programs if you would. We just never looked at them. Never participated in them. So, really didn't follow all of the pieces. One of the best programs I saw with the state is, and again I'm speaking of architecture and engineering. What they call, well the university has it also. Their per diem contracts, or annual contracts, which allow small firms, individuals, to, if you would, get into the flow of the potential of work. To be not competing against the 25, 30, 35 person firms. That has been probably one of the best tools that I've seen, that has been most beneficial for small firms. You build your reputation, and if you do a good job, then you can move forward." [#24]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "The city of Lexington has had events where you could meet the contractors, the people... Not the contractors, but I guess the company's looking for help. And there have been fewer of those.... I would say because of COVID. But they do other opportunities. So, the city of Lexington's procurement department is very helpful. And I've done the Small Business Development Center, the Small Business Association. Let's see, who else? And then WBENC is the Women... I don't know if you're familiar with WBENEC. It's a certifying body, Women Enterprise Business. But I've participated in extensive programs with them about... And it's networking, it's with corporations and organizations. They teach you how to run your business better. And then also they will help you as you're in the process. I left out KYTC... Let's see. K-S... Kentucky. PTAC. KYPTAC is another organization that has been helpful to us in learning how to do RFPs, how to track the opportunities. And they have even reviewed RFPs for us as we were working on them, so that was helpful." [#3]
- The male co-owner of a woman-owned professional services company stated, "I'm a member of the American Society of Highway Engineering Bluegrass Section." [#30]
- The owner of a majority-owned construction firm stated, "I tried to do research online. I looked even in our state, and I was looking at BMA loans or something. I forgot the name, BSA loans, BMA loans. I don't know, but I couldn't get nowhere with that either. So, I didn't

find any assistance. I look government grants online, but I didn't think I qualified for anything. So, I just do what I can. they have some kind of criteria, and I don't think I was falling into that criteria. I don't think so. I heard one time because I'm a refugee from Ukraine. So, I heard one time that the government is helping to start out business for people like me, refugees. And I looked online, but I couldn't find anything. So, I just start from scratch." [#32]

- A representative of a majority-owned goods and services company stated, "So I know in Harden County they have a small business alliance and association that my other small business family members have really participated in. And I know that they had some of the financial assistance in the wake of COVID as far as people being able to pay their employees or kind of keep their businesses afloat. It was nothing that I needed to partake in, no, because it's just me. But I have heard of some of those type of businesses. I know they have some grants, and the reckless small business association was very invested in keeping small businesses afloat. It was a huge push to order local and do delivery. During the pandemic for a period of time, the Harden County [and] Ratcliffe mayor would go live, and it would be like take out Tuesday and he would like highlight whatever small business he was ordering food to go to try to help the small businesses in their area kind of stay afloat." [#35]
- The Black American woman owner of a goods and services company stated, "I don't know of any small business programs that would help; as far as government contracting, bidding on contracts? I think the closest I came to using the SBA was when I applied for my PPP loan, and that was it. Now, former relationships, I have taken classes. There's a class that is offered by my church. It's called Sales Professionals and is a class for current and aspiring business owners. And we go over just biblical principles about business. And in that class, there are a lot of business owners, current business owners, and aspiring business owners, and I've been going to this class, it's been offered since 2018, and usually the classes are like 13 weeks. There's so much information that comes out in that class. I mean, even programs that you would be talking about through the SBA, that's something I wouldn't be surprised to hear are about in this class, because we have people who have been in business for years and know these things. There are people in the class who have businesses that are running for City Council that are on City Council and some of the surrounding cities." [#36]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "We've got a good relationship with the SBA, small business administration and the local offices here and the officers who run those offices. We've got great relationship with them." [#37]
- The Subcontinent Asian American woman owner of a professional services company stated, "That'll be really interesting to know that there is an outreach program and kind of help the, I say, small and minority women-owned businesses. Language, definitely. Most of my [programs] are reach outreach like registrations or contracts. Efforts to avail the contracts are not in person. We furnish the documentation. Most of it is remote. Unless the name or company name makes a difference, but mostly language is what I think. If there is any towards the extent of the color, but I would not know." [#7]
- The Black American woman owner of a professional services firm stated, "Yes. Everybody's in a little silo and nobody's really communicating with each other." [#8]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "I've also used [SCORE], and I've also used [SBA], but [it] has actually helped me with the region through the contract and making sure that I understand all the legalities and whatnot, and making sure that I have the right insurance, or the workman's comp, and all of those things that are in compliance with what they were asking." [#FG1]
- A representative from a focus group consisting of construction companies stated, "Keeping a written record of who you work for and that foreman or that estimator, if you can give a list, a simple list like that can really help get you a job. But if you're just starting out, go to these seminars, DOT, transportation puts them on, your various other small business administration is a good place, just any type of ... Even though it might look like it's simple and consequential, it is. If you can put that, just write it down, and then later on maybe type it in, and be able to hand it to a prime contractor, that helps. That gives a comfort too, to the prime contractor. It's something versus nothing." [#FG2]
- A representative from a focus group consisting of construction companies stated, "The Associated General Contractors of America, that's a huge group. They have classes constantly. Our safety people go to meetings at least once a month with them to find out new things." [#FG2]
- A representative from a focus group consisting of construction companies stated, "A lot of times I will go to plan contract in there in Louisville. Once we hooked up with them years ago, I started going to their safety meetings. They would have plan classes. I'd sit right in on them with their employees and learn. Some of the big wheels would be there, but just to go in there. That's what started me to open my eyes up and say, 'This is the route you want to go. Run to the prime contractor, be there for them, attend some of their classes.' The bigger ones have these classes. They're constantly ... My CDL is a good example. I was struggling on getting my CDL and I went to the prime contractor, and they helped me to get, and I got it. I was very proud of that. That stuff does work. It does. That's the easiest route to go. Less stressful." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Yes, they gave me structure. Otherwise, even though I was college educated and a CPA and all that, I was struggling on it because I didn't know that environment. They gave me that structure and it made all the difference in the world." [#FG2]
- A representative from a focus group consisting of construction companies stated, "Those organizations that I referred to were not Louisville organizations. They were independent organization minority business enterprise groups that were sponsored by ... Yes. I'm sure that some larger contractors help them with their programs, but they weren't done by the government, should I say. It was done by the private organizations." [#FG2]

2. Technical assistance and support services. Five business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses [#1, #6, #12, #13, #FG2]. Comments included:

- The Black American owner of an MBE- and DBE-certified construction company stated, "This is one thing I don't like is when you say, the minority business, or helping with the

paperwork or what. Just because you're a minority business don't mean you're incompetent with the paperwork. Sometimes like, the way the message is displayed at the pre-bid 'Hey, come over and have Joe Blow get into the industry and hold his hand through the job.' Be honest with you, even like me, I don't have time to hold your hand through the job because it's a fast-paced world. The schedule has demand, we want experienced people. Now, I will say, hey, reverse that. When I do the job or whatever, I may utilize smaller minority companies and I know I might help with a little paperwork because I'll take the time to understand and know, and it is time consuming. You can ask my PDMs, the stuff I don't like, but at the same time guess what? Using them did help me get the bid because I knew their price was lower due to less overhead, or its management style. But there's a growth process to it. So, outside of me, who else is going to do that? Not very many people are going to do that or continue to do it because they feel like, 'Okay, we gave you this opportunity. We showed you how to do it. The second job or third job, you should be able to handle it.' And they're not doing it. And I'm not putting that on the minority. I'm putting that on the small business. You have to have the desire to be a business owner and to grow it. Far as the minority thing, I think there needs to be... make sure any business owner, and they talked about this on one job the other day, non-minority missed a job bid filling out the paperwork because there's so much paperwork. I missed a job because I forgot to sign my... I was in a rush and sign my bid bond one day. I was awarded a low bid, get a job, and went through my paperwork, forgot to sign, wouldn't let me sign it. It's sitting right there in my face. Next guy got it, because of it." [#1]

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think having some training on bookkeeping would be good, because in the beginning, we had essentially a part-time bookkeeper that helped us out, and there were some bumps in the road. We evolved past that, but yeah, assistance on that would be good." [#12]
- The Black American owner of a DBE-certified construction company stated, "When I started off with this mentor company, that's one of the first things that they kind of taught me is how to estimate a project. I did a lot of sitting down estimating projects, and going over their old estimates and stuff, and learning the system." [#13]
- A representative of a majority-owned construction company stated, "We got to provide the work area that's safe and we spend a lot of time and effort creating a safety program that you know, that deals with those things. It's hard for a minority owned company to walk into something like that and have to provide a level… we try to pull them in under ours to give them opportunity to do the work in a way that they like. We've given them our safety manuals and said, 'Here you need to adopt this' because they don't have the resources to create their own safety manual." [#6]
- A representative of a Black American-owned WBE- and MBE-certified construction company stated, "The [seminars] are very helpful. Like I said, something is better than nothing. That provides, like software, QuickBooks, that gives you structure going to these seminars and talking to people. It's just amazing that the problems that you might think you have, the other subcontractors being small have the same problems. It's shocking that when you listen to people that have been in the industry and can open up and talk about the hurdles that they had. Just like I said, if you're small, one or two, don't be embarrassed by

that. You can send one or two over to a prime contractor and work with them and learn to work with certain crews. That's a big benefit. So never feel like you're too small. Like I said, these seminars they put on, anything helps, versus nothing. You're looking for structure. The more structure you have or the experience, somebody else's experience, if you learn it and they teach you or just make a statement, it can really help you out in the field. Instead of being bogged down and don't know what to do, you might be able to pick up a phone and ask someone, 'What would you do in this situation?' It's a big help. It really is." [#FG2]

3. On-the-job training programs. Twelve business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries [#1, #10, #13, #14, #17, #23, #25, #27, #29, #34, #35, #6]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "If you're growing, you really definitely have to have a pool or source [of skilled employees], which I'm working on trying to make sure I get linked to one of the construction programs surrounding Lexington. Whether it's a [construction management] program out of Eastern or the construction management [program at] UK or any other program. I'm trying to work on making sure to get involved with them so I can have a direct attachment or pool to review the new graduates, up and coming future leaders. Also, on the technical end, there's a couple of technical schools, actually I just hired two individuals from, that I've just now recently just built a relationship with. And it's helped out with some of those individuals [already having] some skill. The biggest thing a lot of us in this industry is dealing with, is not enough skilled trade individuals. A lot of companies are stealing from each other over a dollar or 50 cents more pay, just because we can't find the help. Our on-the-job training program, show up to work, have the will to learn, and they pay attention to the lead guy, and just have the will to learn. Our on-the-job, which we actually have coming up next week, some training with frame and metal stud framing here in our shop. It will be after hours, on just refresher for some of the guys, new to some of the other individuals on metal stud framing." [#1]
- The Black American woman owner of a goods and services company stated, "There's a lot of entrepreneur college students that are great at what they do. And teaching them at a younger age because a lot of us are going to age out, or we're needing help from a younger population, especially when, and I'm younger, too. So, I'm in the middle. But when it comes to the tech, and the social media, and all that's about to explode. That's about to change. Web 3.0 is about to change the landscape on a lot of things. And if companies and people aren't ready for it, who's going to help you, because you don't have the tech? So, starting younger and introducing it younger." [#10]
- The Black American owner of a DBE-certified construction company stated, "That's another thing too, is that I'm finding out that in this industry a lot of older guys have retired out of this industry. Their kids or nephews or family members, they're not getting into the construction industry so we're losing generations of construction guys. I think one of the things that Lexington-Fayette Urban County Government did is, they did a training program. I was in the training program, matter of fact. It's been years ago, and companies … kind of sponsored it with Lexington [Fayette] Urban County Government. They came in and

kind of taught a class on how to do construction, how to get bonding, how to keep your books, all that stuff on the construction side. It was a good program." [#13]

- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I know they just started an institute over there off Loudon Avenue. They are supposed to be training guys." [#14]
- A representative of a majority-owned construction company stated, "We do much better now than we used to. Our training program, certainly, 10 years ago when I started, the training program was, 'This is the job you're going to be doing. Here's the contact for the architect. Here's your budget. Let me know when you're finished.' We recognize that as an issue because obviously, you leave yourself open to some failures. Now we have a lot of checks and balances, and we try to allow people to operate, and it's okay to fail. We let people know it's okay to fail. But also, we know that people want that training, and they want to be able to be confident when they go to do their work, right? We actually have hired someone, and this is all a part of growth. We hired someone to be the head of our human resources, which part of their job is to do on-boarding. Part of the on-boarding process is to have training we also developed a training manual so that if someone, if you have a question that you don't know the answer to, 99 percent of the time it's going to be in this training manual." [#17]
- A representative of a WBE- and DBE-certified goods and services company stated, "A lot of our clients, they want [employees] to have the knowledge when they get there because they're paying us for a service, but there are some places that will take an entry level and train them up. Like a try before you buy or like testing a car." [#23]
- A representative of a majority-owned construction company stated, "If it's a person with no experience in the HVAC industry, that individual is usually much easier to train than somebody with experience. It just depends upon what the need is at that time." [#25]
- A representative of a woman-owned professional services firm stated, "Over in Hazard, there's a community college that actually has, I think it's in Hazard, has a lineman school. I've gotten a few of those coming out of lineman school. They'll apply, and those have worked out really good too. Out in the field, a lot of times we'll hire somebody green. Doesn't know a thing. Then we have to teach them everything and bring them up through the ranks. If you find somebody that knows anything about it, they want a lot of money. Those community colleges have worked out really good so far. Our biggest problem is they come and work for us for a couple years, get through college, and then they go elsewhere and work." [#27]
- The Black American owner of a construction company stated, "I do a lot of training, okay? So, you've got to have the training. And my nephew and them? I try to show them, or I try to send them to school, or to classes. I do a lot of it through the Jefferson County Health Department. And then, my over-the-road stuff, we do a lot of training through Mercer up there in Louisville. When you get it started, then they can't really take the class, because they make the class so hard. Getting the employees certified, so they can continue working, well, it's all right for the people to be certified, or licensed with whatever, but when you might get substantial [stuff] like, it's got to be common sense stuff. Because a lot of people

are older, and that's how come the older people are not able to do the same thing that the younger people are." [#29]

- The Black American co-owner of a professional services company stated, "We put them through, frankly, an immersion I would call it, more than a training." [#34]
- A representative of a majority-owned goods and services company stated, "[Employees] are trained. I would say the training and the availability of like someone, to answer your questions, are pretty good. I have a lot of people who are on my team and there's a lot of training that comes down from headquarters. So, I would think that they do okay with training us and trying to prepare us the best they could." [#35]
- A representative of a majority-owned construction company stated, "Vocational school, it's a great, great opportunity. Most of vocational schools are not equipment operation or specifically laying pipe or pouring concrete. It's a whole lot of on-the-job training. Okay, that's a tough barrier and over time that's why I encourage all of our people to take them under your wing. Not be the guys from the roadside saying what is this idiot doing, but say 'Hey, you have got to be trained to do this, let me show you how.' And it's hard to teach an old school guy new tricks, but we're making some headway." [#6]

4. Mentor/protégé relationships. Sixteen business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses or participate in unofficial mentoring relationships with other firms [#1, #2, #4, #5, #6, #9, #13, #17, #24, #30, #34, #36, #37, #AV, #FG2, #PT2]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I have learned to ask questions. Even if I think I know or not, I've called, I've met and network, even some of my competition. We talk and talk, and I'll call and ask a question. I'll call and ask general questions like, 'Hey, how do you guys deal with your insurance? What's going on here?' 'What do you mean?' 'I feel like I just got an insurance bill ...' and you'll find out, they are getting the same, or it's the little thing, 'I don't know, you should be doing it this way.' … There isn't [a formal program]. I'm supposed to be joining the BIA. They have some organizations do, but most of my stuff was informal. I'm just trying to figure out how to deal with different challenges of operating a business." [#1]
- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Putting some type of protégé-mentorship program in place that really tie the primes to assure the success of a minority company. And a good analogy in that, when I was growing up, I had a little brother, and my dad would say, 'You went to school together, you come home together.' And he would look at me because I was the oldest, and he would say, 'if you come home without your brother, you've got something to look forward to, and it's not going to be friendly.' It was discipline, and that was the expectation as me being the oldest to do, so with the primes, they're getting a very big bulk of the money, and then if we never... If the city decides, 'Hey, look. We can't give you smaller pieces because it conflicts our...' It falls on them to now come in and focus on the primes, and we've put something in place to assure that they ensure our success with some type of penalty." [#2]
- The owner of a majority-owned construction company stated, "The way I do it is I set up a protégé program. A protégé came to me, an MBE, and asked me if I would help him. I met

him at a pre-bid and then he didn't quote me, and I called him up later and I said, 'I was really looking forward to you quoting me.' He seemed interested. He said, 'Yeah, I had a guy helping me and he fell down on me,' and it was a majority contractor that said he helped him and then he didn't help him. So, I said, 'Well [expletive], I can do better than that. So why don't you come over here and let's talk.' So, he came in here and we struck up a friendship. And now when I get a job, I show him the bid and say, 'Pick what you want to do out of there.' He knows, he trusts me. He knows that he could pick any item he wanted. So, he knows I can do it for that. So, he can just go through it and say, 'I'll do this and this and this.' And then he does. He hires people. He's got a crew and he's successful, in my opinion. So, this has been going since '09. He's become a good friend of mine. I trust him. He trusts me. And I think the foundation for that was he knew I wasn't just trying to take his numbers and yank him around. I was showing him the numbers and letting him pick what he wanted to do… [I started working with him] because I wanted participation and I couldn't get it. I couldn't figure out how to do it. So, I had to rewrite the rule book. … The city runs one, you just go down there and start mentoring somebody. You don't have to sit and whine about the fact that I work with somebody. You go work with somebody and then... Well that way, no matter what happens, there'll be an MBE getting some of it, but that hadn't had much traction." [#4]

- The owner of a WBE-certified construction company stated, "There's no rule against mentoring people, and it's a good thing to mentor and to teach other people how to do what you know how to do. I found recently, when this woman wanted me to tell her my numbers so she could get some work, that left a bad taste in my mouth. But I still believe strongly in mentoring and helping other people learn trades and get good at what they're doing. In the past I have [mentored other businesses], but not in a few years. Most of the interior designers and other contractors I work with, particularly the ones that are women, will ask me questions about how I handle this or how I handle that, or how I've learned to do this, and I'm always willing to help with that. So, I guess inadvertently that is mentoring. That would be a good thing [for LFUCG to start]." [#5]
- A representative of a majority-owned construction company stated, "We don't mind a bit supporting up to the point, you know, supporting a DBE up to the point. We're just not allowed to do the work for them. That's out of bounds. But we've started them out around with small scope of work that doesn't require they even buy the materials, because a lot of the time, the cash flow becomes an issue, and they may not be able to get credit. And then as they get cash flow, and they're able to build up a bank account. Then we look at a bigger scope of work and that's how you grow a company. You don't try to grow too fast. You got to at the rate and pace, that it's within the cash flow and everything makes make sense. And you know, at some point we hope that company can bond and provide us performance and payment bond, but that takes time and money. You know that an insurance company won't write a bond if you don't have some kind of assets to tie that to. Those are all the hurdles that DBE company has to figure out just like all other companies that figure it out you know, it's not to grow too fast and not grow to the point that they're spending more money over three or four month period and taking in. The creditors come calling, that happens, that's real-world things." [#6]
- The Black American owner of a DBE- and MBE-certified construction company stated, "The individuals that I went to, they was like, 'Oh, yes. No problem. We'll help you.' And I said, 'I

don't need no money, nothing like that. I just need to maybe take you to lunch once a month or bend your ear. Tell me if I'm doing something wrong.' 'Oh, yeah. We know. Anything you need, we got you.' Well, when that time came, it was like they never even knew me, and they had known me for 40 years, 50 years. It was like they wouldn't even talk to me. But my cousin is married to a white guy, and his dad was real successful, and his dad died and left him the business. Left him a Ready-Mix plant, and a dump truck business. So, I would go over there, and he would give me the low down on everything, and he would teach me, or tell me how you probably need to do this here, or don't do this here. And I'd go over there about once a week or once every other week, just for some advice, because most of the stuff I was doing, it was right. I just needed confirmation." [#9]

- The Black American owner of a DBE-certified construction company stated, "I was just lucky and blessed I guess because when I started out in late the 8(a) program, the 8(a) program was really hot. I got into it at the right time, and I had a good mentor company that taught me the ropes and introduced me to a lot of government contractors. I was just lucky that I started off right off the bat as a successful contractor right off the bat, and had a good mentor, yeah. But yeah, but I don't think if it wasn't for that, I don't think I could compete with the other guys. Because I was able to, after I did a couple contracts, my bonding capacity started to build, and I got up to about 25 million dollars in bonding really quick… I think they should set up the Mentor-Protégé program also, where the mentor can help the protégé bond, also. My Mentor-Protégé, they were an 8(a) company before me so they kind of introduced me to their people. And then they told me, 'This is how you need to market toward ... For yourself to pick up other agencies that you don't know anything about, just market to them.' So basically, I just learned from them and just market to my own people, and I kept their people that they introduced me to. Because as long as you do a good job, they'll keep asking you to bid on their work, they'll send you RFPs and stuff. So basically yeah, I just learned how to market to them and was successful at it." [#13]
- A representative of a majority-owned construction company stated, "It's something we're kicking around right now. It's the lady that's in charge of HR, she's trying to help us through that process right now [to become mentors]. … [The owner] absolutely used that. And he encourages everyone in the organization to have that. We are trying to do that internally, as well. We've had some conversation with some of the subs. And well, the conversation that I've had with the primes and the bigger companies say that they've had mentors, and that's one of the biggest things that helped them to become a good company." [#17]
- The owner of a majority-owned professional services company stated, "We've not been asked to mentor other firms. We have mentored individuals who we saw promise in. The only problem I've had with that is, I've been fairly successful. Most of them have left and moved on, and in some cases become competitors. But that's the way it's supposed to be. That just helps the whole industry expand and grow. But as far as any kind of formal mentorship, no." [#24]
- The male co-owner of a woman-owned professional services company stated, "We have, and we're trying to get into bidding on federal contracts. And I'm sure you're familiar with the... It's that one program that they have where it's the mentor, protégé thing. … We talked to the SBA about two years ago I talk to an SBA person about that, and her response was, 'Yes, but we need more experience and more years in the field. And also, we need to find the

right company to do that with,' because it would make more sense for us to partner with a company. It would be a mutually beneficial thing as opposed to us going with another archeology firm, because, well, they're going after the same contracts we're going after. Whereas we might be able to pull in civil engineering projects for you guys, you guys would be able to pull us in on archeology stuff, but that really also doesn't help us mentoring on how to focus." [#30]

- The Black American co-owner of a professional services company stated, "[My mentor] got a big business on the back of his relationship with them, but if I've noticed anything, I've noticed that it is the relationships that are driving that, not the certification." [#34]
- The Black American woman owner of a goods and services company stated, "I had what I called a business coach, and what she did was she just helped me from the business aspect. She was able to lead me in the direction of where I could get my business license, and get my business registered. As far as consignment, I went and talked to the owner of that really big consignment store that's in Elizabethtown. And he gave me some great advice I went online, and found other consignment stores and just different areas, different states, and reached out to some of their owners. And then I also joined a couple of consignment Facebook groups. And there was so much information there that I really didn't even have to ask a person face to face. I could go in that group and just whatever question I have; I literally could type it in and there would be an answer. Or if it was dated, then I could ask the group and they would give me the updated I needed to know what systems to use, and what point of sale systems to use, and how do you keep up with this type of inventory. Because it's different, I'm taking people's stuff, I got to make sure that when their stuff sells, I give them credit. How do you keep up with that? And so, there was a time I know that people were doing it by hand, but I'm not a by hand type of person. I need digital technology, something. I was able to find a good system to work for me. And I found that through the Facebook groups, the recommendations and stuff like that. … She's not my coach, but she is a coach, and she's a coach where she was once a consignment store owner herself, a brick-and-mortar. So, she coaches people like me who have brick-and-mortar consignment stores. And so, I've spoken with her about this, and she's given me some great suggestions, and I've acted on those, and will continue to act on those. It has helped tremendously. I mean, I've had other people try to be my coach, but they can only coach me from a business perspective, the overall general business. So, I have pushed them to the side, and I'm like, I have her, who's actually been in the business. So, she knows the barriers and she knows how to get ahead, she's done it. So, I do listen to her because, like I said, she's done it, she's been where I'm at, where she was the one person who shop, she's been there, and she grew, her business grew, she has since let it go, but she's let it go to become a coach to people like me. And she's still she's successful in that as well. It's funny because she found me. She found me on Facebook, and would at random ask me, 'How's your business going?' And would invite me to different little webinars that she would have. And once I realized what was going on, I'm like, 'Oh, she's trying to help me,' because I would get a little skeptical of people sometime. But once I got in and found out what she was really about, I was very appreciative that she reached out to me, because I could see her success. And what she puts out is really good information. And she's not asking a lot. Some people will come and say I can coach you for these many thousands of dollars. Her it's not about the money, it's about seeing you be successful." [#36]

- The Black American owner of an MBE- and DBE-certified professional services company stated, "On larger projects, sometimes if we want to learn a new skillset, that might be a challenge and we've been fortunate, on some projects we've been mentored by larger firms to kind of increase or expand our capabilities. It's just relationships we've built, and they've enjoyed working, prime contractors have been, enjoyed working with us. And so, I think it's times where they want to put us on the team where it might not necessarily make sense for our skillset, but they've been willing to say, hey, we'll at least train you on this skillset, just because we enjoy working you and the partnership. And so that, I think it's a win-win for everybody." [#37]
- A representative from a woman-owned professional services company stated, "It is really difficult for industries like mine who are prime consultants. It would be beneficial for companies like mine to match up with sub consultants and foster a better relationship between the two." [#AV210]
- A representative of a Black American-owned WBE- and MBE-certified construction company stated, "They're very helpful. Like I said, something is better than nothing. That provides, like software, QuickBooks, that gives you structure going to these seminars and talking to people. It's just amazing that the problems that you might think you have, the other subcontractors being small have the same problems. It's shocking that when you listen to people that have been in the industry and can open up and talk about the hurdles that they had. Just like I said, if you're small, one or two, don't be embarrassed by that. You can send one or two over to a prime contractor and work with them and learn to work with certain crews. That's a big benefit. So never feel like you're too small. Like I said, these seminars they put on, anything helps, versus nothing. You're looking for structure. The more structure you have or the experience, somebody else's experience, if you learn it and they teach you or just make a statement, it can really help you out in the field. Instead of being bogged down and don't know what to do, you might be able to pick up a phone and ask someone, 'What would you do in this situation?' It's a big help. It really is." [#FG2]
- The Black American woman owner of a professional services firm stated, "If I've got to do my time, then at least LFUCG could put some type of protégé mentorship program in place with these people who apparently are in control who does their time or not. Put them in place and force them to assure minority success and breaking down those barriers. Like the SBA have protégé mentorship programs. Putting some type of program in place to really force these people who have the relationships, because everything here is about relationships. It's about who you know, who likes you. So, if you don't like minorities, you're not going to get much work. So, putting the local government, putting the things in place to sort of force things to happen, and then the rest is on our part." [#PT2]

5. Joint venture relationships. Three business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses or had successful experiences with joint ventures [#12, #18, #26]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "There definitely is teaming on the larger contracts." [#12]

- A representative of a majority-owned professional services firm stated, "No, we typically... We do some design build, but that's more of us being the sub. And then, we will partner sometimes but I only know of really one joint venture proposal that we've done since I've been here." [#18]
- The owner of a WBE- and DBE-certified professional services firm stated, "We've chased several things trying to go as an all-DBE team before, and it seems like that never wins because they're always like, 'Well, it's two small firms, what can they do?'" [#26]

6. Financing assistance. Ten business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses [#12, #14, #15, #19, #21, #32, #8, #AV, #FG1, #FG2]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "The city financing or possibly getting more exposure to your lending institutions about what work we do. I don't know if you need to have a lender fair where you bring in Central Bank and Forcht Bank, all the local banks, so they can gain a better understanding of how our business works, because these banks, they're more used to lending for retail and I remember when we were first getting set up with recognizing our accounts receivable. We have different cash flows consulting, as you know. We may not get paid for 90 days if we're a sub of a sub. You get it. It may be 120 days sometimes, heaven forbid, but to have the lending institutions more familiar with our operations, I think would be helpful for small business." [#12]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "Working with the bank, it's relationship-based, where we've been a company for a while, we've acquired certain relationships with certain lending institutions, and it's basically relationship-based. Maybe they can work out a situation where if you get the contract with like LFUCG, you can take the contract to the bank, and they say, 'Well, since you have a contract to do this job, we'll give you funding to get started.' That might be a possible solution." [#14]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I think, offering up, or helping with guarantees that would assist the bank and lending, so like offer kind of, grants that companies could apply for, in which the city would have fun, they would be able to act as collateral for a larger fund, from a bank. Similar to what the SBA does, but the SBA does it for so many years." [#15]
- The Middle Eastern American owner of a majority-owned construction company stated, "I don't want to pick up another monthly bill. I'm not there yet to do that. I won't be comfortable doing it. Why I would be interested in any kind of government program as a grant? If it's out there, that would help me. But at this moment, and until next year, I don't want to pick up a monthly payment." [#19]
- The Black American owner of a professional services company stated, "I guess you can get more involved with SBA, maybe do more of a collateral based. And that way you can get a line of credit. That way you have a revolving credit. That way you can keep your jobs rolling and take care of your payroll and stuff." [#21]

- The owner of a majority-owned construction firm stated, "I tried to do research online. I looked even in our state, and I was looking at BMA loans or something. I forgot the name, BSA loans, BMA loans. I don't know, but I couldn't get nowhere with that either. So, I didn't find any assistance. I look government grants online, but I didn't think I qualified for anything. So, I just do what I can. they have some kind of criteria, and I don't think I was falling into that criteria. I don't think so. I don't have enough knowledge about that." [#32]
- The Black American woman owner of a professional services firm stated, "They probably do. I just haven't done that. So, what I've done is started working on the process of my business credit. So, I'm working on business credit right now. And so, I've got four trade lines right now. To get companies where you can get 30-day payment terms for different companies. I've done that to help with my cash flow. Because when I first started, I was taking everything out of my pocket, and by me not getting paid by the companies for 30 to 60 days, it was hard on my cash flow. So, I started with the business credit, whereas any supplies and things that I needed for the business, I signed up with these companies and it allowed me 30 days to actually pay that company for the products that I needed to sustain my business. I have not. And the reason why I have not been because I was trying to go through the steps. Because there's some groups out there on Facebook and stuff to help you establish your business credit. So, I've been going through those steps and it's working. So, I've got those four trade lines right now. So, I'm just keep taking the steps that they have out there to ... It's like a class. But they tell you, step one, do this step two, do this. So, I'm going through those steps to establish myself so that I can get to a point where I have created, it's called like a pay deck score. Enough where when businesses are trying to give you money, that you have established some type of track record." [#8]
- A representative from a majority-owned professional services company stated, "There's a lot of government funds being tossed at the industry, so pretty easy to start a business right now." [#AV46]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I think personally, if maybe the city maybe has a relationship with one of the local banks, and that might be an avenue to maybe help with maybe the lines of credit with people that are just getting established, and things like that. And in the same regard, I guess in my business, bonding capacity is a big deal. Maybe a relationship with a [bonding] company so you can maybe try to marry up any companies with them just to try to figure out what they need to do to secure bonding I think would be great." [#FG1]
- A representative from a focus group consisting of construction companies stated, "A lot of times when you have a huge amount of material that a DBE has to supply to us through their subcontract, sometimes the vendors will require joint checks. Hey, that's fine with us, but it's one more thing that's required sometimes." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I'd recommend going with the joint check just for the comfort for the prime contractor. Because my background is in accounting and I have audited firms across the United States when I was in audits, and it's frightful to see some of the transactions that go on and the prime contractor can get caught up." [#FG2]

- A representative from a focus group consisting of construction companies stated, "Let's just say that [contractor A] has a material that he is purchasing to fulfill his subcontract with us with ABC Company. Let's say that it's a half a million dollars. ABC has maybe never done business with [contractor A's company]. So, they're uncomfortable. I don't know anything about [A]'s finances or their bonding ability or whatever, but they want a payment performance bond from somebody, and we have one. So, if we're paying with a joint check, we will physically write a check to [contractor A] and ABC Supply Company. We'll mail it to [contractor A, contractor A] will sign off on it, and he sends it on to the vendor. It basically makes everyone feel a lot better about all the transactions, and it helps [contractor A] too." [#FG2]
- A representative from a focus group consisting of construction companies stated, "I have heard stories where if they cut the check to [contractor A], the very next day, and this is construction, the very next day that subcontractor can file bankruptcy and they're caught, they have no cover there." [#FG2]
- A representative from a focus group consisting of construction companies stated, "To avoid all that, that's where your joint check comes in… You actually reminded me of a situation where we were dealing with a DBE subcontractor who we'd done business with many times in the past. We were talking to them, and we said, 'Well, I assume we'll have a joint check agreement.' That subcontractor said, 'No, I'm not building any credit if you're paying my bills directly.' Basically, that's what you're doing. I'm writing the check, it's going bomb, bomb, and it all worked out for us. I mean, honestly, I've been through several bankruptcies of subcontractors, and I don't want to have anymore. They're not fun." [#FG2]

7. Bonding assistance. Four business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses [#13, #9, #FG1, #FG2]. Their comments are as follows:

- The Black American owner of a DBE-certified construction company stated, "I think they need to look to the SBA, the way they operated. A lot of times ... I've never did it, but it's in their writing that SBA will back bond a contractor. Basically, they will sign on the bond with you so that you can get a bond to bond a job. I think Lexington-Fayette Urban County Government should consider doing something like that for some of our smaller contractors that can't bond those bigger projects." [#13]
- The Black American owner of a DBE- and MBE-certified construction company stated, "Okay. I never, when I went in there talking to them about that line of credit, I didn't fill no paperwork out or nothing. I went to a group called SCORE. They had some mentors, ex-bankers, businessmen, et cetera. So, I went in with them just to teach me a lot about computers because I didn't know nothing about computers. I knew how to turn one on, I didn't know about Excel spreadsheets or none of that type of stuff. So, they were telling me, they were teaching me how to do all that. And they told me to get this business plan put together. Get a business plan, go to the bank, talk to the banker. There was a couple other things that they told me to do. And see about getting some money and then go back and get some more money. And I'm like, I don't have time for, I mean, it just didn't... I know these guys are much smarter than I am when it comes to this type of stuff, but it just didn't sit well with me. So, I talked to over with a few more people and it's like, yeah, that's the best way to

do it. I'm like, no, I don't like that. I said, I'm going to do it a different way. So, what I did was this, I didn't go see nobody about nothing. I didn't buy no new trucks. I didn't buy anything. I drove a truck. That was 20 some years old, breaking down on the road all the time. But it was paid for." [#9]

- A representative from a focus group consisting of MWBE business owners and representatives stated, "I think personally, if maybe the city maybe has a relationship with one of the local banks, and that might be an avenue to maybe help with maybe the lines of credit with people that are just getting established, and things like that. And in the same regard, I guess in my business, bonding capacity is a big deal. Maybe a relationship with a [bonding] company so you can maybe try to marry up any companies with them just to try to figure out what they need to do to secure bonding I think would be great." [#FG1]
- A representative from a focus group consisting of construction companies stated, "I have actually recommended our bonding agent to call and talk to different minority contractors about their bonding, try to help them. I've actually had a bond written for this individual was having a problem and we needed a bond on the job and ended up our agent actually wrote the bond for them." [#FG2]

8. Assistance in obtaining business insurance. Two business owners and managers thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses [#36, #FG1]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "It was straightforward. And I went straight off the recommendations from those Facebook groups, because a lot of them have been in business for years, so they've done that research. And so, once I went in to see who they recommend, that's what I went with, and I haven't had any issues." [#36]
- The owner of a WBE-certified professional services company stated, "When it comes down to even those things, I know some of the barriers as I've moved up with bigger and bigger companies, that I'm working for insurance limit requirements dramatically increase, and that has a cost to it. And so, maybe the city could have different tiers of insurance requirements based on the scope of the work." [#FG1]

9. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Five owners agreed that start-up assistance is helpful [#9, #10, #AV, #FG1, #FG2]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "When I first started, anytime you start anything for yourself, there's a weird transition because you never really know how things would work out, what to expect, how to do things the right way. Where I was before, things were going sideways. Initially, I didn't really get tapped into SBA and all that until maybe into 2012. So, I did an eight week training with Community Ventures (an SBA program), with the business plan, and things like that. So that was extremely helpful because it helps me to figure out what I should do, plan projections, and things like that. So that was a catalyst for where I'm at now. But before all of that— no. SCORE, actually, was probably the first [program]. I ran into and a client of mine actually

told me about SCORE, because she was going through a similar process of wanting to open up a restaurant and things like that. And so, we would always share notes, and she was the one that initially told me about SCORE. And then after SCORE, I found out about Community Ventures. It was helpful. The only thing is that depending on your business, not everyone is the same. So there really wasn't a lot of people that were in the beauty industry, more of them were consultants, or retired computer people, or whatever. But I was able to glean whatever they were able to share. There's a lot of salon owners I talk to that, they ask me questions and I consult with them. And a lot of them have tax issues. They haven't paid taxes. They owe taxes for seven years ago. Okay, well that locks you out of a lot of money that came through. They are not set up in a certain way, structured corporally with an LLC, so they couldn't get a grant for that. So there's a lot of things that people are shooting themselves in the foot because of not having the information, or not following through with information that's being provided to them, or just not knowing. And they just live and that's just what happens. Another thing, as far as getting contracts with the city, I think foundational, not assuming that people know the process as far as how to properly structure your business. And I think COVID really showed that, that people weren't structured right. They weren't structured properly. And they were locked out of a lot of things because they were weren't an LLC, or they didn't pay their taxes, or whatever. But I think educating people on the basics of business, because not everybody is a businessperson. They're great creatively, but they don't know how to run their business." [#10]

- The Black American owner of a DBE- and MBE-certified construction company stated, "I was able to start doing really well, and it allowed me to get a better guy and a better guy. Then, I was able to go buy a dump truck. Then, [a large local construction company] was all, 'Are you ready to start doing your own demolition?' I said, 'Yeah.' So, I went and bought a $90,000 piece of equipment to start tearing out. So, it allowed me to do that. The money was coming in every two weeks. So, I was able to use that money to get better employees, better equipment, and that's what led to me being able to be the contractor that we are today." [#9]
- A representative from a Hispanic American-owned construction company stated, "[It's] easy to just register with LFUCG and the Attorney General and your business is ready." [#AV236]
- The owner of a WBE-certified professional services company stated, "I think many moons ago, I went to one of those. It's really, a lot of it is Business 101. If you were a brand new ... I could see how if you were brand new, getting started, hadn't worked contracts or anything like that before, they would be very valuable. I personally haven't required that. But I do get notices, and I know the wonderful woman who's in charge of the group, and think the world of her, but yeah." [#FG1]
- A representative of a Black American-owned WBE- and MBE-certified construction company stated, "To learn, you're learning and you're drawing a paycheck. So that's a big deal. It's very big. People might not think it. Just to jump out there on your own and not know the business, that's tough. That's how businesses go under. I tell the ones starting out, I said, 'Hey, don't spend it all. You get a paycheck, put a couple of coins back. It'll come in handy down the road. Things might look good now, but things could tighten up, or your

contract goes south, and money has to be paid. You reach in that pocket and there ain't no money there.' Things can get tight. The air can get tight." [#FG2]

- A representative of a majority-owned construction company stated, "You don't start a business unless you know what the heck you're doing. So, it's tough. We all know it's tough. We see too many businesses going under, all kinds of businesses, not just minority contractors." [#FG2]

10. Information on public agency contracting procedures and bidding opportunities. Eight business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities, noting its accessibility online. Others were unaware of how to access that information and thought the information would be helpful for small and disadvantaged businesses [#1, #11, #18, #19, #24, #25, #36, AVBGS]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I did a class back from my first time and she had, did a class. I can't think, it was a small business class. It was like four, was it? It was like six weeks or something I did. I can't recall if it was through the city or Commerce Lex. I did participate in that. I did participate in another class, up in the Columbus area. Majority of it was a refresher for me, wasn't nothing new, but I just wanted to participate in the class. It is helpful. I do feel, in the commercial industry, is best to have some background or passion in the industry." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I'm not sure that there's anything specific to LFUCG that I would say about that because they do a really good job of sort of pushing out projects and information and letting the community that's that signed up know about things probably better than most of the other entities that we work for. So, to me, the biggest issue is just generally kind of communication in the industry, but that's definitely not been an issue with LFUCG." [#11]
- The Middle Eastern American owner of a majority-owned construction company stated, "There was an invitation, yeah. That would be my first bid. They send the information. I'm reading it. I'm going over it." [#19]
- The owner of a majority-owned professional services company stated, "It's knowing the rules, truthfully the rules. Not all the garbage paperwork you get thrown at you. Knowing who's out there that actually has an interest in, and has a reputation for doing a good job, with regard to city work. I think that would be helpful." [#24]
- A representative of a majority-owned construction company stated, "Just knowing, we would have to learn who we're bidding with or for, and just get involved more." [#25]
- The Black American woman owner of a goods and services company stated, "I would love to do that, but I would probably need some guidance on what to do, because at this point, I have no idea. But like I said, I wouldn't want to not be a part of it because I don't know. I would try to see if I could get some help on getting myself smart on how to do that bidding and stuff like that." [#36]
- A representative from a Black American-owned goods and services company stated, "I've been thinking about looking for government contracts and expanding my business, but I

need to do more research. But I'm willing to look further into things with Lexington government contracts." [#AV269]

11. Directories of potential prime contractors, subcontractors, and plan-holders.

Eleven business owners and managers thought a hard copy or electronic directories of potential primes, subcontractors, and plan-holders would be helpful for small and disadvantaged businesses. Many firms knew how to access that information through LFUCG's MBEP, while others did not know how to access that information [#11, #15, #16, #19, #3, #30, #4, #FG2]. Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "Sometimes that's a barrier. And I think, again, I don't know that that's specific to us, but as a smaller firm, sometimes we don't necessarily have the same level of business development contacts. And so, sometimes we don't necessarily know who is pursuing something and who we might want to talk to, but we'll just tend to try to, when we see something communicate it to our typical clients." [#11]
- The Black American owner of an MBE- and DBE-certified construction company stated, "They're listed, I mean, it's no problem learning about who else is available, it's just that there's limited numbers of them, especially the prime contractors, there's very limited numbers because it's designed that way, the barriers are entry to set up to where only certain contractors are going to be able to perform or do on certain levels." [#15]
- A representative of a majority-owned professional services firm stated, "The cities are pretty good at having a database of firms and what they can do. So, having that information and keeping up with it, we have a pretty good idea of who is out there and who we can use on projects." [#16]
- The Middle Eastern American owner of a majority-owned construction company stated, "No, [I don't know how to find primes in the public sector]." [#19]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "The city of Lexington has had events where you could meet the contractors, the people... Not the contractors, but I guess the company's looking for help. And there have been fewer of those. … I would say because of COVID. But they do other opportunities. So, the city of Lexington's procurement department is very helpful. One other thing that's been very helpful, is we have gotten a list of potential bidders on projects, so we can contact them about being a subcontractor. And I think that's a very fruitful way to do it. they [LFUCG] don't send it out, I request it. And it's actually public information because those people have signed, they're on the list kind of to get the information. And so, we have sent emails to the potential prime saying, 'Hey, we'd like to be considered to work on this.' And then also LFUCG has shared our name with primes who request that, and that's how we got the initial contract as a subcontractor." [#3]
- The male co-owner of a woman-owned professional services company stated, "That's something that if places like LFUCG and the state would like to actually legitimately help small businesses out, is if there was more opportunities for, say like a matchmaking type of conference, and they facilitate a, 'Hey, all these prime companies, engineering companies' and- and then they had all the potential subs and facilitate a meeting of it, because honestly,

I've marketed a lot of companies but it's one of those things of just because I know that you guys are there, I don't necessarily know who's the person at your company that's the gatekeeper that I can to go talk to and say, 'Hey, this is what we do. When you guys have a contract, we would like to be considered, or at least provide a bid to you guys,' so that when you have something coming down, you know who to choose. a matchmaker conference would definitely help out considerably." [#30]

- The owner of a majority-owned construction company stated, "So I've told the city, 'Hey, you ought to keep a list of people that have actually expressed an interest in bidding. You ought to make them say that I'm going to bid. And if they don't say it, then don't let them bid.' In other words, you send out at 1500 invitations. But if 10 people show up with a bid, but only five of them said they were going to bid, don't take the other five. That way you've got a list you can rely on. That these are the people who are going to be turning bids. So, the minority contractor knows who to quote. That's one of the keys right there. I bid [recently on a] job and I got it. I didn't get any quotes. I asked people, 'Why didn't you quote me?' 'I didn't... [expletive], the list is a mile long. I couldn't call 1500 people. I didn't know you were bidding.' We had support from the people we contacted. So, we luckily could meet the percentage. But I mean, it's still a problem, for out of towners coming in here and not knowing the community and no way to contact them." [#4]
- A representative from a focus group consisting of construction companies stated, "With the internet swinging around there and now you have these plan rooms, you actually have these engineering firms, consulting engineer that make up the plans, they'll even have plan rooms that you can lock in and find out what's being bid. It's called Lynn Imaging. You can tap in, and they've got contracts across the state. I mean, this stuff is really nice anymore and it's just a couple of clicks away and used to be you'd have to wait on the fax to come in, or a prime contractor could alert you to a project. But now these plan rooms are there. Even if a person does not have internet access, you can go take a laptop and get Wi-Fi and get free access. It's doable now. There's a lot of nice things in the industry that is changing." [#FG2]
- A representative from a focus group consisting of construction companies stated, "If [a potential sub] called me and said, 'Hey, I'm interested in supplying you rebar for your project.' We would tell him to go talk to Lynn Imaging and go buy yourself a set of plans. Now you can go to our website and the plans you can download them off our ... Every general contractor has the same thing now. You can get all the plans you want for projects, and you can go to our website and see what we're going to be bidding in the next month." [#FG2]

12. Pre-bid conferences. Four business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses to network and develop relationships with project managers and primes. Many firms explained that for large projects, such meetings are mandatory [#3, #12, #18, #FG2]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think the pre-bid meetings are helpful. I mean, the contractors rarely ask questions at them because they're trying to hold their information close to their vest, but I know from a DBE's perspective, [the MBE Liaison] is always there and does a good job of

going through the protocols. So, I think it's a good idea. Maybe not for a super small project, but definitely your big jobs, it definitely is helpful." [#12]

- A representative of a Black American-owned WBE- and MBE-certified construction company stated, "Number one thing is to build a relationship, start the relationship, no matter what, going to the pre-bid meetings is a big thing. Just striking up a conversation with them. Like I said, all prime contractors are always looking, especially in this environment here, but they're always looking for workers." [#FG2]
- A representative of a majority-owned construction company stated, "You can't go and work for somebody if you don't know them. How do you know them? You go to pre-bid meetings. I remember in Louisville, we had open meetings for all DBEs. We actually sponsored luncheons at local hotels and invited these groups in there and tried to show them the perspectives on a certain ... These were like project meetings and tried to show them what we needed basically." [#FG2]

13. Other agency outreach. Eleven business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. Many shared their experiences with LFUCG's outreach efforts [#10, #11, #13, #21, #24, #28, #3, #35, #37, #FG1, #FG2]. Their comments are as follows:

- The Black American woman owner of a goods and services company stated, "I've been to a lot of meetings. I've done a lot of mixers. And you go in and I was young, I mean I'm 37, but when I was doing this, I was 22, 23, going to these professional mixers and stuff. And people don't really pay attention to you. And you're just like a fly on the wall just trying to figure out who's who." [#10]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think just really receiving notification of opportunities is kind of the biggest thing for public sector work, making those events available post-COVID that are kind of those city meet and greets, where they bring various entities and contractors together and I think those are helpful." [#11]
- The Black American owner of a DBE-certified construction company stated, "I used to go to all the 8(a) job fairs that they had around the country, a lot of them around the country, and in state of course. That was a big thing, because you could pick up a lot of work from going into these agencies and introducing yourself. Also, you got a chance to meet other 8(a) contractors and other general contractors that's looking to work with minorities, so it was a win/win by going to a lot of these. And also, what happens, you pick up ... With going to these events, you also pick up their forecast sometimes for the next three or four years, jobs that come out." [#13]
- The Black American owner of a professional services company stated, "I've been to a few networking events. Yes. Yeah. I mean, you got to follow up and you just got to be intentional. That's the main thing, yes. I've been to those two [University of Kentucky and FCPS] when they're bidding out for the schools." [#21]
- The owner of a majority-owned professional services company stated, "One thing I think would help in the city of Lexington, I recall attending a couple of procurement seminars. But they were just thrown, basically they were all encompassing all industries. It really didn't

do anything to deal with the AE industry, and our particular needs and our particular niche, as far as what service we provide. I think it would be beneficial, and they may be doing it and I just don't know, for someone to host the interested AE firms. It'll do two things. It'll let them understand what the city's looking for, and it'll hopefully create a vehicle by where there is some realization, or recognition of who's interested in doing city work. Again, I'm assuming the city does hire a prime consultant, and the prime consultant is responsible for his or her team. I'm not even positive about that. But if you go out and say, 'Okay, this particular firm seems to be one that the city is impressed with, and enjoys working with,' then you may want that person on your team." [#24]

- A representative of a majority-owned professional services company stated, "We hear of some locally here in Georgetown." [#28]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I think it would be great if they went back to having procurement fair at one time where they had tables set up at the different departments, and that allowed me to go and talk to people. Like you said, a lot of times, organizations don't even know that we could be helping them with things. And so that gave me the opportunity to talk to people and say, 'Have you had this problem? Do you need this help? Could we do this?' And so that was very helpful. So, I would recommend, once they can do that, they do it again, even if they did it via Zoom, that would work." [#3]
- A representative of a majority-owned goods and services company stated, "I am planning my second vendor event in Chicago at the end of the month. And so, I'm excited to be able to kind of go out. And it's a women's conference at a big church in Chicago." [#35]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "Yeah. And a lot of our work comes from word of mouth and doing all of the networking events that LFUCG or Fayette County, or even in Louisville at the MSD, unless a lot of these opportunities, it may not directly lead to work, but as long as you continue to keep your name out there and show your face, it's been, I'd say it's been helpful. We've been LFUCG, Fayette County, FCPS, public schools, think Louisville, Metro, MSD, LG&E KU. So, if it's a large, sort of a public servicing industry or entity, chances are, we've probably been to it. It's always worth, it is better to go to it than not go to it. Sometimes it can be frustrating if you feel like you're not getting work from it, but I say you, I'm not going to hide it behind the door. So, I want to get out in front and at least show my face to people." [#37]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I have attended the Minority Business Expo in the past, and yeah, I think a lot of it is business fundamentals, and stuff like that. But one thing I try to do is I'll try to research who's coming and see if they have any projects that interest me on the horizon, just to try to get a leg up maybe on the competition's what I try to do, and just try to market them. Or if not, just see what they've got going on, and see if we'd be a good fit for them. But I think all in all, the outreach, they're good just for networking, period, I think." [#FG1]
- A representative from a focus group consisting of construction companies stated, "I used to be very active in Louisville when we did a lot of work for MSD in the past. In different minority groups, organizations, and it helps." [#FG2]

- A representative from a focus group consisting of construction companies stated, "In those days we would go to those meetings, we would meet people. You'd have a glass of wine with them, sit down and talk and share a meal with them, whatever. Those are very valuable situations for a minority contractor to meet people. You don't know about people until they come and talk to you. A lot of times I will go to plan contract in there in Louisville. Once we hooked up with them years ago, I started going to their safety meetings. They would have plan classes. I'd sit right in on them with their employees and learn. Some of the big wheels would be there, but just to go in there. That's what started me to open my eyes up and say, 'This is the route you want to go. Run to the prime contractor, be there for them, attend some of their classes.' The bigger ones have these classes. They're constantly ... My CDL is a good example. I was struggling on getting my CDL and I went to the prime contractor, and they helped me to get, and I got it. I was very proud of that. That stuff does work. It does. That's the easiest route to go. Less stressful." [#FG2]

14. Streamlining/simplification of bidding procedures. Two business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses [#12, #31]. Their comments are as follows:

- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "Reducing the amount of paperwork would be nice overall." [#12]
- A representative of a majority-owned construction company stated, "It seems like with every government entity, just the rules and regulations are just so overwhelming, it seems like. When you open up a request for bid from LFUCG, for example, it's page after page after page of things that, in my mind, I guess, should be known by everybody. And it just seems like it's very cumbersome to get a run through the documentation to find out what you're really bidding. … Simplify the bid so it's easier just to see what you're actually trying to bid on. You can spend a considerable amount of time going through all this stuff just to find out what's actually going on." [#31]

15. Unbundling contracts. Three business owners and managers shared mixed thoughts on breaking up large contracts into smaller pieces [#2, #3, #30]. Their comments are as follows:

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "One is creating a program, and that's reducing contract size or whatever so that more minorities can get opportunities to work as a prime. Even if that's on the contract I said we had before, where you had all of the trash services for the city, you had the other, smaller pieces, breaking those things up, and it may be more complex for the city, but it's going to give these minority companies the opportunity to lead and show their ability to be successful. That's one." [#2]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Anything that they can legally and appropriately break into smaller parts to allow smaller businesses to bid on and take a role in work out there would be very helpful. I know they have levels that can hire up to $10,000 or up to $20,000. If they can look at work and parts, rather than a massive whole, that would increase the opportunities for smaller businesses to take apart. It's just a consideration, maybe even an analysis if they could do to say, 'There's no reason that we have to bid this whole project out to one person, we could do it

in stages or in phases, and part.' That takes more management, perhaps so it may not be feasible." [#3]

- The male co-owner of a woman-owned professional services company stated, "Very rarely are there construction contracts that get put out that solely deal with our services. Most of the time, our services are subcontracted to like engineering. And they'll go, 'Hey, this is a contract to', let's say, 'build a new road. They're going to widen 64 from Lexington to Louisville.' And the thing is that they'll put the contract out for the engineering, and then it's up to the engineering firms to find firms like mine. And unless we have that close relationship with these engineering firms, not only do we never hear about the contracts, but we may not bid on it because it's up to the discretion of these companies. Whereas if the municipality or the state puts out a bid saying, 'Okay, here's a bid for archeology, here's a bid for geology, here's a bid for wetland studies, and here's a bid for...' and actually separate it into different things, then we would be able to find out about the projects to bid on it. … The prime has to get paid, and the prime's not going to pay their subcontractors until they get paid. And if it takes four months for the prime to get paid, then it might be another month or two before the sub-consultants get paid. And see, that also goes back to why if they broke up contracts instead of making... Which I know it's got to be a lot easier on the bid people to have like one uniform contract. But if they could separate it, then they wouldn't have one giant prime holding onto the funds. They would have a bunch of different companies that would get paid at a sooner time." [#30]

16. Price or evaluation preferences for small businesses. Four business owners and managers thought price or evaluation preferences for small and local businesses are helpful [#1, #11, #14, AVMGS]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I think it would be, yeah. If you avoid the lowest bid and go with a point system, you may have the lowest bid, but then you go to the point system." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "That's actually pretty common with LFUCG RFPs. And I do feel, as a smaller business, that that gives us sometimes an advantage because we have less overhead, and we can be more competitive." [#11]
- A representative of a Black American-owned MBE- and DBE-certified construction company stated, "I don't know how it benefits the DBEs just to say you a DBE, because the big bids are not weighted. They take the lowest bidder, right? They don't weight it. If you're a DBE, they don't say, 'Well, he's a DBE. We going to give him this many extra points, or whatever.' It's no difference between us bidding as a DBE, or just bidding as a regular company. And, they always said that 'Well, we won't put you on the bid list if you're not certified as minority contractor.' I don't understand what being a minority contractor gets you if things is not weighted, or they're not going to be intentional about hiring, or getting you some work." [#14]
- A representative from a majority-owned goods and services company stated, "City should give local business priority over national chain like the state does." [#AV19]

17. Small business set-asides. Ten business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses [#1, #11, #13, #2, #26, #3, #34, #37, #8, #9]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "Also, what they do in their facilities or operational maintenance facilities, any contract I think within their facilities operation that's $50,000 or under, or I think it was $50,000 or under, is dedicated strictly to minority contracts. They have a list of minority contractors. They go and find them. They go and find three and say, 'Bid on this.' If they can't get three to bid on it, then they bring in the one non-minority. But they dedicated that fund, those resources to the small business and the minority. They'd come out and do it. Competition is part of it. It is. It's part of it, but at the same time, there's other programs, and I think what people have to realize, if you want to diversify, you have to bring the people in. I think you mentioned this before. Once you get them in, and then you have to give them an opportunity to grow, and eventually, guess what? Your goal is they grow without you holding their hand, right? So eventually that they grow out and get outside of this $60,000, $50,000 market with you, and you'll start bidding your $400,000 market. And then you're not holding their hand through it, or now they're doing all the correct documents, and may [not] necessarily have to do as much paperwork. You do all [these] training classes, where are they getting the opportunity to utilize those bids? So, the majority of the jobs that they might bid may be out of their overall performance or skill, whatever, maybe a $400,000 or $500,000 job. So, that's an issue. So, that's why I go back to the 'Give them somewhere to start.' And the reason I keep saying smaller is because guess what? There's not too many minority businesses here. The ones that's here are doing work. So, if you want to grow or see more diversity in [the] program, you're not going to go get some old [hats]. It's going to be somebody new to grow. So, give them the opportunity. All these contractors that you see today started with someone. They didn't start at the top. If you really want to improve and get diversity within your organization, this should be a set aside. There is enough general maintenance that goes on in this industry with LFUCG that there should be a set aside to allow minority or small business to grow." [#1]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "[Set asides] can be helpful." [#11]
- The Black American owner of a DBE-certified construction company stated, "There [needs] to be a set-aside percentage, because that's a lot of money that is. I'm sure Fayette County government, I'm for sure that they get a lot of federal dollars that goes in their coffers. It needs to be set aside. Some of that [money needs] to be set aside for minorities and Service-Disabled Veteran contractors. It needs to be mandated, I think, not just ask them to do it and putting a name down and say they asked someone. That percentage needs to be, even if it's small. Just think about a small percentage [out of] say $60 million. Say it's 5 percent over a year among minorities that can do the work. That's a lot of money. Some type of program for minorities where they can sole-source more contracts to them. I think that's a big thing. Because that's what really helped me, is that 8(a) program. Because a lot of jobs that I did with the government were sole-sourced. They just sent me an RFP and I just negotiated the contract. I think that really can help smaller companies, and I think if they can do it for so many years until the company [builds itself] up, and then they can consider graduating and

they can't get back into that sole-sourced thing. Let them get past it after so many years, and then the ones that's from year one, say one to five years, one to four, they get it. After they get [to] that fifth year, they can't get it anymore, with the [sole source] stuff. Just kind of like the 8(a) program, I think that would work for the Lexington-Fayette Urban County Government." [#13]

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "You can get those certifications, and unless the city, LFUCG, or the federal government are mandating or setting aside, then that's another [thing]. I think that there should be, for the city, the city should really have set aside for minority companies, putting some type of set aside program, sort of like what the federal government does to limit who can bid on it, who can get that work. That would also be another suggestion. I think a set aside, depending on what it is, of two, three million dollars is very reasonable. And depending on the type of work, because if you do a set aside for a technical aspect the city needs, it's not going to be $500,000. If it's, oh, they're about to put in a water plant and they need a skater system put in, and you want to do a set aside because you know there's a minority. Until LFUCG, [or another] government—this rolls out to the federal government—until they start setting aside things to allow smaller companies to demonstrate their leadership abilities, it's not going to be a lot of small companies, especially minority companies, who will get that opportunity to gain the control. I would love to become a prime. Then the tables would turn. When minorities, when we can start getting up to that point where we can competitively bid. That's another problem—if we don't get any work that's really going to allow us to build our wealth, how can we build the buffer these larger, non-minority companies have so we can get to a point to competitively bid? Our bids are always going to be higher because we have more expenses." [#2]
- The owner of a WBE- and DBE-certified professional services firm stated, "Another one that they could do is they could have some smaller projects that they purposefully ask DBEs to do. Because then they've shown experience with the different departments, and that's useful and helpful. And honestly, it's usually a better fit. If you tried to get [a large prime] to come fix your three-manhole problem, [that large prime] is not going to help you with your three manhole problem, but they might buy the job just because they know that they want to get [the next] one after it. But they're not going to give you a speedy response. A three-manhole job to me [well] 'We can fit you in next Thursday.' Doing some things that are, you know, specific to the smaller firms, I think would be helpful in a lot of different ways." [#26]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I would welcome set-asides. That would make it more competitive." [#3]
- The Black American co-owner of a professional services company stated, "Making more contracts explicitly small business set-asides is [the thing] I'm always advocating for. I think it's KRS 409A.675, which is the Kentucky statute that governs small business set-asides and minority set-asides, so I really call that out specifically because there a large number of folks who would say, 'Oh, we can't do that.' But they often don't realize that the state of Kentucky already has a statute for it. The federal government obviously does [small business set-asides] through its 8(a) program." [#34]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "The more set aside funds you could have, because I know a lot of people in this

industry talk about just the hassle it is to jump through all these hoops, to get all these certifications and then, there's no guarantee of contracts. It would be nice if there were true set asides that say, and I think you would get a lot of people to want to get certified if they knew it was actually going to be tied to some dollars. So, more set asides, the better." [#37]

- The Black American woman owner of a professional services firm replied to the question, "Should they have a mandatory subcontracting minimum? Some set asides, which means that there's [a] certain amount of some money or certain jobs that they will set aside for minority owned businesses?" The business owner replied, "I think all of what you just said, both. All of it needs set asides." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "That's going to be the biggest thing, right there. If they do the set asides, that takes the good old boys thing out of it now." [#9]

18. Mandatory subcontracting minimums. Ten business owners and managers shared their thoughts on mandatory subcontracting minimums. Many perceived mandatory subcontracting minimums as helpful for small and disadvantaged businesses, while others noted that industry specific requirements may be necessary [#1, #11, #13, #15, #21, #3, #4, #6, #AV, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I'm going to bring up Columbus for example. I did a contractor. The contractor would call the Central Ohio Transit Authority, which is basically our LexTran. Then I went over, and I ran their capital projects division. Internally COTA said, they said, very hard and very blunt, they don't have a 10 percent BG bill. They have a 10 percent mandatory DBE involvement. This isn't right, this is better, but they didn't have it. Nobody balks at it. I've said it before, it's in writing. I can pull up an invitation right now and show you, it says 10 percent mandatory DBE. Nobody balks at it. It's because they have the relationship with their contractors, right? So, you take a contractor who's been here and working, and they never done work with any minority contractors within this area, doesn't know of any, and all of the sudden, you tell him, he has to take a risk on this million-dollar job of 10 percent being on some minority contract, but he's never done work. That's kind of forcing- It is risky. So imagine ... or the quality, or paint doors, doors, and hardware. You get down to the end of the job, this contractor, I'm not saying whether it's minority or what, but this contractor that you decided to use, that you never have used before, right, but you decided to use, those hardware is a finished product, and they come in, and they either they ordered all the wrong doors or installing, they cut or mess with dope, whatever. Those hardware's typically anywhere from basically 12 weeks, 16-week lead time and you at the end of the job, when you supposed to be turning the job over to the next four weeks, but all because this one subcontractor. That's life shattering. I mean not life shattering, but that's a bad mark on your business because everybody going to remember, 'Hey, there was a subcontractor delay that listed their line on the job.' No, my main was the one that was out there on the fence for the last 12 months, you know? Then went, 'Oh, man. they did a terrible job.' 'No, we didn't. We did great,' but guess what? We end up picking up this one sub we never used, and it made everybody's life [expletive]. You know what I'm saying? So that's the problem to why

I'm saying, somehow you got to be able to figure out how to build relationships and it's not going to happen overnight, and there has to be market." [#1]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think that that could be helpful." [#11]
- The Black American owner of a DBE-certified construction company stated, "I think too that a lot of times these larger companies ... What I'm finding out too is, as dealing with these larger companies now, is that I guess before they wouldn't use you on specific problems. Now they're kind of being forced to or being pushed to use minorities. If they don't have to use minorities, they won't. They'll just use their friends and the same people. That's what I'm seeing in this industry now, that I think that's one problem that I see. One of the biggest things I think with the Urban County Government, it's specific contracts that do probably five, 10, 20, 60 million dollars' worth of work somehow. That's a year, and if they're doing that much work and the federal dollars are tied to that contract, it needs to be some type of incentive. There needs to be some type of goals set for minority participation." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I'm saying that the public agencies need to... It's their money. So, they need to make the prime contractor develop a program to give minority business enterprises more access to the work. They can do it with the RFP or whatever. They can come up with a program or a process to do it. Yeah. But they won't do it if nobody asks them to. That will help." [#15]
- The Black American owner of a professional services company stated, "You can say, 'Well look, we going to spend a hundred million on this new school. So, we'll take 10 percent goes mandatory to minorities, minority-owned Black businesses then. And if you don't use them, then you'll be penalized.' It'll be put in like a fund to fund black businesses, then they'll be intentional about using them. You can say, 'Hey, we going to let a minority company paint the school.' We can do the drop ceiling, the drywall, but you can be intentional about making sure that someone do it. That's the best way to go about it. I mean if you don't, it ain't going to stop. I mean, you can look back with in Atlanta, when Maynard Jackson became mayor, he put in there 50 percent. Before he came, it was only like 8 percent. So, unless you make it mandatory, then it ain't going to happen. I think it's okay to say minority, but we need to get the percentage of Black contractors reflect the percentage of Blacks and African Americans in Lexington. So, if it's 10, 12 percent in Lexington, then they need to be doing 10 to 12 percent of work." [#21]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I'm a little concerned about mandates. I think that the city rewards. And rewarding a prime that goes through the trouble to find an established relationship relationships with subcontractors is a good thing with minority or small business, woman-owned, you get credit on the RFP, or that's taken into consideration. Sometimes primes can't find the people to do it. So, mandating it would not... They couldn't meet it. I don't know how they would meet it, at least locally. So, they might have to hire people from out of state or from outside the region, if they have a mandate for a percentage of minority or small DBE, that they couldn't meet locally, then they would have to go out of state, which would not be good for our economy. It helped that business out of state, I guess." [#3]

- The owner of a majority-owned construction company stated, "Of course there are plenty of impediments to business and we got to recognize that, but they could, on a couple jobs, they could easily say, 'You're going to have your goal met, are you going to even come in here?' And so, what the VA does is they try to set jobs to service-disabled veterans, where the disability is related to your service. Well, if they don't get any bids, then they can put it out, but they got to try. They have to have two offerings. So, offer it if they don't get anybody to bite, then they can go back out. City could do that. City could offer work on a certain percentage goal. And if no one meets the goal, then they put it back out, or whatever. I don't know exactly the mechanics of it. The problem with the VA is that there's a group of national service-disabled veterans who run the table on it all. And then they just farm it back out to someone else. So, they're not actually doing the work, they're just taking a percentage and then sub it to someone else. So, that's the problem you get with almost every system. Somebody's going to work it, and that's just not right." [#4]
- A representative of a majority-owned construction company stated, "That experience we are researching into, or the contracts has a DBE goal but it's not a mandatory goal. It's just something we are expected to try and do if DBEs are available. If not, we just have to explain why. So, for years, we were unable to find the right a DBE company to do concrete workforce. We would do the pave the street we'd but then the sidewalks are after that to be improved. And we really wanted to have a good DBE subcontractor do that work so we would have that person to be able to meet the goal of that sort of contract or that contract that we had to pave the street. So, we worked with a person and found that they are not honest, and they didn't live up to the contract terms and we had to cancel the contract agreement and hire a different person who was also a DBE, and they did a great job, and we're still looking for opportunities to use them. In the meantime, that was three-year contract and that expired. We were told that they were going to take the concrete work out of the resurfacing contract because they didn't think they were getting the best price possible. So, we had a series of meetings I think the DBE contractor was also have a series of meetings to try and say hey y'all want to do this by the way, you know this is how you can make the DBE though this contract and you have a really good performing DBE company doing the work. Well, they did not heed our advice. They chose to let the concrete work on the ramps as a separate contract. Thus, taking away any opportunity that we had as prime contractor to sub that workout to a DBE contractor and meet the DBE goal even though it wasn't mandatory, it was an implied expectation. Through that process, we didn't think that Lexington was putting their money where their mouth was. They wanted to save a nickel rather than meet the DBE goal. And it was pretty discouraging. You know that that happened. I know it was for our subcontractor. And then when it was rebid, you know, I assumed he was qualified or capable of bidding it, but he was not the lowest bidder. He lost any opportunity to do work at the time. In fact, since then we looked for other projects, we look for some state projects, and another city project for him to work on and he's in the workforce. But that's been one of those things that we didn't understand. If Lexington was so committed to DBE work, they would make a decision to take out the only part of our contract that we could subcontract to a DBE. If it's really that important to Lexington, they need they need to look at how to give contractors the ability to meet the goal rather than take the scope of work out of the contract that would that would easily allow us to meet the goal." [#6]

- A representative from a Black American-owned construction company stated, "One general observation I don't know why the percentages can't be mandatory as opposed to good faith in the minority business." [#AV62]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "One of the things I guess that I'm hopeful that happens after this study is complete is I hope in contracting, we get away from the good faith efforts. To maybe have some mandatory goals. One of the things that I notice is that on some of these projects where the goals are good faith, as a contractor, a lot of times maybe the generals, they'll call you a day before the bid's do, and ask you, 'Are you going to bid the project?' And you'll ask the folks like, 'Hey. Well, what portion of the scope would you like for me to bid?' Well, the person on the phone won't even know. You get the sense that maybe they're just trying to satisfy that they tried to meet a requirement as opposed to actually utilizing your skills. I think going forward, if we do have mandatory goals, that you will get the best contractors around town to do the work, because they can actually perform the work. I guess that's my two cents." [#FG1]
- A representative from a focus group consisting of MWBE business owners and representatives stated, "I think if you marry the woman-owned and the minority-owned, it's going to be an either-or situation. One particular group is getting it. And so, maybe if you made the goals maybe, I don't know, people don't want them smaller, but if you cut out a niche for each one of those groups, then you're going to make that attractive to a wider range of companies I would think. If you make those goals minority- and woman-owned, and the same minority or the same women owned keeps getting all the contracts, then some people are going to look at that and say as a deterrent. But if you split them up, then hey, you got opportunity, they have opportunity, everybody does." [#FG1]

19. Small business subcontracting goals. Three business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses [#3, #11, #AV]. Their comments are as follows:

- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "Sometimes that's in part of the evaluation process, is the use of meeting a 10 percent goal. So having a goal is encouraging, mandating can make it difficult." [#3]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think that could be helpful. I mean, this is not a huge community, so lots of us qualify as small businesses, but I think that could be helpful, too, just depending on what the size designation is." [#11]
- A representative from a Black American woman-owned professional services company stated, "It has some barriers. One is to get a contract you have to a relationship. I know for minorities business they designated a certain per cent for minorities, [but] does this really meet their intent? If one award equates to 10 percent but all is given to one company." [#AV215]

20. Formal complaint/grievance procedures. Three business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses.

Most firms stressed the need for confidentiality in these procedures [#6, #11, #29]. Their comments are as follows:

- A representative of a majority-owned construction company stated, "I've heard even subcontractor say they have problems with the prime, but LFUCG won't help them mediate the problems that they're having getting paid." [#6]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I don't know that we've had any issues with LFUCG projects. There have been a couple of other instances where, speaking specifically at public schools, I don't know that there really was a path to complain and that's a delicate thing because you want to be treated fairly, but you don't necessarily want to make a difficult relationship with the client. So, there's probably not necessarily great ways to make complaints without burning bridges, I guess." [#11]
- The Black American owner of a construction company stated, "I've had to do that twice since I've been in business. I've had to do it twice. Others, I've settled, because it wasn't worthwhile to go to court. But it's still costing me in the end because I had to pay all that help, you know what I'm saying? And the fuel." [#29]

K. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with FAC's, KYTC's, LFUCG's, and the federal government's certification, minority business programs, and small business programs and provided recommendations for making it more inclusive. Their comments are as follows:

1. Experience with LFUCG's programs;
2. Experience with the federal DBE program; and
3. Recommendations about race- and gender-based programs.

1. Experience with LFUCG's programs. Nineteen business owners and representatives shared their experiences with LFUCG's programs [#1, #2, #3, #4, #6, #7, #11, #13, #15, #16, #21, #26, #37, #AV, #FG1, #PT2, #WT1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "LFUCG Program does a good job of training, but the opportunities aren't there to use the training. And there's not a mechanism to help people actually get the work. In my previous history, LFUCG, their minority coordinator and stuff will reach out to the minorities on whatever. Could they reach out more? Yes. But, at the same time, too, like me, I show up, go to all the events, participate. Then, I started like... Time was money. Am I benefiting from it? Sometimes no. So, that's where eventually there has to be some point, even for... I've seen at the meetings, there's two or three of new minority faces I might see, or I know of, who still didn't get their break. They don't get the opportunity. That's what they do. They go on back across the street. … The city has had one. I think they call it their department inclusion event. Basically, what they do, they bring in whoever the facility is with, the fire department, the police department, parks and rec, streets. Then you go around, and you get to meet these individuals straight, direct, say, 'Hey, give me the opportunity,' give them the

opportunity to call me when they leave. Don't happen, or if it's just a contractor, if 10 contractors are at the pre-bid. They say, 'Hey, we've got this 10 percent goal before you leave. I can go around and shake hands with every last one of them and I might get a phone call out of one. I might, but there's nothing encouraging them to do it, so reverse it. I know it may sound crazy, but if you want to give them an opportunity, like hey, [MBEP Liaison], she's the coordinator, can talk until she's blue in the face and say... 'Hey, this general contractor who can frame up walls is great to work with. You should use him. This contractor does drywall, this contractor does concrete, this contractor does paint, this one does flooring. They're an excellent team. They have an excellent resume. Here goes their sheet, here's goes their references, here goes their background. On every job you do, I think you should give one of these guys the opportunity to team up and do it. Guess what? It doesn't happen. And then everything is there, and it's called a little bit of the... It's the term of the good old boys, but they're already established in that way, so you've got to get them to break that." [#1]

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "Before, it was just simply little to no incentive to do anything for minorities. You hear people talk about it, but nothing taking down even to the study that we're doing right now. And trying to gain an opportunity without the relationships with non-minorities to get your foot in the door was almost virtually impossible, frustrating. And then the closer... LFUCG started doing things to encourage. They didn't have mandates, it was more so, 'Come on, guys. Can't we all get along? Let's try to do a little something, but we're not going to put it in the law or put it... Mandate it. Now let's just try to do something.' That's how we got our foot in the door at the beginning, that really strong push to say, 'Okay, start working together.' But it really didn't do nothing, or we would still be running that contract right now. I think that with this, they're doing some of the things. I think that they really are headed in the right direction. With the study, the study first of all, with the study. And then even before that, with them encouraging primes and non-minority companies to work with us was a good direction, but actually they also put another program in place where they did actually mandate certain goals. Now, this was after all of ours, but they started moving in that direction, treading lightly before the pandemic." [#2]
- The owner of a WBE-, DBE-, and HubZone-certified professional services firm stated, "I think to some degree they do encourage primes to hire DBEs and small businesses as partners, and so I think that's very good. Prior to COVID, they were very active, and they even continued during COVID, but I'm not sure how that impacted their capabilities of doing all of those things. But I would commend the city, they have been good to work with and they've certainly helped us in a number of ways." [#3]
- The owner of a majority-owned construction company stated, "I think their goals are good, but they... We talked about bid shopping earlier. They have a big, long form you fill out with every bid. I think I counted 17 signatures I had to apply to a recent bid. They're just not meeting the goals. And they're not adjusting for the fact that they're not meeting the goals. And one of the questions that says, will you shop the bids? Basically, it doesn't say it in that many words, but it pretty much has a check list of things you can do. And one of them is compare prices and talk to the people and try to, after the fact, try to see if you can get them low on a job. And I just can't do that. Ethically, I can't take a price from one guy, and he is

low and then go out and show his price to other people, see if they could bid lower. That's not the way to do it, but they seemingly is what they want." [#4]

- A representative of a majority-owned construction company stated, "… The contract has a DBE goal but it's not a mandatory goal. It's just something we are expected to try and do if DBEs are available. If not, we just have to explain why. So, for years, we were unable to find the right a DBE company to do concrete workforce. We would do the pave the street we'd but then the sidewalks are after that to be improved. And we really wanted to have a good DBE subcontractor do that work so we would have that person to be able to meet the goal of that sort of contract or that contract that we had to pave the street. So, we worked with a person and found that they are not honest, and they didn't live up to the contract terms and we had to cancel the contract agreement and hire a different person who was also a DBE, and they did a great job, and we're still looking for opportunities to use them. In the meantime, that was three-year contract and that expired. We were told that they were going to take the concrete work out of the resurfacing contract because they didn't think they were getting the best price possible. So, we had a series of meetings I think the DBE contractor was also have a series of meetings to try and say hey y'all want to do this by the way, you know this is how you can make the DBE though this contract and you have a really good performing DBE company doing the work. Well, they did not heed our advice. They chose to let the concrete work on the ramps as a separate contract. Thus taking away any opportunity that we had as prime contractor to sub that workout to a DBE contractor and meet the DBE goal, even though it wasn't mandatory, it was an implied expectation. Through that process, we didn't think that Lexington was putting their money where their mouth was. They wanted to save a nickel rather than meet the DBE goal. And it was pretty discouraging… And then when it was rebid, you know, I assumed he was qualified or capable of bidding it, but he was not the lowest bidder. He lost any opportunity to do work at the time. In fact, since then we looked for other projects, we look for some state projects, and another city project for him to work on and he's in the workforce. But that's been one of those things that we didn't understand. If Lexington was so committed to DBE work, they would make a decision to take out the only part of our contract that we could subcontract to a DBE. If it's really that important to Lexington, they need they need to look at how to give contractors the ability to meet the goal rather than take the scope of work out of the contract that would easily allow us to meet the goal. I think it was just that the judgment of, of a group of people thought they could save 5 percent or 10 percent of the contract by eliminating that scope of work for one contract and living in under a separate contract. And there was no real DBE requirements under that other contract." [#6]
- The Subcontinent Asian American woman owner of a professional services company stated, "I have seen RFPs written in other states and I have seen RFPs written in state of Kentucky. There is one language that is missing in, I wouldn't say missing, but it's lack of that kind of effort in other states and other contracts that I was able to successfully get. What it reads is the contract requires them to have certain percentage of their work be done by minority small businesses." [#7]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "LFUCG does a really good job of that. They consistently have the WBE, DBE representative at pre-bid meetings and pre-proposal meetings, and they do a good job of disseminating bid opportunities and you really just have to kind of sign up and ask when things are there. So, I

think they do a really good job of administering that program. I mentioned [the previous MBE Liaison] reaching out specifically and giving us suggestions on certification. I think I somewhere had expressed to her some frustration with the state process. And she said, 'Oh, while you're doing that, go look at these because this is simpler and much faster review process.' So, just kind of continuing to have support for that process of becoming certified, that was really helpful for us. And I think, again, the outreach events that the city has and sometimes FCPS has, those are always good to attend and good to meet people and see people." [#11]

- The Black American owner of a DBE-certified construction company stated, "A lot of times the government have events, so Lexington-Fayette Urban County used to have events. I used to go to their events also and just pass out cards and my statement of capabilities. I think one of the things that Lexington-Fayette Urban County Government did is, they did a training program. I was in the training program, matter of fact. It's been years ago, and companies kind of sponsored it with Lexington Urban County Government. They came in and kind of taught a class on how to do construction, how to get bonding, how to keep your books, all that stuff on the construction side. It was a good program. EKU contracting program, and he was really good. He put on a really good class, and that's one of the things I think is very important, to keep these continuation programs going in the construction industry." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "It's available, it's just not effective. It hasn't been effective." [#15]
- A representative of a majority-owned professional services firm stated, "They keep a good list of those firms. It's well-organized. And that's what I would need, and I get quite often. And it's not just people in Lexington. That list includes people in Louisville and other states even. It seems to get a lot of... It's widespread, so there's a lot of opportunity for businesses to get on the list." [#16]
- The Black American owner of a professional services company stated, "The city always has them networking events, the Fayette County- I guess maybe break it out into smaller packages, when you just meet with the primes in a smaller package." [#21]
- The owner of a WBE- and DBE-certified professional services firm stated, "Kentucky, as a DBE program, has not provided useful things. Lexington, I graduated from the Minority Contractor Training Program that Lexington puts on, I've graduated from the SBA Emerging Leaders Program, and there was some other training program that I went through. But honestly, I've been through enough of those now that they're all very, very similar. They start off with the 'How do you know the different government agencies? How do you put together a bid? How do you put together a proposal? How to make sure your insurance is right?'… some basic HR types of things. Once you went through one of those, you don't need those annually." [#26]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "A lot of our work comes from word of mouth and doing all of the networking events that LFUCG or Fayette County, or even in Louisville at the MSD, unless a lot of these opportunities, it may not directly lead to work, but as long as you continue to keep your name out there and show your face, it's been, I'd say it's been helpful." [#37]

- A representative from a Black American-owned professional services company stated, "Lexington-Fayette Urban County Government is lacking in giving minority MBE, majority is WBE not MBE." [#AV69]
- A representative from a woman-owned professional services company stated, "I am certified DBE, only 3 of us ladies in Kentucky, as a small business owner. [We're] not rich. We were given free booth at the Minority Business Expo, and this helps us connect with contractors and city officials was appreciated." [#AV81]
- A representative from a majority-owned construction company stated, "As starting a business I feel it's a pretty good market. I know when I started it was pretty easy. Lexington Fayette County Government helped out a lot." [#AV326]
- The owner of a WBE-certified professional services company stated, "I think many moons ago, I went to one of those. It's really a lot of it is business 101. If you were a brand new ... I could see how if you were brand new, getting started, hadn't worked contracts or anything like that before, they would be very valuable. I personally haven't required that. But I do get notices, and I know the wonderful woman who's in charge of the group, and think the world of her, but yeah. Not really sure that I know what the goals that they have for outreach include… If it's they want greater participation from a more diverse base ... They could do, I know the procurement officer, but he's in charge of just doing the RFP solicitation and compliance. But if they had, I guess, meet and greets with the different agencies, there's division of waste, there's public service, there's facilities, just all those different branches of the city government, and do a one-on-one conversation with listed firms, I think that would, I mean, I'd jump all over that. Everybody in our business wants exposure to the decision makers. Exposure to decision makers, that would be valuable." [#FG1]
- The Black American male owner of an MBE-certified construction company stated, "I have attended the Minority Business Expo in the past, and yeah, I think a lot of it is business fundamentals, and stuff like that. But one thing I try to do is I'll try to research who's coming and see if they have any projects that interest me on the horizon, just to try to get a leg up maybe on the competition's what I try to do, and just try to market them. Or if not, just see what they've got going on, and see if we'd be a good fit for them. But I think all in all, the outreach, they're good just for networking, period, I think." [#FG1]
- The owner of an SBE-, DBE-, and WBE-certified professional services firm stated, "The question that I asked, whether or not they were meeting their goals is because I think the goals are set. However, there seemed to be some disparity in the goals. And what would I say about that? Say they got 5 percent for each of the different areas and say I come along, and I am selected and maybe I meet, and the contract is very large, and I meet three of the different minority areas, then they consider that meeting their goal. Maybe it has met their goal but not their intent of the program. So, I think they need to look at that. And especially when it comes to maybe construction because those bids are so large that it can knock up a whole 5 percent and maybe you've only helped one company. And I don't really think that's the true intent of the program." [#PT2]
- The Black American woman owner of a professional services firm stated, "For example, I believe it was the 2019 number. Yes, the goal was made basically with businesses but less than 1 percent of the business was done with [minority- and woman-owned firms]. And so,

there are some real serious problems that we have in terms of who's getting those opportunities. And so yes, we can say we've met the goal, but how was the goal even framed was problematic. And then the last thing I would just say is real quick, that one of the things some of us hope to see is a process where the procurement cards ... They have over 300 people that have procurement cards but there's only maybe 10 or 15 of them that are doing the vast majority of that spend purchasing and connecting minority businesses where they might be able to garner relationships with those folks that are making those quick decisions about procurement with those cards outside of a bid process to be paramount. Because from the numbers they shared with us virtually none of that business is being done with minority businesses. It's all built on relationships and the relationships are not forged. There's no intentionality around doing that." [#PT2]

- A representative of a majority-owned construction company stated, "LFUCG's list is full of businesses that are either out of business or their contact information is not up to date. LFUCG has lists by type of work." [#WT1]

2. Experience with federal DBE program. Four business owners and representatives shared their experiences with the federal DBE program [#11, #13, #26, #6] Their comments are as follows:

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think we found the federal process to be kind of daunting and maybe for our particular sector of work, not necessary. The Transportation Cabinet certification, I think we've been able to list that on a few things, but we don't typically seek out a lot in terms of federal work. If we do, we're listed on, say, USACE Army Corps projects or military projects where our scope is typically pretty minor, but it's not something we seek a lot of ourselves. It's a much more complicated core process." [#11]
- The Black American owner of a DBE-certified construction company stated, "That's one thing I love about working on federal contracts. They do not distinguish against anything. That's one of the few agencies that's like that." [#13]
- The owner of a WBE- and DBE-certified professional services firm stated, "The DBE programs, historically in Kentucky, have not been helpful other than get you certified. They've been good for get you certified. I get free training, all the free training I want, because I have my ODOT DBE, and I get $10,000 reimbursed every year because I'm Virginia DOT DBE certified. They spend their DBE program money on actually providing services to those of us who have made it past the get-certified point. Kentucky only cares about the get-you-certified, they don't care about actually helping you maintain your business, grow your business, get past the point of viability. Same thing with Tennessee. Tennessee provides free consulting services. I can get a free audit. I just had the phone call a minute ago to have my... Every five years, they do a full assessment of my business plan, everything, and it's free. That's meaningful things that I can use as a DBE." [#26]
- A representative of a majority-owned construction company stated, "Is definitely different. Federal projects have always required DBE goals that are very, very stringent, and very I'll say sometimes hard to meet because of the availability of contractors. We've looked to try and develop additional DBE contractors and you can't do the work for them. That's support

that you could possibly offer without stepping over those lines. But it's been difficult to find enough DBE contractors and material suppliers to meet some of the goals that come with federal projects." [#6]

3. Recommendations about race- and gender-based programs. Interviewees provided other suggestions to LFUCG, FAC, and KYTC about how to improve their certification process and programs for certified firms [#1, #2, #3, #4, #6, #7, #8, #9, #10, #11, #12, #13, #15, #16, #17, #24, #26, #32, #36, #37, #FG1]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "My biggest thing I see with Lexington is your bigger entities giving the minorities the opportunity to break through. I'm going to bring up Columbus for example. I did [work with] a contractor. The contractor would call the Central Ohio Transit Authority, which is basically our LexTran. Then I went over, and I ran their capital projects division. Internally COTA said, they said, very hard and very blunt, they don't have a 10 percent BG bill. They have a 10 percent mandatory DBE involvement. This isn't right, this is better, but they didn't have it. Also, what they do in their facilities or operational maintenance facilities, any contract I think within their facilities operation that's $50,000 under, or I think it was $50,000 or under, is dedicated strictly to minority contracts. They have list of minority contractors. They go and find them. They go and find three and say, 'Bid on this.' If they can't get three to bid on it, then they bring in the one non-minority. But they dedicated that fund, those resources to the small business and the minority. They'd come out and do it. You know I really think if some of the just I really think from my small business, which I never like using that phrase, or MBE. You must be given the opportunity, right? I had to work, work, work to get an opportunity. Non-minority had to work, work, work to get an opportunity, okay? Yes, there might have been an easier path. If the city really wants to make a difference, give the minorities the opportunity, create a pathway, just like I mentioned the facility stuff. Create an opportunity to where, hey, this area scope of work is dedicated to minorities, first come, you know? They get first look. If it doesn't work out, we need others to look at it then do that, then allow them to establish themselves. To find a translate that, just down the street, the market down the street, right, a smaller boost. It's giving vendors the opportunity to establish and see, is this something I want to do full-time? It's low rent. Instead of them going off and investing lot of money and getting a storefront, let's see if this works? Then guess what? 'Oh, my gosh. They're great. Their food is great, or their craftsmanship is great. I'm going back to them. I'm going to do whatever.' So, the same thing with contract, and then give them the opportunity. So, the city should say, 'Hey, anything under $50 grand or anything $20 grand or you're building this, when it comes to painting or a touch up, or we even call small renovation projects or something in that internally, it is dedicated to DBEs first look, and then as they build a relationship, guess what? Now that DBE has a resume approving work with this city. The non-minority needs to be comfortable with the minority contractor that he's dealing with. … When you have these network sessions, a lot of times first thing they want to treat the small businesses, understanding the paperwork or knowing the paperwork and how do you do it, like they're not competent… There's some may be there, but at the same time, it's 10 of y'all, there's two of me in the room. The 10 non-minorities, two minorities in the room. The city is saying, 'Hey, let's meet this 10 percent and go,' and the 10 doesn't ask the two to participate at all...

at that event, they talked about the paperwork as opposed to the relationship building… deal with the risk, okay. … what's my risk. What's my return? Why am I? Why are you forcing me to use somebody I ain't used before on this job? That's the risk I'm taking. Who's going to cover that risk? Somebody has to cover their risks. What's the benefits of that? Can I get 10 percent back on my bid and the low bid? … If you really want to improve and get diversity within your organization, this should be a set aside. There is enough general maintenance that goes on in this industry with LFUCG that there should be a set aside to allow minority or small business to grow. Private does it. That's different. There's one down the road. They make sure they meet their minority goals. Not all private does it, but private industries do do it. Federal funds do it. They do it. It's mandatory. people don't want to take the time. They're scared of the push back … Another thing I think, we need to make sure we're not hiding behind the diversity spend amongst women, non-minority women. Not to take anything away from women-owned business, but don't fudge the numbers. I have been part, like I said, Cincinnati has a larger entrepreneurial population. They all came out together and said, 'Do it, push it, stood behind it. Fulfill it, figure out how to make a way, spend, utilize.' Here, Lexington is smaller in numbers, so you have a minority community come together, push their spending. Then at the same time, sad to say I said this, it shouldn't fall on me, don't mess this up for everybody. It ain't no different. We're going out here as a team. Don't shoot a bad shot for everybody, and let's make it happen. At the same time, there's still responsibility. The city has to put it in place. Put it in writing. Make it law." [#1]

- The Black American owner of an MBE-, DBE-, WBE-, and SBE-certified construction company stated, "If the city put certain things in place and then reached out to us as minorities, and even though we weren't a prime, we were subcontractors. I would still be interested because I'm in the business of making money and I want to grow. And if the city put the program together that support that, it's companies like mine that we know how to survive, we've really made it through... Where other companies faltered, fail, we made it through. With the city focusing on companies like ours and helping us grow, and then that will encourage other minorities. If the city had really embraced us, helped us work with that prime, and we got through that five year and then that renewable, can you imagine how big that would've been and how encouraging that would've been for other minority companies? What LFUCG needs to do… I know one of the things is, because we do a lot of bidding to a prime contract. That's only because they have to seek out these minorities and get them to put on a project. A lot of times, that's just where it leads. Whether or not the city getting the correct information, I'm not sure. Some type of checkpoint with primes and following up with these so-called subcontractors that they put on these proposals to make sure that they were actually contracted and make sure that the information is correct, because something is going wrong. They're not needing minorities put under contract. Something is wrong because there are out there." [#2]
- The owner of a WBE-, DBE-, and HUBZone-certified professional services firm stated, "I think it would be great if they went back to having procurement fair at one time where they had tables set up at the different departments, and that allowed me to go and talk to people. Like you said, a lot of times, organizations don't even know that we could be helping them with things. And so that gave me the opportunity to talk to people and say, 'Have you had this problem? Do you need this help? Could we do this?' And so that was very helpful. So, I

would recommend, once they can do that, they do it again, even if they did it via Zoom, that would work. One of the things that I have heard is if you get a master contract, with the University of Kentucky, or with the state or with the city, that it will help you that other people can use it. They can attach new projects to it. I haven't had a lot of luck with that, so far. The university contract, it's called a price contract. So, any organization that has to comply with the state contracting rules can use our existing contract to work with us without having to send it out to bid. But when I tell people that, they don't know how to do that. It's a price contract. In the state level, it's called a master contract. And what that is, is it says, 'This vendor is approved, and you can work with them, if it falls within their contract, the work that's in their contract.' So, for instance, there's an agency, our competitor that has a state master contract, and any division of the state that wants some PR work can just go to them and contract with them without sending it out for an RFP. They get a lot of work based on that. So, I don't know if there's anything like that that exists with the city but that would make it easier. And it may not apply because they may get funds from different places and have different requirements. But if there could be a master contract and then people could add on work once you get that contract that would be very helpful. It would help small businesses grow based on a small contract, then you could get more work." [#3]

- The owner of a majority-owned construction company stated, "Other towns do different things, like if you're not from the town, they're not going to give you a job, but in Lexington you can come in here from anywhere and get the job and they don't really care. There's nothing they do. There's been some proposals made, this has nothing to do with minorities, but it has something to do with home brew. They suggested at one point to put a pretty good tax on contractors and then turn around and credit the people that with the property tax so that give some advantage, or charge a fee for certification for a license, charge a big fee for it. Not like $100 or $200. Charge, $10,000, but then credit them back for being a community member and MBEs, you could do that, and then they could pay that. They could give assistance to MBEs that are local and contract with them. But that might eliminate some MBEs that come from out of town." [#4]
- A representative of a majority-owned construction company stated, "If it's really that important to Lexington, they need they need to look at how to give contractors the ability to meet the goal rather than take the scope of work out of the contract that would easily allow us to meet the goal. I think Lexington needs to look at their values and say is it worth saving 5 percent on the contract, to not meet the DBE goal, I've ran into this not only with LFUCG, [but] I've run into the same thing with the power department. But you know, it's all about getting the best value for the taxpayer. Whether that allows you to sub out to a DBE company or not. So, the practices of owner to take low bid, and cheapest price over maybe a little bit more expensive price that actually had more DBE involved in the contract." [#6]
- The Black American woman owner of a professional services firm stated, "If they have RFPs out there that they're looking for, and they're needing somebody to provide those services, I don't have a problem with starting that business, but I need to know what it is that they need. And I'm more than willing to go out there and try to seek it." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "MSD in Louisville does this. If I go to bid as a prime, and let's say I bid against a company out of

Lexington. I get a 10 percent advantage immediately. Yeah. The way it works is, is that job is $200,000. Okay? And [a prime contractor] bids it for $200,000. If I bid it for $220,000, I get it. But if I bid it for $221,000, I don't get it. If I'm $1 outside of that 10 percent, I don't get it, but I can be 10 percent higher as an MBE. ... Because me being a small MBE, I can't afford to do it as cheap as he can because he's been able to build his company up because of his skin color over the years. And people like us, ain't been able to get there. So, now it's not fair to us to have to give the same number. That's what MSD does. And let me tell you, that changes the game. When I say change the game, the game has now changed … the city of Lexington, to say, 'Hey, if y'all really want to do something, here's two things you can do. Do subsidizes, but more importantly, if a minority company comes in here and bids work, they can be 10 percent higher. Say that's what they do down Louisville at the MSD. They can be 10 percent higher than a Caucasian person coming in here.' … It allows us to be able to still be competitive. It allows us to still be competitive and go after it. And now, with us being able to be 10 percent higher, we should be able to get in the ballpark, even though they're a bigger company, and they can bid it a little cheaper, now we're able to get in that ballpark because we have a 10 percent advantage." [#9]

- The Black American woman owner of a goods and services company stated, "If the majority of the business' contracts are going to larger firms that are maybe all white and are the ones being passed over, is it because they don't have the staffing? Well, could we do something that would be, make it easier for those that have less than 100 employees or less than whatever, to where they can get in? Anybody can be a small business. And small business is what, less than 1,000 people, or 10,000, or something? And that's what I think is the narrative, and the terminology, and opening it up to where more micro businesses can have a chance, because that's where most of us live. Most of us fall into the category of micro, a micro business. And if that's where we are, we're never going to get a chance. I don't have the resources, money. I definitely don't have the staff. I don't have the time. And I may not have the connections to where I can find different things. … that would be one suggestion, would be that, thinking out of the box and making it easier for micro companies to have a chance. Because there's a lot of amazing companies here in the area that can do a lot." [#10]
- The co-owner of a WBE- and DBE-certified professional services firm stated, "I think the biggest thing that the city can continue to do is to continue to support those not necessarily requirements, but the submittal of DBEs, WBEs in it for both consulting work and construction work for all of their requests for proposals and bids. I think just continuing to support that and emphasize that is very helpful to that community. I think continuing with what LFUCG currently does and in our particular industry, the number of those types of firms is pretty limited on the consulting end. And, so if there's a way to encourage more ownership in more minority and women and veteran, for that matter, ownership in firms, and I guess it starts kind of way back, more participation in the industry as kids are figuring out what they want to do. And trying to get more diversity that way too, which is not necessarily something that LFUCG does or maybe there's a way to do that at the educational level. But I think there are ways to support that kind of ownership and allow people to kind of come up through the ranks and have the opportunity to be owners." [#11]
- The Subcontinent Asian American owner of a DBE-certified professional services firm stated, "I think the matchmaker type sessions we've talked about, things like that, getting to allow the DBEs a platform to get exposure to the primes, doing more of that, because one

thing I see, I don't see a whole ... the amount of DBEs out there, from my perspective, don't seem to be many, particularly in the engineering plan. There are not many, so being able to get to motivate maybe more people to start up a business. Anyway, there just don't seem to be that many to choose from, to be honest." [#12]

- The Black American owner of a DBE-certified construction company stated, "That's something that I think we need to give some courses on, of how to build up your bonding and how to keep money in your company for buying materials and building up enough monies that you can have a supply company say they will open up an account for you. As minorities, we need better access to capital. That's one of the biggest things, better access to capital, bonding, and lines of credit. I think that's some of the things that if we had better, we wouldn't be afraid to bid these bigger jobs. And also, we need them to set up Mentor-Protégé relationships with these larger companies that can mentor a smaller company. They can mentor two or three smaller companies and help them financially with bonding and buying material for a job, and just help them all the way around. I think that's one of the things that will really help smaller companies just really want to get in this industry. I just think that training is a big thing. Like I said, I think that if we had more training courses for minorities, like this minority training program they had, I think that helps out a lot. I think if they set up programs, get it federally funded through grants to set up programs like incubators for minority companies also, where the minority companies can all get together and team together, and go after projects together and split the profits." [#13]
- The Black American owner of an MBE- and DBE-certified construction company stated, "I think the public entities need to require the prime contractors to present them a plan of how they will utilize or how they will increase their African-American participation on jobs and make the prime contractor by award of the bid or before the bid is awarded, present them with a plan on how they're going to work with minority contracts. If the public entity … like the school system they built, say they build a high school, … tell them, how they're going to utilize minority contractors on the job, they would have just did it, in order to get the bid, or if they didn't do it, they wouldn't get the bid, but they would just do it. And then they would work with minority contractors. But outside of that, you got an $85,000,000 job and there's no Black contractors working on the project. Same with U.K, same with Urban County Government, same with all of it." [#15]
- A representative of a majority-owned professional services firm stated, "Just a firsthand experience, I got the list from the city the other day and, gosh, it's a long list. So, I searched through it. I wonder... Now, I'm only on the list for getting engineering RFPs. So, I know there are other types of services and equipment and bids that they take that could impact a lot of other types of businesses. But maybe as a suggestion... If the city was to have a webinar, once a year, focused on the engineering industry. Where they, 30 minutes or an hour, say, 'okay, here are the list of firms that provide services. Here's what...' And this is a city presentation. Okay. 'Here's the list. Here's what they do.' But then you could expand that to have the businesses themselves, give a five-minute overview of what they do." [#16]
- A representative of a majority-owned construction company stated, "I would like to see that, to where if you've got a whatever the requirements are, then those people need to be listed." [#17]

- The owner of a majority-owned professional services company stated, "One thing I think would help in the city of Lexington, I recall attending a couple of procurement seminars. But they were just thrown, basically they were all encompassing all industries. It really didn't do anything to deal with the AE industry, and our particular needs and our particular niche, as far as what service we provide. I think it would be beneficial, and they may be doing it and I just don't know, for someone to host the interested AE firms. It'll do two things. It'll let them understand what the city's looking for, and it'll hopefully create a vehicle by where there is some realization, or recognition of who's interested in doing city work. Again, I'm assuming the city does hire a prime consultant, and the prime consultant is responsible for his or her team. I'm not even positive about that. But if you go out and say, 'Okay, this particular firm seems to be one that the city is impressed with, and enjoys working with,' then you may want that person on your team. One of the best programs I saw with the state is, and again I'm speaking of architecture and engineering. What they call, well the university has it also. Their per diem contracts, or annual contracts, which allow small firms, individuals, to, if you would, get into the flow of the potential of work. To be not competing against the 25, 30, 35 person firms. That has been probably one of the best tools that I've seen, that has been most beneficial for small firms. You build your reputation, and if you do a good job, then you can move forward. It's not exclusively, but it doesn't exclude you because you don't have the numbers when they look at you. It's not a set aside, but it is an opportunity that you usually don't have." [#24]
- The owner of a WBE- and DBE-certified professional services firm stated, "I graduated from the Minority Contractor Training Program that Lexington puts on, I've graduated from the SBA Emerging Leaders Program, and there was some other training program that I went through. But honestly, I've been through enough of those now that they're all very, very similar. They start off with the 'How do you know the different government agencies? How do you put together a bid? How do you put together a proposal? How to make sure your insurance is right?' … some basic HR types of things. Once you went through one of those, you don't need those annually. specifically, KYTC has started requiring classes for... The Project Manager Boot Camp, it's a requirement. I forget if it's $600, $1,500, I forget what it is, but DBEs have to pay the full price. What the [expletive]? In Ohio, that puppy would be free. I would get $10,000 in free classes. And up here, they set up a hurdle that says, 'You can't even be a project manager unless you're going to be spendy and do this class for which you may never get any return.' Any of the training classes required for any of the prequalifications, I'll say that again, any of the classes required for any of the prequalifications, the DBEs should get a scholarship. And if you want to make me pay a token amount, I think that's fine, because then I have skin in the game and I'm going to be a little bit more committed to it. I'm not just going to sign up for every free one that I saw. They need to change the way that they treat DBEs. … Fair payment terms are not what's in the FAR. The FAR is out of date. They have not even considered what a reasonable term is in the way that today's stuff works… We need to come up with a totally new way of doing things for DBEs. And to me, it means that DBEs need to be paid in net 30, period. I just think it's horribly unfair. We're economically challenged, which is what you have to be to be DBE certified." [#26]
- The owner of a majority-owned construction firm stated, "I don't know how you found me, but you found me because I'm really fresh and struggling. So, if you guys can give

opportunity to people like that, like give them a job to bid on so they can survive. They can grow and sustain themself because we are in the ocean swimming. It's not easy." [#32]

- The Black American woman owner of a goods and services company stated, "I was just sitting here thinking like, wow, I haven't been asking the right questions to know the programs that you're talking about, I've been sleeping. Just find a way to contact me. because of this interview, now I will go about like, asking my business peers, if you will, 'Hey, what do you know about government contracts?' Or things like that, the MBE and the WBE." [#36]
- The Black American owner of an MBE- and DBE-certified professional services company stated, "It would be nice if you, whatever the goal, let's say you got a DBE goal of 10 percent. Why not just set aside that plot of money and strictly pay your DBE firms with it? If the payment is, if the timeliness of a payment is an issue, why not just pay the, your sub consultants directly? Why is our payment tied directly to the prime? Because a prime's not going to do, go months on end without getting payment and so, but we as a subcontractor, you're expected to, so that gets frustrating. What's the harm in paying your subs directly? I understand that the prime needs to sign off on everyone's invoice, but once that happens, the same way you pay your prime, why not pay the subs the same way. So that way our payment's not directly tied to the promptness of the contractor getting around to paying or the prime getting around, paying us." [#37]
- The Black American male owner of an MBE-certified construction company stated, "I would like to see them differentiate between maybe MBEs, woman-owned, and maybe supply, firms that supply materials in terms of contracting. I think that would be the fairest way that, and all the other groups in between, that everybody gets a fair shot at it, I would think… I think on maybe just a basic level, it would be helpful for businesses that maybe are just now starting to have somebody just to go through the paperwork with. Because I think for a lot of businesses, you see this 300-page specifications, and these plans, maybe walk them through so it's not so overwhelming for them. Because I know when I first started, and I start first looking at it, it was consuming. But then, the more and more you do it, you get comfortable. And then, I think you can help people get themselves out there, and at least try to put together something, and win a contract… MBE typically has racial guidelines in it. Women-owned has different ethnicity guidelines in it. They're almost interrelated I guess in what I'm seeing, in my experience. They're kind of the same. I think if you marry the woman-owned and the minority-owned, it's going to be an either-or situation. One particular group is getting it. And so, maybe if you made the goals maybe, I don't know, people don't want them smaller, but if you cut out a niche for each one of those groups, then you're going to make that attractive to a wider range of companies I would think. If you make those goals minority- and woman-owned, and the same minority- or the same woman-owned keeps getting all the contracts, then some people are going to look at that and say as a deterrent. But if you split them up, then hey, you got opportunity, they have opportunity, everybody does." [#FG1]
- The owner of a WBE-certified professional services company stated, "If it's they want greater participation from a more diverse base ... They could do, I know the procurement officer, but he's in charge of just doing the RFP solicitation and compliance. But if they had, I guess, meet and greets with the different agencies, there's division of waste, there's public

service, there's facilities, just all those different branches of the city government, and do a one-on-one conversation with listed firms, I think that would, I mean, I'd jump all over that. Everybody in our business wants exposure to the decision makers. Exposure to decision makers, that would be valuable… We're talking about less established businesses, and we're talking about an individual entrepreneur starting out. I know they have SCORE programs, and things like that, but a quick path for that first win, if they're a new chef, or running a new catering business, a path for them to have that first win, so I think that's what those set asides are intended to do. But all businesses need encouragement, and hope there's the next opportunity. I don't know that the city does anything like that, like a master agreement. I think they used to have a master agreement. I think they eliminated that. I don't know what service categories that that's available for. But really digging through that master agreement, and then using people to help I guess." [#FG1]

L. Other Insights and Recommendations

Other recommendations for LFUCG, or other public agencies in the Lexington area to enhance the availability and participation of small businesses. Interviewees shared other insights or recommendations [#1, #11, #16, #18, #4, #7, #8, #9]. Their comments are as follows:

- The Black American owner of an MBE- and DBE-certified construction company stated, "I'm hesitant to sign on disparity study. Is it going to produce something negative saying, 'Well, see, you can't get the minorities,' or I think too, you got to look at Lexington? I think I was trying to get to this earlier. I don't feel, even though some people mentioned. I don't feel Lexington is a really strong entrepreneurial city. Yes, Lexington has a lot of built on small businesses, but majority of those small businesses are involved some type of other industry, but you don't see a real strong small business effort in Lexington area, and definitely not from the minorities. So, you have to encourage that to where you have a network of small business owners. I deal with business owners now, the same industry as mine, the same industry, and you have to have network group just in conversation with business, not in competition, just about business on how to operate. The main reason I'm trying to do more community service or find an entity is so people that look like me, see me doing this, right? Why the non-minority company that's a painter, right, been sitting here painting for years. How many other painting companies we got? Probably 10, right? You know how that happened? Well, if he can do it, why can't I? They probably used to work for him, right? If he can do it, why can't I? It's no different than when the people like ... because they seen him [as a] painter. If you don't see anybody ... If your environment, all they see is your mom and dad works at UK, or works Toyota, or works at Lexmark, that's what you grow up thinking. You gonna go work at Toyota, Lexmark, or UK. If your mom and dad an entrepreneur and owns a business, more likely that child's mentality is going to be, I'm going to own my own business or have something structured like that. So if they see more minorities or women owned business in front of them with you, owing restaurants or owning contract jobs, or having a consultant, or having attorney friends. Guess what? Then why can't I? The reason they want to be in sports is because they see the fame and the glory and the money, right. Well, why can't they ... If there's more seeing the fame and the glory around people who are running businesses, 'Oh, wow. I ain't an athlete, I can go over here and do it, and I don't have to go to practice.' If you want to make a difference, stop tippy toeing around it and just

do it. You're going to get push back regardless, just like internally from the employees. Prime example, just say, 'Hey, it's mandatory that everybody come back to work now.' They used to work here for 30, 20 years. Then when they tell you come back in the office, you get push back. Guess what? You guess what? You come back to the office. That's what it is. Guess what? We've got to dedicate $3 million a year to the diversity spend. It is what it is. You're going to get push back regardless from somebody. But just do it. Whenever they want to do a new project, and nothing to do a minority, guess what? The city or somebody or the people, they're in community's going to complain. Right? Some people might be certain different projects they doing, but anyway, guess what? They push forward, right? So why ain't you pushing forward about the diversity spend?" [#1]

- The co-owner of a WBE- and DBE-certified professional services firm stated, "I don't know if there is a better way to try to get the private sector opportunities out there more. It's a whole different entity, but I don't know if there's a way where it can be facilitated for private sector developers or to be encouraged or to meet other folks in the industry. I'm not sure there's a way to regulate that, but that's probably the biggest gap I see locally." [#11]
- A representative of a majority-owned professional services firm stated, "There are not a lot of minority firms that specialize in engineering or surveying or those kinds of things. There doesn't seem to be a long list. There is a long list that do a lot of other things like supply equipment or supply other types of services, but in the engineering business, the list is rather short." [#16]
- A representative of a majority-owned professional services firm stated, "I mean, I'm not sure how they would go about it, but it would be great to see more minority and women-owned businesses on the approved list. I think, again, just reaching out and letting them know how to get on that city list and the benefits of doing so. Maybe through LinkedIn, networking, that sort of thing." [#18]
- The owner of a majority-owned construction company stated, "There's a lot of majority contractors that just fold their hands. And I hate to say it, but they think, a lot of them were born on third base and they think they hit a triple, you know what I mean? They had some lucky breaks. Race is part of it, and generational wealth is part of it, and they don't appreciate the fact that they had something given to them. I hear it all the time, 'I've made this business from scratch,' but yeah right. And it's not true a lot of times. They just don't really appreciate what all they've been given." [#4]
- The Subcontinent Asian American woman owner of a professional services company stated, "One thing that you mentioned that there is an agency within Frankfort, right? That could help minority businesses, if not anything else, to build a bridge, language barrier bridge, help with the documentation and all, that kind of knowledge. When we are establishing, this is my idea of how the bridge can be narrowed. We can build a bridge. When we apply for a business license, we declare a lot of things. Can this minority- or woman-owned certification be made easier during that process? That's when we are applying who we are. Can that be extended at that stage, and at the same time, the knowledge? Instead of just saying, 'Okay, this is your license, you're ready to go. Do the business,' can they share more knowledge to the businesses saying that 'Okay, you can seek help from such agencies within your area'? Any sort of knowledge sharing. We apply FEINs, and then we apply for SEINs at the state, and we file for taxes. At no place, we are given such information unless sometimes

we don't even get when we ask because people are not knowledgeable enough to ask. Instead of outreach at a later stage, at early stages of establishment of the business itself, if we are given the knowledge, if not an interactive way but at least in a printing material, that'll help us around. Yeah. City temple gives us a place, BIACS. There is an organization called BIACS where a lot of cultures come together. No, not that I know of, but that would be a very good experience both for the city and people within that culture to bring the city together, right?" [#7]

- The Black American woman owner of a professional services firm stated, "I think there are. I really think there are, and people just don't know about them. And just by me actually going and doing these loans signings that I've been doing, I've run into all types of people, who have all types of business that I never would've thought of. No, I don't. I don't know if there should be just like a, maybe there could be a round table group of minority businesses where they come together. I know that the Chamber of Commerce has meetings, and different places have meetings, but maybe there could be one specifically for minority businesses that they come together so that they can learn together." [#8]
- The Black American owner of a DBE- and MBE-certified construction company stated, "Oh yeah. So, what we do is, when we need to, we use my Blackness and when we need to, we use his whiteness. In other words, if we're dealing with an inspector and I can tell something ain't right, I'm going to let [my partner] handle him. I ain't got to be, there's nothing goods going to come out for me, sitting there going, 'I'm the owner and this is the way.' Listen, we're here to do a job, build a project and get paid and grow.' We know that America has changed a lot, but she ain't going to change overnight. What I do now is when I talk to young people is I tell them, 'Don't be coming in here complaining. I won't hear it.' I tell them about what happened to me. I say, 'Listen. When I got out, I was 44 years old I think it was. I'm getting ready to be 50. Or I was at 45,' maybe 45. I said, 'In five years of being home, five and a half, this is what I did. In five years, at my age, at being at middle age. You want to come in here and whining and complaining and you're 35 years old? If I had your body, a 35-year-old body, there would be no grass in Lexington. There'd be no grass in Indiana.' 'What do you mean?' I said, 'It'd be all concrete when I got done.' I said, 'There wouldn't be no mowers. Mowers wouldn't be no good. Everybody's yard, everything would be concrete. Couldn't even find a lawn mower. It'd be use of John Deere mowers, all those mowers, I'd put them out of business. I'd work 18, 19 hours a day nonstop until there wouldn't no more concrete left to pour.' Now of course you know I'm exaggerating when I say that but that's what I tell them. I say, 'Listen. You have the same opportunities that I have. I don't want to hear that you went to jail for a year, two years. You can't do it. I went for 10 years. I did 10 calendars. I don't want to hear it.' I said, 'Have you ever been able to dunk a basketball?' They'll say, 'Yeah, I dunked a basketball.' 'Why? Why have you tried to dunk a basketball?' 'I don't know, we just tried.' 'No. You seen somebody else do it. Then you said, 'Let me try.'' I said, 'Now you're looking at somebody else that's came out of jail, and this is where I'm at. Now you've seen somebody else that can do it which means you can do it if you want to do it. If you don't want to do it, don't talk to me about it. Choice is yours. But if you keep doing the same thing, that's on you because I don't do the same thing no more.' I said, 'That was a book. See, there was a chapter, that chapter's closed. I don't go back to that chapter. That's closed. Now this is a new chapter. You got to make a decision in what chapter that you want to be in right now. But don't sit here and tell me and whine and

cry about this and that, you ain't got no money and the white man holding you down. Man, the white man been holding us down for 400 years buddy. It ain't going to stop tomorrow, you just got to figure out a way around it.' I said, 'No. You come over here to work for a minority business because you say the man holding you down. I treat you good. But now you want to come in here and moan and complain. What do you want? One thing for sure, I'm not going to hold you back.' 'You've made a choice and it's affecting you now.' I said, 'Could have went to college and then you wouldn't have to be dealing with this, but you didn't. So now to make good money, this is what's left. If you don't go to college, nine out of 10 times, you're not going to make good money with using your brain. You ain't went to school. How you going to make good money? So there ain't but one thing left. It's either illegal activity or you going to have to use your back. That's all that's left if you want to make good money. You can go out here and go to work at Walmart and make $13 an hour, but that ain't good money. If you want to make good money, if you want to make $60,000 a year, 50, 60, anywhere in there and above, you ain't got no formal education, you better get ready to use your back.' So, that's what I would teach the younger people. I could tell that, 'Man, I want to learn something.' They'd be like, 'Man, no one's never taught me nothing.' I'd be like, 'Okay.' And I would get them underneath my wing because I took business classes while I was in there. I'd say, 'Listen, you need to take this business class.' And they had a really good welding program, and I knew the welding instructor and I would fight to get them... I said, 'Man, let these guys get in there.' And you would see mostly white guys in there because they already did that type of work or whatever. I said, 'Listen...' And the welding instructor, he was a white guy. I mean, he was a guard, but he was a welding instructor. I said, 'Listen, man, you say that you understand the challenges of being Black. Right?' He said, 'Yeah.' We got some at-risk youth that's wanting to get in this program, let's get them in the program. Let's get them in the program so they're not robbing nobody. Let's do that. I ain't saying just alienate the people that look like you, white people, but I'm saying, let's take a really good hard look at this. They want to get in the program, I done took them under my wing, and I told them I would go down there and try to get them in the program.' He would get them in the program and most of the time they already had a job the week they got out of prison; they was to report to this place. They already had a job for $25 an hour. Are we clear? Okay. We have a habit... We have gotten to the place where we feel that we're owed something, and something should be handed to us to get back. Hey, let me tell you something. I do believe that we're owed something. No doubt about it. We are owed, but if we're going wait around to get it, you'll starve. And that's what I try to tell Black people. You're right, we are owed, but if you think you going to wait around and get it, you'll starve, because these white people ain't going to give it to you. Now, I'll tell you right now. They ain't going to give it to you. The other side, they'll give it to you, but they ain't really giving it to you. They just want your votes. They want to have you think they're giving you something, but they ain't doing a thing... Man, they ain't doing it to be nice to you. They ain't doing it because they care about you. They got an agenda. So, I tell other Black people, my age and younger, all you can do, you just got to keep on going. If you keep going, you'll find the good white person and he going to take you under his wing, most of the time. If you act right, pull your pants up, keep your hair neat and nice, talk like you got some sense, keep working. But if you think that you're going to do it completely without them, you're crazy. They still have control." [#9]

APPENDIX E.
Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of Lexington-area businesses for construction, professional services, and goods and other services prime contracts and subcontracts the Lexington-Fayette Urban County Government (LFUCG or the Urban County Government) awards.[1] Appendix E expands on the information presented in Chapter 6 to further describe:

A. Availability Data;

B. Representative Businesses;

C. Availability Survey Instrument;

D. Survey Execution; and

E. Additional Considerations.

A. Availability Data

BBC partnered with Davis Research to conduct telephone and online surveys with hundreds of business establishments throughout LFUCG's *relevant geographic market area* (RGMA). BBC identified the RGMA for LFUCG's construction and professional services work as the *Bluegrass Area Development District*, which comprises Anderson, Bourbon, Boyle, Clark, Estill, Fayette, Franklin, Garrard, Harrison, Jessamine, Lincoln, Madison, Mercer, Nicholas, Powell, Scott, and Woodford Counties in Kentucky. We identified the RGMA for LFUCG's goods and other services work as the Bluegrass Area Development District plus Boone, Campbell, Grant, Jefferson, Kenton, Oldham, Pendleton, and Shelby Counties in Kentucky. Business establishments Davis Research surveyed were businesses with locations in the RGMA that BBC identified as doing work in fields closely related to the types of contracts and procurements LFUCG awarded between July 1, 2016 and June 31, 2021 (i.e., *the study period*). BBC began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then compiled information about local business establishments D&B listed as having their primary lines of business within those work specializations.

As part of the survey effort, the study team attempted to contact 4,598 local business establishments that perform work relevant to LFUCG's contracting and procurement. The study team was able to successfully contact 1,076 of those business establishments, 499 of which completed availability surveys.

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

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business operating in the RGMA. Rather, the objective was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically valid manner. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction, professional services, and goods and other services work. Instead, BBC determined the types of work most relevant to LFUCG's contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure E-1 lists 8-digit work specialization codes within construction, professional services, and goods and other services most related to the relevant contract dollars LFUCG awarded during the study period and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from relevant business establishments located in the RGMA. As an example, the survey instrument the study team used with construction establishments is presented at the end of Appendix E. BBC modified the construction survey instrument slightly for use with establishments working in professional services to reflect terms more commonly used in those industries.[2] (E.g., BBC substituted the words "prime contractor" and "subcontractor" with "prime consultant" and "subconsultant" when surveying professional services establishments.)

1. Survey structure. The availability survey included 13 sections, and Davis Research attempted to cover all sections with each business establishment the firm successfully contacted.

a. Identification of purpose. The surveys began by identifying LFUCG as the survey sponsor and describing the purpose of the study. (E.g., "The Lexington-Fayette Urban County Government is conducting a survey to develop a list of companies that have worked with or are interested in providing construction-related services to LFUCG and other local public agencies.")

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information (see areas "X" and "Y" of the availability survey instrument).

[2] BBC also developed e-mail versions of the survey instrument for business establishments that preferred to complete the survey online.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		**Excavation, drilling, wrecking, and demolition**	
15220101	Apartment building construction	16299901	Blasting Contractor, Except Building Demolition
15220106	Multi-family dwelling construction	16299906	Trenching contractor
15220201	Remodeling, multi-family dwellings	17949901	Excavation and grading, building construction
15410000	Industrial buildings and warehouses	17990901	Boring for building construction
15419905	Industrial buildings, new construction		
15420100	Commercial and office building contractors	**Fencing, guardrails, barriers, and signs**	
15420103	Commercial and office buildings, renovation and repairs	16110100	Highway signs and guardrails
15420201	Farm building construction	16110101	Guardrail construction, highways
15429903	Institutional building construction	16110102	Highway and street sign installation
16290505	Waste water and sewage treatment plant construction	17999912	Fence construction
Concrete work		**Heavy construction equipment rental**	
17719900	Concrete work	50820303	Cranes, construction
17410102	Retaining wall construction	35310000	Construction machinery
17710000	Concrete work	35370205	Cranes, industrial truck
17710200	Curb and sidewalk contractors	35370210	Lift trucks, industrial: fork, platform, straddle
17710202	Sidewalk contractor	50820300	General construction machinery and equipment
17719904	Foundation and footing contractor	73530000	Heavy construction equipment rental
Concrete, asphalt, sand, and gravel products		**Highway, street, and bridge construction**	
14420000	Construction sand and gravel	16110000	Highway and street construction
29510000	Asphalt paving mixtures and blocks	16110200	Surfacing and paving
32720608	Pipe, concrete or lined with concrete	16110202	Concrete construction: roads, highways, sidewalks
32720610	Sewer pipe, concrete	16110204	Highway and street paving contractor
32730000	Ready-mixed concrete	16110205	Resurfacing contractor
59999909	Concrete products, pre-cast	16110207	Gravel or dirt road construction
		16119900	Highway and street construction
Electrical equipment and supplies		16119901	General contractor, highway and street construction
36690206	Traffic signals, electric	16119902	Highway and street maintenance
50630000	Electrical apparatus and equipment	16220000	Bridge, tunnel, and elevated highway construction
50630206	Electrical supplies	16229900	Bridge, tunnel, and elevated highway
		16229901	Bridge construction
Electrical work		16229902	Highway construction, elevated
17310000	Electrical work	16229903	Tunnel construction
17319903	General electrical contractor	16229904	Viaduct construction

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description
Construction (continued)	
Highway, street, and bridge construction (continued)	
16290000	Heavy construction
16299900	Heavy construction
17710300	Driveway, parking lot, and blacktop contractors
17710301	Blacktop (asphalt) work
17710302	Driveway contractor
17710303	Parking lot construction
Insulation, drywall, and masonry	
17410000	Masonry and other stonework
Landscape services	
07820200	Lawn services
07820204	Mowing services, lawn
07829903	Landscape contractors
17110302	Irrigation sprinkler system installation
Landscaping supplies and equipment	
35230500	Turf and grounds equipment
35240000	Lawn and garden equipment
35240200	Lawn and garden mowers and accessories
50399912	Soil erosion control fabrics
50830000	Farm and garden machinery
50830200	Lawn and garden machinery and equipment
50830201	Garden machinery and equipment
50830202	Landscaping equipment
50830203	Lawn machinery and equipment
50830204	Mowers, power
51930202	Nursery stock
52610100	Lawn and garden equipment
52610101	Garden tractors and tillers
Landscaping supplies and equipment (continued)	
52610103	Lawnmowers and tractors
52610200	Lawn and garden supplies
Other construction services	
16119903	Highway reflector installation
17210200	Commercial painting
17210201	Exterior commercial painting contractor
17210300	Industrial painting
17210302	Bridge painting
17210303	Pavement marking contractor
Painting, striping, and marking	
16119903	Highway reflector installation
17210200	Commercial painting
17210201	Exterior commercial painting contractor
17210300	Industrial painting
17210302	Bridge painting
17210303	Pavement marking contractor
Plumbing and HVAC	
17110000	Plumbing, heating, air-conditioning
17110103	Heating systems repair and maintenance
17110301	Fire sprinkler system installation
17110401	Mechanical contractor
Plumbing and HVAC supplies	
26790104	Pipes and fittings, fiber: made from purchased mat
30880000	Plastics plumbing fixtures
32590104	Sewer pipe or fittings, clay
33120600	Pipes and tubes

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Plumbing and HVAC supplies (continued)		**Trucking, hauling and storage**	
33170000	Steel pipe and tubes	42120000	Local trucking, without storage
33170203	Pipes, wrought: welded, lock joint, or heavy rivet		
34329903	Plastic plumbing fixture fittings, assembly	**Water, sewer, and utility lines**	
34430900	Pipe, standpipe, and culverts	16230000	Water, sewer, and utility lines
34949901	Plumbing and heating valves	16230300	Water and sewer line construction
50740000	Plumbing and hydronic heating supplies	16230302	Sewer line construction
50740100	Water heaters and purification equipment	16230303	Water main construction
50740300	Plumbing fittings and supplies	16239900	Water, sewer, and utility lines, nec
50740302	Pipes and fittings, plastic	16239902	Manhole construction
50740303	Plumbers' brass goods and fittings	16239903	Pipe laying construction
50740304	Plumbing and heating valves	16239904	Pipeline construction, nsk
52519903	Pumps and pumping equipment	16239905	Pumping station construction
59999916	Plumbing and heating supplies	16239906	Underground utilities contractor
		16290105	Drainage system construction
Rebar and reinforcing steel		17110201	Septic system construction
34419901	Building components, structural steel	17310302	Fiber optic cable installation
50510216	Steel	17999906	Core drilling and cutting
		17999925	Petroleum storage tanks, pumping and draining
Roofing		17999935	Petroleum storage tank installation, underground
17610103	Roofing contractor	17999941	Protective lining installation, underground (sewag
		76990402	Septic tank cleaning service
		76990403	Sewer cleaning and rodding
Professional services			
Advertising, marketing and public relations		**Engineering**	
73119901	Advertising consultant	87110400	Construction and civil engineering
87430000	Public relations services	87110402	Civil engineering
87439902	Promotion service	87110404	Structural engineering
87439903	Public relations and publicity	87119903	Consulting engineer
87120000	Architectural services	87120100	Architectural engineering
		87120101	Architectural engineering
Construction management			
87419902	Construction management		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional Services (continued)			
Environmental services		**IT and data services (continued)**	
87110101	Pollution control engineering	73730200	Systems integration services
87119906	Energy conservation engineering	73749902	Data processing service
87489905	Environmental consultant	73790100	Computer related maintenance services
89990702	Geophysical consultant	73790200	Computer related consulting services
		87480400	Systems analysis and engineering consulting servic
Human resources and job training services			
73610000	Employment agencies	**Landscape architecture**	
73610100	Placement agencies	07810201	Landscape architects
73610102	Labor contractors		
73610204	Nurses' registry	**Surveying and mapmaking**	
73630000	Help supply services	87130000	Surveying services
73630103	Temporary help service		
73639905	Medical help service	**Testing and inspection**	
87420200	Human resource consulting services	73890200	Inspection and testing services
		73890203	Building inspection service
IT and data services		73890211	Sewer inspection service
73730000	Computer integrated systems design		
73730100	Systems software development services	**Transportation**	
73730101	Computer systems analysis and design	87420410	Transportation consultant
73730102	Systems engineering, computer related	87480200	Urban planning and consulting services
		87480204	Traffic consultant
Goods and Supplies			
Automobiles		**Dining services**	
55119901	Automobiles, new and used	58129905	Commissary restaurant
55119903	Trucks, tractors, and trailers: new and used	58129906	Contract food services
Cleaning and janitorial supplies		**Equipment maintenance and repair**	
28420100	Specialty cleaning	76990504	Industrial machinery and equipment repair
50870304	Janitors' supplies	76990508	Valve repair, industrial
51690400	Specialty cleaning and sanitation preparations	76992209	Pumps and pumping equipment repair
59999908	Cleaning equipment and supplies		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Supplies (continued)			
Facilities management		**Other goods (continued)**	
87440000	Facilities support services	36990502	Security control equipment and systems
		39939907	Signs, not made in custom sign painting shops
Industrial equipment and supplies		50630500	Electric alarms and signaling equipment
34430121	Tanks, lined: metal plate	50650200	Communication equipment
34430122	Tanks, standard or custom fabricated: metal plate	50659903	Security control equipment and systems
35610000	Pumps and pumping equipment	51699907	Industrial chemicals
35610100	Industrial pumps and parts	57319907	Radios, two-way, citizens band, weather, short-wave
35619900	Pumps and pumping equipment	59990101	Alarm signal systems
35619903	Pumps, domestic: water or sump	59990602	Communication equipment
35890300	Sewage and water treatment equipment		
35890301	Sewage treatment equipment	**Other services**	
36210000	Motors and generators	17969901	Elevator installation and conversion
36210110	Power generators	73490100	Building and office cleaning services
50399911	Septic tanks	73810105	Security guard service
50639903	Generators		
50840805	Pumps and pumping equipment	**Petroleum and petroleum products**	
50840807	Water pumps (industrial)	51720203	Gasoline
50849905	Hydraulic systems equipment and supplies	51729905	Petroleum brokers
50849913	Tanks, storage	59830000	Fuel oil dealers
50850000	Industrial supplies		
		Printing, copying, and mailing	
Office equipment and supplies		27590000	Commercial printing
20860000	Bottled and canned soft drinks	27590602	Letterpress printing
50440000	Office equipment	27599900	Commercial printing
50440207	Photocopy machines	73340000	Photocopying and duplicating services
51129907	Office supplies		
57129904	Office furniture	**Safety equipment**	
59991402	Photocopy machines	38420100	Personal safety equipment
		50849912	Safety equipment
Other goods		50990300	Safety equipment and supplies
36690100	Emergency alarms	59990103	Safety supplies and equipment

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Supplies (continued)			
Uniforms and apparel			
23110303	Policemen's uniforms: made from purchased material		
56619903	Men's boots		
56990100	Uniforms and work clothing		
56990102	Uniforms		
72130204	Uniform supply		
Vehicle parts and supplies			
37140000	Motor vehicle parts and accessories		
50130000	Motor vehicle supplies and new parts		
50130100	Automotive supplies and parts		
50130119	Truck parts and accessories		
Vehicle repair services			
75389902	General truck repair		
75490100	Automotive maintenance services		
Waste and recycling services			
49530100	Hazardous waste collection and disposal		
49530200	Refuse collection and disposal services		
49530201	Garbage: collecting, destroying, and processing		
49530203	Rubbish collection and disposal		
49539905	Recycling, waste materials		
49590300	Toxic or hazardous waste cleanup		

c. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded "yes" to that question.

d. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B's work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners or managers if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

f. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past contracts and procurements. Davis Research asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).

g. Interest in future work. The surveyor asked businesses about their interest in future work with LFUCG and other government agencies. Davis Research asked those questions in connection with both prime contracts and subcontracts (Questions B3 through B4).

h. Geographic area. The surveyor asked businesses whether they could serve customers in the Lexington area (Question C1).

i. Largest contracts. The surveyor asked businesses about the value of the largest contracts on which they had bid or had been awarded during the past five years. (Question D1).

j. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 and E2). If businesses indicated they were minority-owned, they were also asked about the race/ethnicity of the business's owner (Question E3). The study team confirmed that information through several other data sources, including:

- Kentucky Finance and Administration Cabinet and Kentucky Transportation Cabinet certification and ownership lists;
- LFUCG vendor data; and
- Information from other available certification directories and business lists.

k. Business revenue. The surveyor asked questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also included questions about their revenues and number of employees across all locations (Questions F1 through F3).

l. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working with LFUCG and other local government agencies and general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

m. Contact information. The survey concluded with questions about the participant's name, position, and contact information with the organization (Questions H1 through H3).

D. Survey Execution

Davis Research conducted all availability surveys in 2021 and 2022. The firm made multiple attempts during different times of the day and on different days of the week to successfully reach each business establishment. The firm attempted to survey the owner, manager, or other officer of each business establishment who could provide accurate responses to survey questions.

1. Establishments the study team successfully contacted. Figure E-2 presents the disposition of the 4,598 business establishments the study team attempted to contact for availability surveys and how that number resulted in the 1,076 establishments the study team was able to successfully contact.

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B and Davis Research attempted to contact were:

- Duplicate phone numbers (39 listings);
- Non-working phone numbers (822 listings); or
- Wrong numbers for the desired businesses (286 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them. For those businesses, BBC conducted additional research to find different working phone numbers so Davis Research could attempt to reach them again. The number of duplicate phone numbers, non-working numbers, and wrong numbers reflect those efforts.

b. Working phone numbers. As shown in Figure E-2, there were 3,451 business establishments with working phone numbers Davis Research attempted to contact. They were not successful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts at different times of the day and on different days of the week for 1,980 establishments.
- The firm could not reach a responsible staff member after multiple attempts at different times of the day on different days of the week for 387 establishments.
- The firm could not conduct the availability survey due to language barriers for eight businesses.

Thus, Davis Research was able to successfully contact 1,076 business establishments.

Figure E-2.
Disposition of attempts to contact business establishments

Source:
BBC Research & Consulting availability analysis.

	Number of Establishments
Beginning list	4,598
Less duplicate phone numbers	39
Less non-working phone numbers	822
Less wrong number/business	286
Unique business listings with working phone numbers	3,451
Less no answer	1,980
Less could not reach responsible staff member	387
Less language barrier	8
Establishments successfully contacted	**1,076**

2. Establishments included in the availability database. Figure E-3 presents the disposition of the 1,076 business establishments Davis Research successfully contacted and how that number resulted in the businesses the study team included in the availability database and considered potentially available for City work.

Figure E-3.
Disposition of successfully contacted business establishments

Source:
BBC Research & Consulting availability analysis.

	Number of Establishments
Establishments successfully contacted	1,076
Less establishments not interested in discussing availability	369
Less unreturned fax/online surveys	33
Establishments that completed surveys	674
Less not a for-profit business	11
Less line of work outside of study scope	14
Less no interest in future work	117
Less multiple establishments	33
Establishments potentially available for organization work	**499**

a. Establishments not interested in discussing availability for LFUCG work. Of the 1,076 business establishments the study team successfully contacted, 369 establishments were not interested in discussing their availability for LFUCG work. In addition, BBC sent e-mail availability surveys upon request but did not receive completed surveys from 33 establishments. In total, 674 successfully contacted business establishments completed availability surveys.

b. Establishments available for LFUCG work. BBC deemed only a portion of the business establishments that completed availability surveys as potentially available for the prime contracts and subcontracts LFUCG awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 11 establishments that indicated they were not for-profit businesses.

- BBC excluded 14 establishments that indicated their businesses were involved in construction or professional services but reported that their main lines of business were outside of the study scope.

- BBC excluded 117 establishments that reported they were not interested in contracting opportunities with LFUCG or other government organizations.

- Thirty-three establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record according to several rules:

  - If any of the establishments reported bidding or working on a contract or procurement within a particular subindustry, BBC considered the business to have bid or worked on a contract or procurement in that subindustry.

  - BBC combined the different roles of work (i.e., prime contractor or subcontractor) that establishments of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts within the relevant subindustry.

  - BBC considered the largest contract any establishments of the same business reported having bid or worked on as the business's relative capacity (i.e., the largest contract for which the business could be considered available).

After those exclusions, BBC compiled a database of 499 businesses that were considered potentially available for LFUCG work.

E. Additional Considerations

BBC made additional considerations related to its approach to measuring availability to ensure estimates of the availability of businesses for LFUCG work were accurate and appropriate.

1. Providing representative estimates of business availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of LFUCG contracting dollars for which minority- and woman-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for LFUCG work and should not be used in that way.

2. Using a custom census approach to measuring availability. Federal guidance around measuring availability recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. BBC rejected such approaches when measuring the availability of businesses for LFUCG work, because dividing a simple headcount of certified businesses by the total number of businesses does not account for business characteristics crucial to estimating availability accurately. The

methodology BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys the study team conducted provided data on qualifications, business capacity, and interest in LFUCG work for each business, which allowed BBC to take a more detailed approach to measuring availability.

3. Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations to assigning businesses to specific D&B work specialization codes. Specifically, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. In addition, when the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

4. Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity but were asked to answer such question in terms of ranges of dollar figures. Where possible, BBC verified survey responses in a number of ways:

- BBC compared data from the availability surveys to information from other sources such as vendor information the study team collected from LFUCG. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses.

- BBC examined LFUCG contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts businesses won during the past five years with actual contract data.

- LFUCG reviewed contract and vendor data the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

DRAFT Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the Lexington-Fayette Urban County Government, also known as LFUCG or the City. This is not a sales call. We are developing a list of companies interested in providing construction-related services to LFUCG and local public agencies in the Lexington area. The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES THAT HAVE WORKED WITH OR ARE INTERESTED IN WORKING WITH THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT AND OTHER PUBLIC AGENCIES IN THE LEXINGTON AREA]

A1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [*firm name*]?

1=RIGHT COMPANY – SKIP TO A2

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – TERMINATE

Y1. What is the name of this firm?

1=VERBATIM

Y2. Is [*new firm* name] associated with [*old firm* name] in anyway?

1=Yes, same owner doing business under a different name – SKIP TO A2

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – TERMINATE

99=Refused to give information – TERMINATE

Y3. Can you give me the complete address or city for [*new firm name*]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

A2. Let me confirm that [*firm name*/n*ew firm name*] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other – TERMINATE

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes – SKIP TO A3c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [*firm name/new firm name*]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT SPECIFICALLY WHAT TYPE OF CONSTRUCTION FIRM PROVIDES (EXAMPLE, RESIDENTIAL OR COMMERCIAL BUILDING, HIGHWAY AND STREET CONSTRUCTION, ETC.).]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

A4. 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)

A5. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – SKIP TO B1

99=(REFUSED) – SKIP TO B1

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing construction-related work. During the past five years, has your company submitted a bid or received an award for any part of a contract—either in the public or private sector—as either a prime contractor or subcontractor?

[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No – SKIP TO B3a

98=(DON'T KNOW) – SKIP TO B3a

99=(REFUSED) – SKIP TO B3a

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY _____

98=(DON'T KNOW)

99=(REFUSED)

B3a. Please think about future work as you answer the following few questions. Is your company *interested* in working with government or public agencies in the Lexington area?

1=Yes

2=No – SKIP TO C1

98=(DON'T KNOW) – SKIP TO C1

99=(REFUSED) – SKIP TO C1

B3b. Is your company *interested* in working with government or public agencies in the Lexington area as a prime contractor; a subcontractor/trucker/supplier;

or both?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY _____

98= (DON'T KNOW)

99=(REFUSED)

B4a. Is your company *interested* in working with the Lexington-Fayette Urban County Government specifically in the future?

1=Yes – SKIP TO C1

2=No

98=(DON'T KNOW) – SKIP TO C1

99=(REFUSED) – SKIP TO C1

B4b. Please tell me why your company is not interested in future work with the Lexington-Fayette Urban County Government?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

C1. Is your company able to work or serve customers in the Lexington area?

1=Yes

2=No

98= (DON'T KNOW)

D1. What was the largest <u>prime contract or subcontract</u> that your company bid on or has been awarded during the past five years? This includes contracts not yet complete and contracts in either the public sector or private sector.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=$100,000 or less

2=More than $100,000 to $250,000

3=More than $250,000 to $500,000

4=More than $500,000 to $1 million

5=More than $1 million to $2 million

6=More than $2 million to $5 million

7=More than $5 million to $10 million

8=More than $10 million to $20 million

9=More than $20 million to $50 million

10=More than $50 million to $100 million

11= More than $100 million to $200 million

12=$200 million or greater

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?

1=Yes

2=No

98= (DON'T KNOW)

99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by Black American, Asian American, Hispanic American, or Native American individuals. By this definition, is [*firm name/new firm name*] a minority-owned business?

1=Yes

2=No – SKIP TO F1

98= (DON'T KNOW) – SKIP TO F1

99=(REFUSED) – SKIP TO F1

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet indicates that your company has about [number] employees working in your company across all locations. Is that an accurate estimate of your company's average employees, both full-time and part-time, over the last three years?

(NOTE TO INTERVIEWER - INCLUDES FULL- AND PART-TIME EMPLOYEES WHO WORK ACROSS ALL THEIR LOCATIONS)

1=Yes – SKIP TO F3

2=No

98= (DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

F2. About how many full-time and part-time employees did you have working in your company across all locations, on average, over the last three years?

[READ LIST IF NECESSARY]

1= 100 employees or less

2=101-150 employees

3=151-200 employees

4=201-250 employees

5=251-500 employees

6=501-750 employees

7=751-1,000 employees

8=1,001-1,250 employees

9=1,251-1,500 employees

10=1,501 or more employees

F3. What was the average annual gross revenue of your company, including <u>all</u> locations, over the last three years? Would you say . . .

[READ LIST]

1=Less than $1 Million

2=$1.1 Million - $6 Million

3=$6.1 Million - $8 Million

4=$8.1 Million - $12 Million

5=$12.1 Million - $16.5 Million

6=$16.6 Million - $19.5 Million

7=$19.6 Million - $22 Million

8=$22.1 Million - $26.29 Million

9=$26.3 Million or more

98= (DON'T KNOW)

99= (REFUSED)

G1. Do you have any thoughts to share regarding general marketplace conditions in the Lexington area, starting or expanding a business in your industry, or obtaining work?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97= (NOTHING/NONE/NO COMMENTS)

98= (DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

1=Yes

2=No

98= (DON'T KNOW)

99=(REFUSED)

H1. What is your name?

1=VERBATIM NAME

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. And at what email address can you be reached?

1=VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Sherita Miller, Minority Business Enterprise Liaison, for the Lexington-Fayette Urban County Government at (859) 258-3323.

APPENDIX F.
Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of disadvantaged, minority-, and woman-owned businesses in construction, professional services, and goods and other services prime contracts and subcontracts that the Lexington-Fayette Urban County Government (LFUCG) awarded between July 1, 2016 and June 30, 2021 (i.e., the *study period*) with the percentage of contract dollars those businesses might be expected to receive based on their *availability* for that work.[1] Appendix F presents detailed results from the disparity analysis for relevant business groups and various sets of contracts LFUCG awarded during the study period.

A. Format and Information

Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure F-2 presents disparity analysis results for all contracts and procurements BBC examined as part of the study considered together. A review of Figure F-2 introduces the calculations and format of all disparity analysis tables in Appendix F. As shown in Figure F-2, the tables present information about each relevant business group in separate rows:

- "All businesses" in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as minority- or woman-owned businesses (MBEs or WBEs).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as WBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as MBEs or WBEs.
- Rows (5) through (10) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as MBEs or WBEs.
- Rows (11) through (19) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as MBEs or WBEs.

1. Utilization analysis results. Each results table includes the same columns of information:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure F-2, BBC analyzed 10,001 contract elements LFUCG awarded during the study

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

period. The values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (5) of column (a), Asian American-owned businesses participated in 155 prime contracts and subcontracts LFUCG awarded during the study period.

- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure F-2, BBC examined approximately $460 million that were associated with the 10,001 contract elements LFUCG awarded during the study period. The value presented in column (b) for each individual business group represents the dollars businesses of that particular group received on the set of contract elements. For example, as shown in row (5) of column (b), Asian American-owned businesses received approximately $4 million of the prime contract and subcontract dollars LFUCG awarded during the study period.

- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as minority-owned but for which specific race/ethnicity information was not available. Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups. As shown in row (9) of column (b), no LFUCG prime contract and subcontract dollars were awarded to minority-owned businesses with unknown race/ethnicity during the study period.

- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Asian American-owned businesses, the study team divided $4 million by $460 million and multiplied by 100 for a result of 0.9 percent, as shown in row (5) of column (d).

2. Availability results. Column (e) of Figure F-2 presents the availability of each relevant group for all contract elements BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contract elements, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (5) of column (e), the availability of Asian American-owned businesses for LFUCG work is 0.6 percent. That is, Asian American-owned businesses might be expected to receive 0.6 percent of relevant LFUCG contract and procurement dollars based on their availability for that work.

3. Differences between participation and availability. Column (f) of Figure F-2 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for LFUCG work. For example, as presented in row (5) of column (f) of Figure F-2, the participation of Asian American-owned businesses in relevant LFUCG contracts and procurements was greater than their availability for that work by a 0.3 percentage points.

4. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure F-2 presents the disparity index for each group. For example, as reported in row (5) of column (g), the disparity index for Asian American-owned businesses was 160.6, indicating that they actually received approximately $1.60 for every dollar they might be expected to receive based on their availability for the relevant prime contracts and subcontracts LFUCG awarded during the study period. For disparity indices exceeding 200, BBC reported an index of "200+." When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of "100," indicating parity.

B. Index and Tables

Figure F-1 presents an index of the sets of contracts for which BBC analyzed disparity analysis results. In addition, the heading of each table in Appendix F provides a description of the subset of contracts BBC analyzed for that particular table.

Figure F-1.

Table	Characteristics				
	Time period	Contract area	Contract role	Contract size	Funding
F-2	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	N/A
F-3	**07/01/16 - 12/31/18**	All industries	Prime contracts and subcontracts	N/A	N/A
F-4	**01/01/19 - 06/30/21**	All industries	Prime contracts and subcontracts	N/A	N/A
F-5	07/01/16 - 06/30/21	**Construction**	Prime contracts and subcontracts	N/A	N/A
F-6	07/01/16 - 06/30/21	**Professional services**	Prime contracts and subcontracts	N/A	N/A
F-7	07/01/16 - 06/30/21	**Goods and services**	Prime contracts and subcontracts	N/A	N/A
F-8	07/01/16 - 06/30/21	All industries	**Prime contracts**	N/A	N/A
F-9	07/01/16 - 06/30/21	All industries	**Subcontracts**	N/A	N/A
F-10	07/01/16 - 06/30/21	All industries	**Prime contracts**	**Small**	N/A
F-11	07/01/16 - 06/30/21	All industries	**Prime contracts**	**Large**	N/A
F-12	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	**DOT**
F-13	07/01/16 - 06/30/21	All industries	Prime contracts and subcontracts	N/A	**Non-DOT**

Figure F-2.
Time period: 07/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	10,001	$460,150	$460,150				
(2) Minority and woman-owned businesses	1,319	$55,146	$55,146	12.0	16.5	-4.5	72.5
(3) Non-Hispanic white woman-owned	996	$38,002	$38,002	8.3	11.9	-3.6	69.4
(4) Minority-owned	323	$17,144	$17,144	3.7	4.6	-0.9	80.4
(5) Asian American-owned	155	$4,073	$4,073	0.9	0.6	0.3	160.6
(6) Black American-owned	120	$6,978	$6,978	1.5	2.3	-0.8	66.0
(7) Hispanic American-owned	44	$5,583	$5,583	1.2	1.2	0.0	97.9
(8) Native American-owned	4	$510	$510	0.1	0.5	-0.4	20.3
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	311	$32,462	$32,462	7.1			
(11) Non-Hispanic white woman-owned (certified)	208	$22,325	$22,325	4.9			
(12) Minority-owned (certified)	103	$10,138	$10,138	2.2			
(13) Asian American-owned (certified)	30	$3,427	$3,427	0.7			
(14) Black American-owned (certified)	54	$2,577	$2,577	0.6			
(15) Hispanic American-owned (certified)	16	$3,629	$3,629	0.8			
(16) Native American-owned (certified)	3	$504	$504	0.1			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Time period: 07/01/2016 - 06/30/2018
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	5,401	$263,736	$263,736				
(2) Minority and woman-owned businesses	703	$35,309	$35,309	13.4	15.9	-2.5	84.4
(3) Non-Hispanic white woman-owned	510	$25,898	$25,898	9.8	11.2	-1.4	87.8
(4) Minority-owned	193	$9,411	$9,411	3.6	4.7	-1.1	76.2
(5) Asian American-owned	93	$2,201	$2,201	0.8	0.6	0.3	144.8
(6) Black American-owned	69	$5,733	$5,733	2.2	2.2	-0.1	96.6
(7) Hispanic American-owned	27	$968	$968	0.4	1.2	-0.9	29.4
(8) Native American-owned	4	$510	$510	0.2	0.6	-0.4	31.7
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	159	$19,713	$19,713	7.5			
(11) Non-Hispanic white woman-owned (certified)	112	$14,880	$14,880	5.6			
(12) Minority-owned (certified)	47	$4,833	$4,833	1.8			
(13) Asian American-owned (certified)	14	$1,760	$1,760	0.7			
(14) Black American-owned (certified)	23	$1,897	$1,897	0.7			
(15) Hispanic American-owned (certified)	7	$672	$672	0.3			
(16) Native American-owned (certified)	3	$504	$504	0.2			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Time period: 01/01/2019 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,600	$196,414	$196,414				
(2) Minority and woman-owned businesses	616	$19,837	$19,837	10.1	17.4	-7.3	58.0
(3) Non-Hispanic white woman-owned	486	$12,105	$12,105	6.2	12.9	-6.7	48.0
(4) Minority-owned	130	$7,732	$7,732	3.9	4.6	-0.6	86.0
(5) Asian American-owned	62	$1,872	$1,872	1.0	0.5	0.4	184.2
(6) Black American-owned	51	$1,245	$1,245	0.6	2.4	-1.7	26.8
(7) Hispanic American-owned	17	$4,615	$4,615	2.3	1.2	1.1	190.9
(8) Native American-owned	0	$0	$0	0.0	0.5	-0.5	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	152	$12,750	$12,750	6.5			
(11) Non-Hispanic white woman-owned (certified)	96	$7,445	$7,445	3.8			
(12) Minority-owned (certified)	56	$5,305	$5,305	2.7			
(13) Asian American-owned (certified)	16	$1,667	$1,667	0.8			
(14) Black American-owned (certified)	31	$681	$681	0.3			
(15) Hispanic American-owned (certified)	9	$2,957	$2,957	1.5			
(16) Native American-owned (certified)	0	$0	$0	0.0			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Time period: 07/01/2016 - 06/30/2021
Contract area: Construction
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,422	$317,648	$317,648				
(2) Minority and woman-owned businesses	419	$37,534	$37,534	11.8	17.0	-5.2	69.4
(3) Non-Hispanic white woman-owned	305	$26,587	$26,587	8.4	12.3	-4.0	67.8
(4) Minority-owned	114	$10,947	$10,947	3.4	4.7	-1.2	73.5
(5) Asian American-owned	11	$69	$69	0.0	0.0	0.0	200+
(6) Black American-owned	58	$4,834	$4,834	1.5	2.6	-1.1	59.0
(7) Hispanic American-owned	41	$5,534	$5,534	1.7	1.4	0.3	121.6
(8) Native American-owned	4	$510	$510	0.2	0.7	-0.5	23.7
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	164	$23,270	$23,270	7.3			
(11) Non-Hispanic white woman-owned (certified)	128	$17,346	$17,346	5.5			
(12) Minority-owned (certified)	36	$5,924	$5,924	1.9			
(13) Asian American-owned (certified)	3	$56	$56	0.0			
(14) Black American-owned (certified)	15	$1,761	$1,761	0.6			
(15) Hispanic American-owned (certified)	15	$3,603	$3,603	1.1			
(16) Native American-owned (certified)	3	$504	$504	0.2			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Time period: 07/01/2016 - 06/30/2021
Contract area: Professional services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,114	$61,041	$61,041				
(2) Minority and woman-owned businesses	206	$13,134	$13,134	21.5	16.8	4.7	128.1
(3) Non-Hispanic white woman-owned	152	$8,060	$8,060	13.2	13.3	-0.1	99.5
(4) Minority-owned	54	$5,074	$5,074	8.3	3.5	4.8	200+
(5) Asian American-owned	29	$3,391	$3,391	5.6	0.9	4.7	200+
(6) Black American-owned	23	$1,660	$1,660	2.7	1.0	1.7	200+
(7) Hispanic American-owned	2	$23	$23	0.0	1.5	-1.4	2.5
(8) Native American-owned	0	$0	$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	100	$8,519	$8,519	14.0			
(11) Non-Hispanic white woman-owned (certified)	63	$4,657	$4,657	7.6			
(12) Minority-owned (certified)	37	$3,862	$3,862	6.3			
(13) Asian American-owned (certified)	27	$3,371	$3,371	5.5			
(14) Black American-owned (certified)	10	$491	$491	0.8			
(15) Hispanic American-owned (certified)	0	$0	$0	0.0			
(16) Native American-owned (certified)	0	$0	$0	0.0			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Time period: 07/01/2016 - 06/30/2021
Contract area: Goods and services
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,465	$81,461	$81,461				
(2) Minority and woman-owned businesses	694	$4,478	$4,478	5.5	14.3	-8.8	38.3
(3) Non-Hispanic white woman-owned	539	$3,355	$3,355	4.1	9.1	-5.0	45.4
(4) Minority-owned	155	$1,123	$1,123	1.4	5.3	-3.9	26.2
(5) Asian American-owned	115	$613	$613	0.8	2.5	-1.7	30.7
(6) Black American-owned	39	$484	$484	0.6	2.2	-1.6	26.9
(7) Hispanic American-owned	1	$26	$26	0.0	0.3	-0.3	10.6
(8) Native American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	47	$673	$673	0.8			
(11) Non-Hispanic white woman-owned (certified)	17	$321	$321	0.4			
(12) Minority-owned (certified)	30	$352	$352	0.4			
(13) Asian American-owned (certified)	0	$0	$0	0.0			
(14) Black American-owned (certified)	29	$325	$325	0.4			
(15) Hispanic American-owned (certified)	1	$26	$26	0.0			
(16) Native American-owned (certified)	0	$0	$0	0.0			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Time period: 07/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,235	$395,686	$395,686				
(2) Minority and woman-owned businesses	1,153	$40,041	$40,041	10.1	16.7	-6.6	60.6
(3) Non-Hispanic white woman-owned	891	$31,292	$31,292	7.9	12.2	-4.3	64.6
(4) Minority-owned	262	$8,748	$8,748	2.2	4.4	-2.2	49.8
(5) Asian American-owned	133	$3,367	$3,367	0.9	0.6	0.2	140.4
(6) Black American-owned	100	$4,578	$4,578	1.2	2.3	-1.2	50.0
(7) Hispanic American-owned	28	$684	$684	0.2	1.1	-0.9	16.1
(8) Native American-owned	1	$120	$120	0.0	0.4	-0.4	6.7
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	205	$20,414	$20,414	5.2			
(11) Non-Hispanic white woman-owned (certified)	139	$16,495	$16,495	4.2			
(12) Minority-owned (certified)	66	$3,918	$3,918	1.0			
(13) Asian American-owned (certified)	18	$2,754	$2,754	0.7			
(14) Black American-owned (certified)	40	$681	$681	0.2			
(15) Hispanic American-owned (certified)	7	$363	$363	0.1			
(16) Native American-owned (certified)	1	$120	$120	0.0			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Time period: 07/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	766	$64,464	$64,464				
(2) Minority and woman-owned businesses	166	$15,105	$15,105	23.4	15.6	7.9	150.6
(3) Non-Hispanic white woman-owned	105	$6,710	$6,710	10.4	9.7	0.7	107.2
(4) Minority-owned	61	$8,395	$8,395	13.0	5.9	7.2	200+
(5) Asian American-owned	22	$706	$706	1.1	0.2	0.9	200+
(6) Black American-owned	20	$2,401	$2,401	3.7	2.2	1.5	167.4
(7) Hispanic American-owned	16	$4,899	$4,899	7.6	2.3	5.3	200+
(8) Native American-owned	3	$390	$390	0.6	1.1	-0.5	53.2
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	106	$12,048	$12,048	18.7			
(11) Non-Hispanic white woman-owned (certified)	69	$5,829	$5,829	9.0			
(12) Minority-owned (certified)	37	$6,219	$6,219	9.6			
(13) Asian American-owned (certified)	12	$673	$673	1.0			
(14) Black American-owned (certified)	14	$1,896	$1,896	2.9			
(15) Hispanic American-owned (certified)	9	$3,266	$3,266	5.1			
(16) Native American-owned (certified)	2	$384	$384	0.6			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Time period: 07/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,142	$136,958	$136,958				
(2) Minority and woman-owned businesses	1,143	$20,214	$20,214	14.8	22.1	-7.3	66.9
(3) Non-Hispanic white woman-owned	883	$12,806	$12,806	9.4	13.7	-4.3	68.4
(4) Minority-owned	260	$7,409	$7,409	5.4	8.4	-3.0	64.5
(5) Asian American-owned	131	$2,027	$2,027	1.5	1.2	0.3	123.5
(6) Black American-owned	100	$4,578	$4,578	3.3	3.3	0.1	101.6
(7) Hispanic American-owned	28	$684	$684	0.5	2.6	-2.1	19.2
(8) Native American-owned	1	$120	$120	0.1	1.3	-1.2	6.7
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	199	$7,448	$7,448	5.4			
(11) Non-Hispanic white woman-owned (certified)	135	$4,870	$4,870	3.6			
(12) Minority-owned (certified)	64	$2,579	$2,579	1.9			
(13) Asian American-owned (certified)	16	$1,414	$1,414	1.0			
(14) Black American-owned (certified)	40	$681	$681	0.5			
(15) Hispanic American-owned (certified)	7	$363	$363	0.3			
(16) Native American-owned (certified)	1	$120	$120	0.1			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.
Time period: 07/01/2016 - 06/30/2021
Contract area: All industries
Contract role: Prime contracts

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	93	$258,728	$258,728				
(2) Minority and woman-owned businesses	10	$19,826	$19,826	7.7	13.8	-6.2	55.4
(3) Non-Hispanic white woman-owned	8	$18,486	$18,486	7.1	11.5	-4.3	62.2
(4) Minority-owned	2	$1,340	$1,340	0.5	2.3	-1.8	22.0
(5) Asian American-owned	2	$1,340	$1,340	0.5	0.3	0.2	176.9
(6) Black American-owned	0	$0	$0	0.0	1.8	-1.8	0.0
(7) Hispanic American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(8) Native American-owned	0	$0	$0	0.0	0.0	0.0	100.0
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	6	$12,965	$12,965	5.0			
(11) Non-Hispanic white woman-owned (certified)	4	$11,626	$11,626	4.5			
(12) Minority-owned (certified)	2	$1,340	$1,340	0.5			
(13) Asian American-owned (certified)	2	$1,340	$1,340	0.5			
(14) Black American-owned (certified)	0	$0	$0	0.0			
(15) Hispanic American-owned (certified)	0	$0	$0	0.0			
(16) Native American-owned (certified)	0	$0	$0	0.0			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.
Time period: 07/01/2016 - 06/30/2021 **USDOT funded**
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	337	$54,572	$54,572				
(2) Minority and woman-owned businesses	63	$5,645	$5,645	10.3	13.7	-3.3	75.5
(3) Non-Hispanic white woman-owned	44	$1,529	$1,529	2.8	10.9	-8.1	25.6
(4) Minority-owned	19	$4,116	$4,116	7.5	2.8	4.8	200+
(5) Asian American-owned	14	$444	$444	0.8	0.1	0.7	200+
(6) Black American-owned	2	$18	$18	0.0	1.0	-1.0	3.4
(7) Hispanic American-owned	3	$3,654	$3,654	6.7	1.4	5.3	200+
(8) Native American-owned	0	$0	$0	0.0	0.3	-0.3	0.0
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	29	$3,774	$3,774	6.9			
(11) Non-Hispanic white woman-owned (certified)	18	$835	$835	1.5			
(12) Minority-owned (certified)	11	$2,939	$2,939	5.4			
(13) Asian American-owned (certified)	7	$439	$439	0.8			
(14) Black American-owned (certified)	2	$18	$18	0.0			
(15) Hispanic American-owned (certified)	2	$2,482	$2,482	4.5			
(16) Native American-owned (certified)	0	$0	$0	0.0			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. “Woman-owned” refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.
Time period: 07/01/2016 - 06/30/2021 **Non-USDOT funded**
Contract area: All industries
Contract role: Prime contracts and subcontracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,664	$405,579	$405,579				
(2) Minority and woman-owned businesses	1,256	$49,501	$49,501	12.2	16.9	-4.7	72.2
(3) Non-Hispanic white woman-owned	952	$36,473	$36,473	9.0	12.0	-3.0	74.8
(4) Minority-owned	304	$13,028	$13,028	3.2	4.9	-1.7	65.7
(5) Asian American-owned	141	$3,629	$3,629	0.9	0.6	0.3	145.5
(6) Black American-owned	118	$6,960	$6,960	1.7	2.5	-0.8	69.4
(7) Hispanic American-owned	41	$1,929	$1,929	0.5	1.2	-0.7	38.9
(8) Native American-owned	4	$510	$510	0.1	0.6	-0.5	21.7
(9) Unknown minority-owned	0	$0					
(10) Minority and woman-owned (certified)	282	$28,688	$28,688	7.1			
(11) Non-Hispanic white woman-owned (certified)	190	$21,490	$21,490	5.3			
(12) Minority-owned (certified)	92	$7,198	$7,198	1.8			
(13) Asian American-owned (certified)	23	$2,988	$2,988	0.7			
(14) Black American-owned (certified)	52	$2,559	$2,559	0.6			
(15) Hispanic American-owned (certified)	14	$1,147	$1,147	0.3			
(16) Native American-owned (certified)	3	$504	$504	0.1			
(17) Unknown minority-owned (certified)	0	$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown minority-owned certified businesses were allocated to minority and certified business subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.